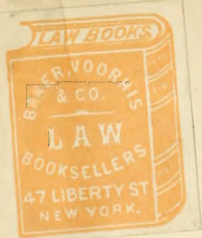


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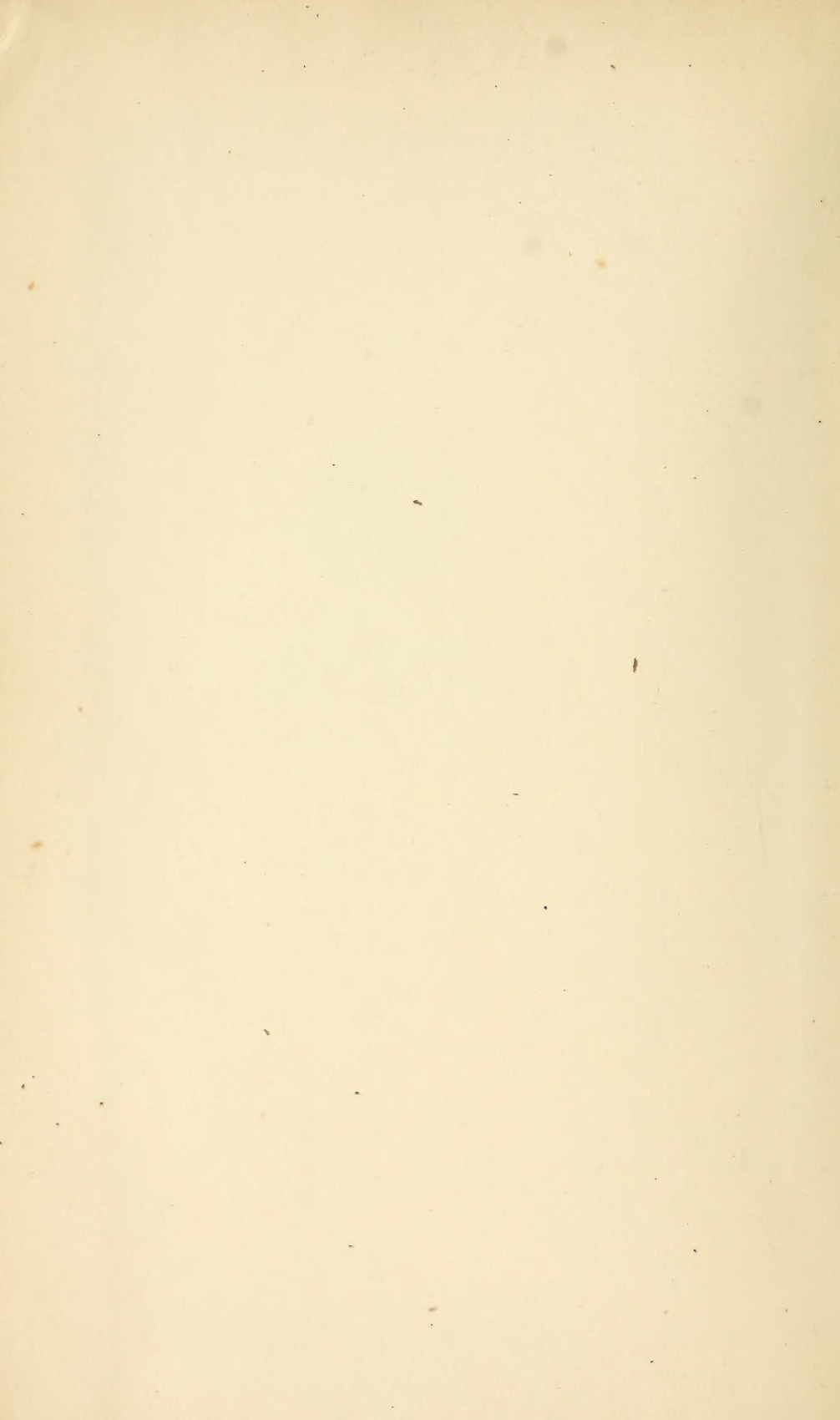


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THE
LAW AND PRACTICE
OF
SURROGATES' COURTS

IN THE
STATE OF NEW YORK.

BY AMASA A. REDFIELD, LL. D.

SIXTH EDITION
BY ROBERT L. REDFIELD,
OF THE NEW YORK BAR.

NEW YORK :
BAKER, VOORHIS & COMPANY,
1903.

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PREFACE TO SIXTH EDITION.

The task of preparing the present edition, owing to the enormous number of new cases (many reported under different titles) with which the profession continues to be inflicted, has been unusually onerous, and though it has not been thought advisable to make any radical revision in the substance of the text, except in so far as the acts of the legislature have required it, it is believed that this edition will be found more serviceable than its predecessors.

No one, whose attention is directed to the subject, can fail to remark the great increase in the volume of litigation conducted in surrogates' courts, since their establishment as courts of record. In the fourth edition of this work (1890) there were cited 3,700 cases; in the fifth edition (1894), 4,000, while in the present edition no less than 5,500 cases are mentioned in the notes, on different pertinent points. Very many of these do not appear in the official reports, but wherever possible, all cases reported since the last edition have been cited as well from the official as the unofficial series.

An effort has been made to save the reader the necessity of consulting reports which are possibly inaccessible, by a statement of the points decided. To make that possible, within a reasonable compass, the pages have been somewhat lengthened, sharper-faced type has been employed, and condensation of matter has been freely indulged in; yet, notwithstanding, the present work is larger, by thirty-nine pages, than the last preceding edition.

It is believed, too, that the numbering of the section headings, thus permitting a closer indexing of the subject-matter, will facilitate the practitioner. The forms have been revised, to meet the requirements of Code amendments, and a considerable number of new precedents have been appended. In this connection I cannot omit to acknowledge my obligation to the several surrogates of the State, for their efficient aid in furnishing me with copies of the forms used in their respective courts.

NEW YORK, *December*, 1902.

ROBERT L. REDFIELD.

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INTRODUCTION.

The courts of this country which possess original jurisdiction of matters relating to wills and the administration of the estates of deceased persons, have occasion to resort constantly to the precedents established by the ecclesiastical courts of England, to whose jurisdiction in such matters they have succeeded in this country.¹

Down to a very recent period, the ecclesiastical courts formed a fundamental division of the judicial power of England, dating their origin from the principal epoch in the history of the origin of English courts of justice—the period from Edward I. to Edward III. For a very long time, both before and after that period, their jurisdiction was a subject of vehement dispute between the clergy on the one hand, and the parliament and law courts on the other. Repeated instances of collision between the judges and the bishops as to the extent of the jurisdiction of the latter occurred, and the law courts frequently issued prohibitions against proceeding in the ecclesiastical courts with suits not legally cognizable there. From time to time the jurisdiction of the latter courts was restricted by legislation, until 1857, when it was very materially diminished by the establishment of the courts of probate and divorce and matrimonial causes.

The ordinary ecclesiastical courts were the provincial or archiepiscopal courts of the provinces of Canterbury and York, being, in the former province, the court of arches, the prerogative or testamentary court and the court of peculiars; and, in the latter province, the prerogative or testamentary court and the chancery court. There were also diocesan courts, the principal of which is the consistory court, which was formerly held in the cathedral or some aisle or chapel of the cathedral, the bishop presiding, but now usually held by the bishop's chancellor in some convenient place in the diocese.

¹ In an introductory note prefixed to the first volume of his reports, the late Surrogate BRADFORD has given a succinct and interesting sketch of the origin of the ecclesiastical jurisdiction over the probate of wills and the administration of the estates of deceased persons which the reader will find well worth perusal.

The prerogative courts had jurisdiction of wills and administrations of personal property left by persons having effects of a certain value, in the various jurisdictions within the province. The court of arches, so called because anciently held in the church of Saint Mary-le-Bow (S. Maria de Arcubus), exercised appellate jurisdiction in the province of Canterbury, and had also original jurisdiction in some testamentary matters. From this court an appeal lay to the judicial committee of the privy council.

There were also the faculty court and a court of peculiars of the Archbishop of Canterbury, the former having had a voluntary or non-contentious jurisdiction, and the latter both contentious and voluntary jurisdiction, in matters relating to wills and letters of administration, though the voluntary jurisdiction of the former courts, and a great part of that of the latter, have now been abolished.

In general, causes cognizable in the ecclesiastical courts were formerly classified as beneficial, matrimonial, testamentary, and criminal. The jurisdiction in testamentary matters is now transferred to the probate courts and others. The matrimonial jurisdiction, except as to granting marriage licenses, is transferred to the court for divorce and matrimonial causes. The jurisdiction in criminal suits, including church discipline and the correction of offenses of a spiritual kind, and the beneficial jurisdiction relating principally to ecclesiastical dues and fees, rights of ecclesiastical patronage, validity of presentations to livings, and dilapidations of the chancel or parsonage-house, are still exercised by these courts.

As before observed, all jurisdiction, both voluntary and contentious, of the ecclesiastical and other courts, in testamentary causes, and with respect to granting or revoking letters of administration, is now taken away from those courts and transferred to other courts, of which the principal is a court of probate sitting in London, having jurisdiction throughout all England. Where there is no contention as to the grant of probate or of letters of administration, the grant is in "common form," and is now made either in the principal registry in London, or in the district registries throughout England and Wales. Where there is a contention, the questions of probate or grant of letters are determined judicially in "solemn form" in the court of probate, except where the estate does not exceed a certain amount, in which cases the county courts exercise jurisdiction. The probate court may try

questions of fact itself, or may direct an issue to be tried before any of the superior courts.¹

In the English colonies of America, the jurisdiction of the ecclesiastical courts of the mother country in testamentary causes, etc., was exercised by the tribunals established for ordinary civil business, according to the precedents and principles of the spiritual courts. In the Dutch colony of New York, this jurisdiction was governed by the Dutch Roman law, the custom of Amsterdam, and the law of Aasdon, by a tribunal composed of members of the colonial council; afterward, in 1653, by the court of burgomasters and schepens; and afterward (1665) by the court of orphan masters, and then by the mayor's court, after the occupation of the province by the English. The history of the testamentary courts of New York since that time, and the limitations of their jurisdiction, have been the subject of careful examination by an eminent judge, in a judicial proceeding before him, as surrogate of New York county; and the reader will thank us for taking a few passages from his opinion, conspicuous alike for profound learning and gracefulness of statement.²

After the English occupation, in 1664, says Judge DALY, the court of burgomasters and schepens was changed into the mayor's court, a name by which it was known for one hundred and forty-six years afterward, until the present name was given of the court of common pleas. For some years, under the English rule, it continued to exercise the same functions as before, its proceedings being conducted in the Dutch language. The court of orphan masters was discontinued, and the mayor's court, for a long period after its proceedings were conducted in the English language, exercised the same jurisdiction in respect to testamentary matters and estates of persons dying intestate within the city, as it or the court of orphan masters had exercised previously, with some modifications and restrictions.

When the government of the province was committed to Governor Nicholls, by James II., then Duke of York, a body of laws was framed for its government, afterward known as "The Duke's Laws," and this Code, with such additions as were made to it by

¹ 20 & 21 Viet. c. 77; 21 & 22 Id. c. 95. See Cox's Institutions, etc., 570.

² Opinion of Chief Justice CHARLES P. DALY, of the common pleas, acting surrogate during a vacancy caused by the death of the incumbent of that office (Nov., 1862), in the Matter of

Brick's Estate, reported in 15 Abb. Pr. 12. See also a valuable monograph on the History of the Judicial Tribunals of New York, by the same eminent judge, prefixed to E. D. Smith's Common Pleas Reports, vol. I.

the governor and council, or at the annual sitting of the court of assize, the written instructions received by the governors from the home government, the principles of the common law, together with certain usages and customs derived from the Dutch, constituted the law of the province until the sitting of the first legislative assembly in 1683.

By the Duke's laws, a constable and two overseers were required to proceed to the house of a deceased person, forty-eight days after the death, and inquire respecting his estate, and whether he had left any will. They were required, further, to make an inventory of his effects, appraise the value, and make a return of their proceedings, under oath, to the next court of sessions.

The province was divided into three ridings, and in each of these ridings there was a court of sessions, composed of the justices of peace living within the riding, which was held twice a year. The probate of wills, the granting of administration in cases of intestacy, the final accounting of executors and administrators, together with such compulsory measures as were necessary to compel it, the removal of executors, the distribution of estates, and the appointment of guardians, took place in the first instance before the court of sessions, except in the city of New York, where the same jurisdiction was exercised by the mayor's court. If the estate, however, exceeded £100, all proceedings upon the probate of wills, and all records in cases of administration, had to be transmitted, duly certified, to the office of the secretary of the province in the city of New York, where they were required to be recorded, and where letters testamentary and of administration in such instances, and the final discharge of executors or administrators, which was called a *quietus*, were granted by the governor under the seal of the province. The proof and all proceedings took place in the first instance before the court of sessions or the mayor's court, and the court gave its judgment or opinion, which was transmitted to the governor under the certificate of one of the justices and the clerk, and the act of the governor was simply a formal ratification by the granting of letters or of discharges. In some instances the governor gave his judgment upon the construction of a will, and Governor Andros granted letters without any proceeding in court, but these were exceptional instances and of rare occurrence. In all proceedings before them, the court of sessions had the power of granting a rehearing, or, as it was called, a "review," and upon such review

might in their discretion admit new evidence — a power, however, which was not continued in the courts which succeeded, in 1691, to the civil jurisdiction of these tribunals.¹

This state of things continued until 1686. In the letter of instructions transmitted in that year to Governor Dongan, he was, among other things, directed to see that the ecclesiastical jurisdiction of the Archbishop of Canterbury should take place in the province, "as farr as conveniently may bee," except the collating of benefices, the granting of marriage licenses, and the probate of wills, which were reserved to the governor; and in a similar letter of instructions to Sloughter, in 1689, the ecclesiastical jurisdiction of the Bishop of London, was added.² The ecclesiastical jurisdiction of the Bishop of London, so far as it related to testamentary matters or the administration of the estates of intestates, was limited to cases where the effects of the deceased were exclusively within the bishop's diocese, and the jurisdiction was exercised by a court held in the diocese by the bishops, commissary, or surrogate; but if the deceased had left effects in more than one diocese, then the Archbishop of Canterbury had exclusive jurisdiction, and the matter was heard before his delegate in the prerogative courts, of which there were two, the prerogative office at York and Canterbury.³

After these instructions were received, a change took place in the course of procedure. The courts of sessions and the mayor's court continued to exercise the same functions as before, but the governor, or the secretary of the province, also took proof of the execution of wills and of the inventory and appraisement of estate; and in 1691, under the administration of Lieutenant-Governor Ingoldsby, a clause was inserted in all letters testamentary or of administration, that the granting of such letters, the hearing of accounts, the reckoning of administration, and the granting of the final discharge, belonged to the governor, and not to any inferior judge. If a will was proved before a secretary, he annexed a certificate that "being thereunto delegated," the will had been duly proved before him; and an authentication, in the name of the

¹ The Duke's Laws. Collection of the N. Y. Historical Society, vol. I. 315, 404, 412, 415; Records of Wills in N. Y. Surrogate's Office, lib. I. 1, 3, 10, 19, 21, 28, 31, 38, 41, 67, 90, 91, 105, 190, 195, 270, 283, 355, 376, 377, 442; lib. II, 29; lib. III, 191; lib. IV, 129; Book of Inventories, vol. I, 1, 5; Daly's

Jud. Trib. 23-20; 2 Rev. L. of 1813, app. V.

² 3 Col. Doc. 372, 688, 820.

³ Ayliff's *Parergon Juris Canonici Anglicana*, 192, 534, London, 1726; Gibson's *Codex*, 465, 471, 472, 478; Godolphin's *Orphan's Legacy*, 106; 4 Inst. 335; Williams on Ex. 248, 4th Lond. ed.

governor, in the form that continued in use down to the Revised Statutes, that the will had been "proved, approved, and allowed," under the prerogative seal, was annexed, and the whole was recorded in the secretary's office — the validity of the record being attested by his signature. In this way a distinct department grew up in the secretary's office, which took the name of the prerogative office, and the records, connected with it the name of the registry of the prerogative, and, in 1691, the whole became distinguished by the judicial appellation of the prerogative court.¹

The legislative assembly which was convened in 1683, having been established, was again reinstated in 1691, and, at its second session, in 1692, an act was passed² by which it was declared that the probate of all wills and letters of administration should thenceforth be granted by the governor, or such person as he should delegate, under the seal of the prerogative office; that all wills in the counties of Orange, Richmond, Westchester, or Kings, should be proved in New York before the governor or his delegate, and in the remote counties in the courts of common pleas — tribunals which had been created in each county by an act of the previous session; and where the proof was taken in the courts of common pleas, it was required to be certified under the hand of the judge and clerk to the secretary's office in New York, where probate was granted. Where the estate was under £50, the courts of common pleas were authorized to admit the will to probate, or to grant letters of administration, and from their decision an appeal was allowed to the governor, or to the person he might delegate to act for him. How this jurisdiction was then understood appears from a letter written the year following, by Clarkson, the secretary of the province, to the Lords of Trade.³ "The governor," he says, "discharges the place of the ordinary (the bishop) in granting administration and in proving wills, and the secretary of the province acts as registrar." The secretary of the province was an officer independent of the governor, holding his appointment from the crown, the duties of which he discharged chiefly through a deputy. Governor Fletcher, immediately after the passage of this act, in 1692, appointed this deputy his delegate, and he took proof of wills, which were afterward approved and allowed in the name of the governor. In 1702, Lord Cornbury appointed as his delegate a Dr. Bridges, who was afterward chief justice of the prov-

¹ Records of Wills in N. Y. Surrogate's Office from 1683 to 1690 and 1691, 182, 229.

² Laws of N. Y. from 1691 to 1751, Smith and Livingston's ed. I, 15.

³ Col. Doc. IV, 28.

inee. The proof of wills was then taken before him, and upon his certificate letters were granted by the deputy secretary in the name of the governor. Before Dr. Bridges, also, executors and administrators were sworn faithfully to execute their trust; the renunciation of executors was formally made before him, and he took proof of inventories. This gentleman was a man of legal acquirements, and had received in England the degree of doctor of laws, and he was the first in the province to make use of the title of surrogate, adding it after his signature to all documents.¹ Dr. Bridges having been appointed chief justice, Cornbury appointed the deputy secretary his delegate, and this officer, with the exception of a few interruptions or changes, continued to act as the governor's delegate down to the time of the revolution. The provision in the act of 1692, which required all wills in the counties named to be proved in New York before the governor or his delegate, was found to be exceedingly onerous. Traveling then was very different from what it is now, and to bring witnesses in all such cases to New York was attended with difficulty and expense. In view of this inconvenience, Cornbury, acting upon the previous precedent of Ingoldsby, and giving what was, perhaps, an allowable construction to the act of 1692, commissioned delegates to act for him in all of these counties, and at a later period, under future governors, delegates were appointed for the more remote counties.² At the same time, a local delegate was appointed for the city and county of New York, distinct and apart from the secretary of the province or deputy secretary, who were also commissioned to act as delegates. In fact, an attempt was made to carry out, in conformity with the instructions that accompanied the governor's commission, the distinct jurisdictions in England, by the commissary of the bishop diocesan, and the ordinary or delegate of the Archbishop of Canterbury; or what was then known as the court held by the commissary of the bishop, and the prerogative court held by the delegate of the archbishop or metropolitan.³ If the deceased had, at the time of his death, effects in more than one county, or as the official document expressed it, "goods, chattels, and credits in divers places within the province," then the governor exercises exclusive jurisdiction. The will was proved before his delegate in the prerogative court. Let-

¹ Rec. of Wills, VII, 3, 64, 87, 93, Book of Commissions, III, 473; V, 235, 129, 169, 212. 412, 418, 420; VI, 4.

² Rec. of Wills, VII, 212, 476, 489; ³ Gibson's Codex, 465, 1035.
VIII, 18, 19; XII, 187, 199; XIII, 891;

ters were issued in the name of the governor, under the prerogative seal, attested by the signature of the secretary or the deputy secretary, and the whole was recorded in the registry of the prerogative court. If the deceased, however, had effects only in one county, then the will was proved before the local delegate of that county. He gave a certificate of the fact, and the will was then taken to the registrar's court, where it was approved and allowed, letters testamentary were granted in the name of the governor, the seal of the prerogative was affixed, and the whole was recorded in the registry of the court. Letters of administration could not be obtained except in the prerogative court. By the act of 22, 23 Car. II (cap. 10), administrators were required to exhibit, under oath, an inventory of the personal estate of the deceased in the registry of the court that granted letters; to make a true and just account, also under oath, to the court, of their administration, by the day fixed in their bonds which was not less than a year; their accounts were to be examined and allowed in that court, and they bound themselves to pay to such persons as the judge of that court should limit or appoint. This jurisdiction in the colony was vested in the prerogative court; executors and administrators accounted before it, and the decree upon final distributions was made there. It had the power to issue citations to compel the attendance of witnesses, and it heard appeals, where probate or administration was granted by the court of common pleas; in addition to which it exercised a jurisdiction more especially ecclesiastical, such as the granting of marriage licenses, licenses to schoolmasters, and in taking proof of the due installation of clergymen.¹

The delegate who represented the governor in this court, or, as he might be called, the general delegate, was either the secretary of the province or the deputy secretary — generally the latter. He was empowered by his commission to admit wills to probate, to grant letters of administration, and for that purpose might "affix the prerogative seal of the province thereto, without any further fiat or allowance."²

No such general powers were conferred on the local delegates. They were authorized by their commissions to take proof of the execution of any will made by a person residing in their county,

¹ Rec. of Wills in N. Y. Surr. Of- I. 5; Rec. of Admin. I, 2; N. Y. Col. fice, II, 39, 104, 107; III, 149; IV, Doc. VII, 830; VIII, 322, 413; N. 129, 182, 213, 221, 230, 250, 328; V, Y. Rec. of Marr. Albany, 1860; Mun- 286, 333; VI, 1; VII, 474, 484, 491; sell's Annals of Albany, III, 327; IV, VIII, 18, 19; XII, 197, 199; XIII, 16.
891; XXVIII, 107; Book of Inven. ² Book of Coms. V, 62.

to swear executors or administrators that they would faithfully execute their trust, or that the inventories or accounts to be exhibited by them in the prerogative court were true, and to supervise the estates of intestates. This power of supervising the estates of intestates was in consequence of a clause in the act of 1692, which provided that, where any person died intestate, two freeholders of the town, to be annually elected, should inquire into the real and personal estate of the deceased, and make an inventory of it, and return it, under oath, to the person in the county delegated by the governor to supervise the estates of intestates; that the person delegated should cause the goods and chattels to be sold, retaining the proceeds for those who should appear and have a right to claim them; and that if the deceased left orphans, and there was no widow or next of kin, the person so delegated by the governor should have the administration and care of the intestate's estate, and the guardianship of the persons and estates of the orphans, until they should marry or reach the age of twenty-one; a provision that was superseded and became inoperative by subsequent legislative enactments.¹ With the exception of this provision, the powers of these legal delegates were not much greater in fact than that of commissioners of deeds in our day. They did little else than to administer formal oaths, for if any contest arose upon the execution of a will, it was settled either in the prerogative court, from which alone letters could issue, or in the courts of record where it had to be proved in what was called the solemn form *per testes*, to make it binding upon real estate. At first, these local delegates bore only the name of delegates, but about 1746 they began to assume the title of surrogates, and were so designated thereafter in their commissions. There were thus, as in England, a local and a general tribunal, with this distinction, however, that the local tribunal here was much more limited in its powers; and, further, that its judicial acts, such as taking the proof of wills, had to be approved and ratified under the seal of the prerogative court.

In 1743, an act was passed for the more speedy recovery of legacies. By this act any person entitled to a legacy or a residuary estate under a will, or to any share in the estate of an intestate, might bring an action against the executor or administrator, after it became due, or, if no time was fixed by the will after a year has expired, to compel its payment, in the supreme court or

¹ Book of Coms. III, 473.

any court of record, if it amounted to more than £20, or if under that sum, in a court of common pleas; and if a plea of want of assets was put in, the court was empowered to appoint auditors to examine the accounts of the executor or administrator, who were to report how the accounts stood, and what sum would remain after the payment of debts, and what proportion the plaintiff was entitled to. The court was empowered to correct any mistakes or errors in the accounts reported, and for the amount found to be due the plaintiff had execution — which act continued in force down to the Revised Statutes.¹ This act and the general jurisdiction exercised by the court of chancery in such cases, furnished a much more effectual remedy than the prerogative court could afford, and the practice of accounting in that court, therefore, fell into disuse, except when an executor or administrator filed his account with the view of obtaining his discharge; and in time the common-law courts were but rarely resorted to, as the remedy in equity was more efficient and better adapted for adjusting the rights of all parties.

I have thus given, as far as it is now possible to ascertain it, the exact jurisdiction exercised by the prerogative court. No minutes of the sittings of this court, if any were ever kept, or if it ever had any regular sittings, which I very much doubt, are to be found.² In fact, its whole business was managed for seventy years before the revolution, by the secretary of the province and his deputy, with little interference on the part of the governor, and with but little knowledge on their part respecting it. In connection with the registry, which the secretary claimed as a part of his office, everything was done to keep the court exclusively under the control of this officer. It was entirely managed by his deputy, who fulfilled many functions, which were so mixed up as the acts of one and the same person, that it was difficult even then to distin-

¹ Laws of N. Y. Smith & Livingston's ed. I, 316; Street's N. Y. Council of Revision, 281.

² The records belonging to it, and everything appertaining to wills and the administration of estates were carried to Albany during the revolution, before the evacuation of the city by the American troops. An act was passed in 1799 (2 Greenleaf's Law of N. Y. 420), directing the judge of the court of probate to deliver to the surrogate of the city and county of New York all books, records, minutes, documents and papers belonging to the

court of probate, before the 1st of May, 1807, in pursuance of which the late Sylvanus Miller, who was then surrogate, went to Albany in 1800, and brought away everything that could then be found. I presume that if any minutes had ever been kept of the court, they would have existed then, and would have been discovered by Judge Miller, as the chain of records now here, and which he arranged and classified, are, for the whole colonial period, very complete and perfect.—DALY, J.

guish the varied capacities in which he acted. The precise character of his powers or those of the secretary, together with the extent or nature of the authority which, in virtue of the governor's prerogative, was vested in the prerogative court, were matters of great perplexity then, and a constant subject of complaint and remonstrance.¹ One of the last of the secretaries, Clark, held no less than twelve distinct offices, nearly all of them connected with the administration of justice, and his deputy, Goldsbro'w Banyan, who held that office, with but few interruptions, from 1746 to the revolution, in addition to acting as the general assistant of his principal, was examiner of the prerogative court, and the local delegate for the city and county of New York, while at the same time he fulfilled the function of general delegate, or as Gov. Tryon describes the office, acting as principal surrogate. A course of management which was designed to baffle all inquiry then, and which succeeded in doing so,² was not very easy to unravel afterward, and, therefore, when the revolution broke out, very confused ideas prevailed as to the nature of jurisdiction of this court, and even as to its name, being sometimes called the prerogative court, and sometimes the court of probate; a confusion of names which led to the impression that there were two tribunals before the revolution, an impression which I formerly entertained,³ whereas there was in reality but one. The legislature, in 1778, meant to sweep away every authority vested in this court, in virtue of the prerogative of the colonial governors, supposing it to be greater than it actually was, and to constitute a court thereafter to be held by a single judge, having the same jurisdiction in testamentary matters and in cases of intestacy, to be known as the court of probates; and, accordingly, in an act passed in that year, it was declared that the judge in a court of probate should be vested with the powers and authority, and have the like jurisdiction in testamentary matters, which the governor of the colony of New York, while it was subject to the crown of Great Britain, had and exercised as judge of the prerogative court, or the court of probates of the colony, except the power of appointing surrogates.⁴

From this period to 1789, this new tribunal, the court of probates, continued to exercise the same jurisdiction in such matters

¹ See Gov. Moore's Letter to the Lords of Trade, and Gov. Tryon's upon the same subject, Col. Doc. VII, 130, 187, 283, 323.

³ Daly's Judicial Tribunals of N. Y. 53: Rec. of Com. V, 70, 412, 418: VI, 201.

⁴ 1 Laws of N. Y. Jones & Varick's

² See Report of the Lords of Trade, ed. 23. N. Y. Col. Doc. VIII, 413.

as the prerogative court had done. The proof of wills, where the deceased had effects in more than one county, was taken before the judge of that court, and before the surrogate where the effects were exclusively in one county; and in both cases the proof of the will was "approved and allowed" in the name of the people, before the court of probates, where it was recorded, and from which letters issued under the seal of the court, attested by the signature of its clerk. Letters of administration were also granted there, and all inventories were filed there. This court held stated sittings, at regular periods in different parts of the State, until 1783, when it was fixed in the city of New York until 1787, after which it was permanently removed to Albany, and up to 1797 the surrogates of the different counties continued to exercise exactly the same powers which they did before the revolution.¹

In that year, 1787, an important change was made; an act was passed² by which the granting of probate and of letters of administration was taken away altogether from the court of probates, except in certain specified cases, and conferred upon the surrogates of the different counties, from whose decision in contested cases an appeal was allowed to the court of probates. This act provided that the governor, with the consent of the council of appointment, should commission a surrogate for every county in the State, and empowered each surrogate to take proof of the last wills and testaments of persons dying in his county, or who was an inhabitant of it if he died from home, to issue probate and grant letters testamentary thereon, or letters of administration with the will annexed; or where such person died intestate, to grant letters of administration; such letters to issue in the name of the people, and to be tested in the name of the surrogate, and sealed with the seal of his office. This act further provided that each surrogate should record all wills proved before him, with the proof thereof, and all letters testamentary or of administration issued by him, with all things concerning the same, and directed that when administration was granted by him, the inventory should be "exhibited" in his office.

Where persons died out of the State, or within it not being inhabitants, the act directed that their wills should be proved be-

¹ Rec. of Wills in N. Y. Surrogate's Inventories, 1; Rec. of Admin. IV, V, Office, XXXII, 50, 360; XXXIII, 2, VI, VII, 19, 59, 316, 421, 438; XXXIV, 436; XXXV, 290; XXXVI, 2; XXXVII, ed. 71.
² Laws of N. Y. Jones & Varick's ed. 71.

fore, or administration of their personal estates should be granted by, the judge of the court of probate, and in such cases the inventory was "exhibited" in the registry of that court. This act also gave the court of probates authority to compel administrators to account in cases of intestacy, to decree and settle the order of distributions after the payment of debts and expenses, and to compel the payment of the amounts so decreed. It was empowered, also, to hear and determine all causes touching any legacy or bequest in any last will and testament, payable out of the personal estate of the testator, and to compel payment of it. This was a provision virtually empowering the court to call executors to account, which was an important change, as before that time probate or ecclesiastical courts had no power, either by the canon law or by statute, to compel executors to account.¹ Authority was also given to the court to enforce its decree for payment of distributive shares or bequests or legacies, by execution against the person, and by the twentieth section of the act it was declared that "the courts of the said surrogate and the said court of probates, in the matters submitted to their cognizance, respectively, by this act, shall proceed according to the course of the courts having, by the common law, jurisdiction of like matters."

In 1786, the court of probates, where the personal estate was insufficient to pay debts, was empowered to order the sale of the real estate, and make distribution of the proceeds among the creditors,² but when the court was removed permanently to Albany, in 1797,³ it was found very inconvenient to resort thither in all cases for that purpose, and, accordingly, in 1797,⁴ an act was passed conferring this power on the surrogates when the lands of the deceased were exclusively in one county; and by the same act they were authorized to admit wills to probate and to grant letters of administration where persons died out of the State, or within it not being inhabitants.

In 1801, the surrogates were clothed with the same power as the judge of probate, to cite the administrators to account, to decree distribution, or the payment of bequests and legacies, and compel it by execution.⁵ In 1802, they were authorized to appoint guardians for infants as fully as the chancellor might do;⁶

¹ Sparrow v. Norfolk, Noy's R. 28; Gibson's Codex, 466, 478.

² Greenleaf's Laws, 238.

³ 3 Greenleaf's Laws, 391.

⁴ Laws of N. Y. 1799, Andrew's ed.

⁵ 1 Webster's Laws, 317, 325; Seymour v. Seymour, 4 Johns. Ch. 409; Foster v. Wilber, 1 Paige, 537; Dakin v. Hudson, 6 Cow. 221.

⁶ 3 Webst. 158.

in 1806, to order the admeasurement of dower of lands within their county, upon the application of the widow, the heirs or the guardians of minors;¹ in 1807, to exercise powers as extensive as the court of probates, in ordering sale of lands for the payment of debts;² in 1810, to order the mortgaging or leasing of the land of testators or intestates for the payment of debts, where any infants were interested; and all these laws, whether relating to the surrogates or to the court of probates, were incorporated in one general act in the revision of 1813, in which act are also embraced some other general powers, such as compelling the production of wills, documents, or writings, the attendance of witnesses, and the power of punishing for contempt; and, by an act passed in the same year, they were authorized to complete the unfinished business that might be left by their predecessor.³

In 1819, they were empowered to confirm sales of real estate ordered by them for the payment of debts, and to direct conveyances to be made by executors or administrators;⁴ and in 1821, to institute an inquiry respecting the personal estate of intestates not delivered to the public administrator, or not accounted for in a lawful and satisfactory manner by the person into whose hands it was supposed to have fallen.

By the act passed in 1823, the court of probates was abolished. Its appellate jurisdiction on appeal from surrogates was transferred to the court of chancery, and whatever other jurisdiction it possessed was by this act vested in that court.⁵

From 1823 to the passage of the Revised Statutes, the only acts of a general character relating to surrogates were acts directing them to record all letters testamentary and of administration, all appointments of guardians, and all orders and decrees upon the sales of real estate made by themselves or their predecessors.⁶

It will be seen, as the result of this lengthened examination, that the powers conferred upon surrogates were, from the beginning, carefully enumerated in the commission under which they were first appointed, and by subsequent legislative acts; that what was not granted to them was vested before the revolution, either in the prerogative court, the supreme court, the court of common pleas, and the court of chancery, and afterward in the court of probates. That when the prerogative court was abolished, in 1778, its jurisdiction in testamentary matters and in cases of intes-

¹ Id. 316.

² 5 Id. 138.

³ Laws of 1813, 139.

⁴ Laws of 1819, 214.

⁵ Laws of 1823.

⁶ Laws of 1828, 136.

tacy was transferred to the court of probates; and that when that court was abolished, in 1823, its jurisdiction was vested in the court of chancery. The supreme court and the courts of common pleas had, as had been shown, under the provision in the act of 1743, the power of compelling executors or administrators to account in actions brought to recover legacies or distributive shares, and wills of real estate were proved in the supreme court or the court of common pleas until the passage of the Revised Statutes.

The commissioners who prepared the revision of the statutes which was adopted in 1830, while proposing some substantial reforms in the then existing law relating to wills and the administration of estates, declared in their reports and notes,¹ that their principal object was "to adapt the written law to the actual existing law, and where that was settled, to express it in intelligible language, and to incorporate provisions which should terminate the uncertainty that now prevails over a large part of the subject." Their revision, as adopted, formed almost a codification of the then existing law and practice of surrogates' courts.

The distinction between the procedure in cases of wills of real property and that in cases of wills of personal property was, unfortunately, substantially preserved, and numerous deficiencies were soon found in the working of the system. In the year 1837 the legislature adopted the very important statute entitled "An act concerning the proof of wills, executors and administrators, guardians and wards, and surrogates' courts," commonly known by practitioners in these courts as the act of 1837; and the extent of the changes which it made in the system prescribed by the Revised Statutes is indicated by the fact that its seventy-seven sections amend or repeal thirty-nine sections of the Revised Statutes. The next statute of general importance which should be noticed is the judiciary act of 1847, by which the judicial system of the State was reorganized, in consequence of constitutional changes made by the Constitution of 1846; and we should also mention, from the great importance of the act, although applicable only to the city and county of New York, the statute of 1870, chapter 359, which considerably extended the powers and jurisdiction of the surrogate's court of that county.

In almost every year, since the adoption of the Revised Statutes, other special changes of greater or less importance have been made by the legislature, but these changes have been made to remedy

¹ Revisers' Notes, 5 Edm. Stat. 622.

some supposed special defects, and without any reference to the system as a whole, until the present codification effected in 1880.

The confusion resulting from this kind of fragmentary legislation, during a period of over thirty years, was the occasion of much complaint on the part of the profession, and a homogeneous code was urged upon the legislature. The first proposed revision of the statutes, relating to the estates of deceased persons, was prepared by the commissioners of the code, and had the especial attention of the late Surrogate BRADFORD. This statute was intended to be inserted in the proposed Code of Civil Procedure, and was submitted to the legislature for that purpose, in the form of an appendix (D) to the draft of a civil code for the State of New York, prepared by Messrs. FIELD, NOYES, and BRADFORD, the commissioners of the codes, and published in 1862. The proposed civil code, as revised, was republished in 1865, without the appendices.

In 1870, the legislature authorized a new commission to revise the statutes, whose report was the basis of the present Code of Civil Procedure. The second part of the code, containing chapter 18, which relates to surrogates' courts, etc., went into effect on the first day of September, 1880, and, as was to be expected, has given rise to many questions of construction. But it is matter for congratulation that simplicity and uniformity have succeeded the obscurity and often the contradiction of the former statutes relating to proceedings in these courts.

It will be observed that the new legislation has left the jurisdiction and powers of surrogates' courts substantially where it found them. Only a few and comparatively unimportant additions to the incidental powers of surrogates are added to those previously existing, and these powers the courts had already held to be implied from those expressly conferred.

The chief feature of the present code, in respect to surrogates' courts, is that it assimilates the proceedings in those courts to civil actions, so far as practicable, thus working an entire change in the practice in several respects.

CHAPTER I.

CONSTITUTION AND ORGANIZATION OF SURROGATES' COURTS.

TITLE FIRST.

THE COURT, AND THE SURROGATE.

The courts which, in the United States, have jurisdiction of the administration of the estates of decedents, and of cognate subjects, are variously designated as Surrogates' Courts, Courts of Probate, Orphans' Courts, or the Court of the Ordinary. "The ordinary" was the technical term adopted by the English law to designate the bishop of a diocese, when sitting as an ecclesiastical tribunal in the administration of the ordinary temporal jurisdiction of his see; his subordinate, or deputy, was called a surrogate, to indicate that he exercised a delegated power. In the State of New York, the courts which, after some intermediate changes, have succeeded to the characteristic jurisdiction of the ordinary, respecting probate and administration, are still termed Surrogates' Courts.¹

§ 1. Creation of the court.—The Constitution of 1846, which remodeled the whole judicial organization of the State, superseded the County Courts of Common Pleas and the Surrogates' Courts, which theretofore existed, and provided for the election of a county judge in each county, except that of New York, and made it his duty to hold the County Court, and also to perform the duties of the office of surrogate. Power was reserved, however, to each county² having over 40,000 population, to determine, from time to time, whether they would have a separate officer to perform the duties of surrogate; and where such an officer was elected, the county judge was relieved from service in the Surrogate's Court, except when called upon in an exigency, as here-

¹ Co. Civ. Proc., § 2; Const., art. 6 § 6 (of 1869), § 15; art. 6 (of 1894), (of 1869), § 27. § 15; L. 1847, c. 276, § 8; L. 1871, c.

² Const., art. 6 (of 1846), § 14; art. 859, §§ 2, 3.

after stated. The growth of judicial business has been such, that in thirty-one of the sixty-one counties of the State this course has been adopted, and a distinct office of surrogate created.³

The Constitution also provides that the Legislature may, on application of the board of supervisors of any county, provide for the election of local officers, not exceeding two in any county, to exercise the duties of surrogate or of county judge respectively.⁴ On the other hand, provision has been made for discontinuing the separate office of surrogate, in any county where it has been created, and merging it again in the office of county judge, by a resolution of the board of supervisors, when the office of county judge is vacant, to the effect that thereafter there shall be no such separate officer, and thereupon the office is to be deemed abolished from the time the office of county judge is filled.⁵

The surrogate is elected by the people, holding office six years;⁶ except in New York county, where, since 1890, the term of office is fourteen years.⁷ He is a local officer, and, except in vacation month,⁸ is confined, in the execution of his duties, to the county for which he is elected, although his process may run throughout the State; and he must reside in the county for which he is elected.⁹

§ 2. Surrogate's Court of New York county.—The Surrogate's Court of the county of New York is recognized by the Constitution of 1846 as a then existing court, and is declared to remain, until otherwise directed by the Legislature, with its then existing powers and jurisdiction. Hence the office of surrogate of New York county is not held under the Constitution, but is a local office established especially for that county under pre-existing laws, but recognized and continued by section 12 of article 14 of the Constitution.¹⁰ By the New York City Consolidation Act of 1882,¹¹ so called, the special and local laws affecting public in-

³ See as to Steuben county, L. 1883, c. 309.

⁴ Const., art. 6 (of 1846), § 15; art. 6 (of 1869), § 16; art. 6 (of 1894), § 16.

⁵ L. 1871, c. 859, § 6. As to Niagara county, see L. 1894, c. 109.

⁶ L. 1871, c. 859, § 5; L. 1892, c. 686, § 220. An election to fill a vacancy before expiration of term, in counties other than New York and Kings, is to be for full term of six years (L. 1886, c. 164); and not merely for the unexpired term (*People v. Townsend*, 102 N. Y. 430.)

⁷ L. 1890, c. 329; L. 1892, c. 642, § 1. 8 Co. Civ. Proc., § 2505, as amended 1881.

⁹ 1 R. S. 101, § 11; L. 1892, c. 618, § 3.

¹⁰ *People v. Carr*, 86 N. Y. 512, affg. 25 Hun, 325.

¹¹ L. 1882, c. 410. By this statute certain of the incorporated acts are reproduced in the exact language of their originals, others are slightly modified; but it was not the intention of the Legislature, as declared by the act itself, to make any new enactment, or to repeal, modify, amend, or

terests in New York city were brought together in a single statute; among which special and local laws are those relating to the surrogate and the Surrogate's Court of that city and county.¹²

Since January 1, 1893, the Surrogates' Court of the city and county of New York consists of two surrogates. By L. 1892, c. 642, provision was made for the election of *an additional surrogate* for New York county; and such officer was accordingly elected in November, 1892. His official designation is that of Surrogate, the word *additional* being no part of his title. "All the powers conferred by law upon the surrogate of the city and county of New York may be exercised by either of the surrogates of said city and county."¹³

§ 3. **In new or altered counties.**—In case of the erection of a new county or the transfer of territory from one county to another, provision is made for the creation of a Surrogate's Court for the new county.¹⁴ Where a special proceeding is pending in a Surrogate's Court, whose jurisdiction to entertain the same is taken away, or in consequence of the erection of a new county, or altering the territorial limits of a county, it must be transferred by order of the court in which it is pending, to the Surrogate's Court having jurisdiction; and the latter court has the same jurisdiction, power, and authority with respect thereto, which the former court would have had, if the territorial limits of its county had not been changed.¹⁵

§ 4. **Official designations.**—The separate officer elected to perform the duties of the office of surrogate, is, by the present Constitution, expressly denominated the surrogate; and the same designation has been conferred upon him by statute.¹⁶ Where the

supersede the substance of any provisions of the incorporated acts (§ 2143).

¹² *Id.*, § 1178. This act, so far as it relates to surrogates and their courts, was not repealed by the Greater New York Charter. See L. 1897, c. 378, §§ 1608, 1609; L. 1901, c. 466.

¹³ Co. Civ. Proc., § 2504, amended 1893. Vacancies occurring otherwise than by expiration of the official term, by the effluxion of time, or by the disability of age, the office is to be filled in the same manner as vacancies in the office of a Supreme Court judge, under section 9 of article 6 of the Constitution (L. 1892, c. 642, § 2). See art. 6 (Const. 1894), §§ 4, 15.

¹⁴ Co. Civ. Proc., § 2479. This provision of the Code is substantially the same as L. 1870, c. 20, § 1 (amending L. 1843, c. 177, § 4), and section 2 of the act of 1870. See *Matter of McGuinness*, 13 Misc. 714; 35 N. Y. Supp. 820.

¹⁵ Co. Civ. Proc., § 2480. The jurisdiction of the surrogate of Westchester county remains unaffected by the annexation of a part of the county to the city of New York, by virtue of L. 1895, c. 934. (*Matter of McKeon*, 20 Misc. 464; 58 N. Y. Supp. 589.)

¹⁶ L. 1847, c. 276, § 14. The somewhat obscure provision of L. 1871, c. 859, § 7, that the "separate officers elected to perform the duties of the

county judge is also surrogate, he is to be designated, when referred to in that capacity, the surrogate of the county, without any addition referring to his office as county judge.¹⁷ Other officers who exercise the power of a surrogate, in certain contingencies hereafter referred to, are designated "special surrogates" and "acting surrogates." Pursuant to the permission granted by the Constitution, the Legislature has provided for the election, in certain counties, of "local officers" to discharge the duties of surrogate, or of county judge and surrogate, in cases of the inability, or a vacancy in the office, of the latter. The statute provides that such an officer, so elected, may, when acting as surrogate, be designated the "special surrogate" of his county.¹⁸ Where an officer, other than the surrogate, *e. g.*, the district attorney, acts as surrogate in a case prescribed by law, he must be designated by his official title, with the addition of the words, "and acting surrogate."¹⁹ Where the Supreme Court, in New York and Kings counties, exercises the jurisdiction of surrogate, the proceedings are entitled in the court,²⁰ and, of course, no special designation is added. There remains the case of temporary appointment, by a board of supervisors, of a person to act as surrogate where that officer is disabled.²¹ As such a person is not "an officer" who "acts as surrogate," the statute appears to make no provision for an official designation in his case; so that, doubtless, his proper title, while he continues to act, is "surrogate" without additions.

The language of the Code, which requires a petition in some instances to be presented to the "Surrogate's Court," and then confers power upon "the surrogate" to act upon the petition, while the decree or order made is spoken of as that of the Surrogate's Court, does not, we think, indicate that a distinction was intended to be made between the powers of a surrogate, and the powers of a court, at least none such as could raise a question of jurisdiction.

§ 5. **Seal of court.**—The Surrogate's Court has a seal, of which the surrogate has charge.²² A description of the seal is required to be deposited with the secretary of state, and provision is made by statute for a new seal when the old one is unfit for use.²³ When-

office of surrogate under the fifteenth and sixteenth sections of article 6 of the Constitution, shall be denominated the surrogates of the respective counties," was repealed by L. 1880, c. 245.

¹⁷ Co. Civ. Proc., § 2483.

¹⁸ Co. Civ. Proc., § 2483; L. 1851, c. 108, § 1.

¹⁹ Co. Civ. Proc., § 2483.

²⁰ Co. Civ. Proc., § 2490, as amended 1895.

²¹ Co. Civ. Proc., § 2492.

²² Co. Civ. Proc., § 2507.

²³ Co. Civ. Proc., §§ 27, 30.

ever any other officer acts as surrogate, he uses the surrogate's seal. We have already seen that where the proceeding is in the Supreme Court, the seal of that court is to be used.

§ 6. Time and place of holding court.—The Surrogate's Court is always open for the transaction of any business within its powers and jurisdiction.²⁴ There are no stated terms in these courts;²⁵ except in New York county, the surrogates of which are required, from time to time, to appoint times of holding terms of the Surrogate's Court for the trial of probate proceedings and for hearing of motions and other chamber business, prescribing the duration of such terms and assigning the surrogate to preside and attend. Two or more terms may be appointed to be held at the same time; the term held at chambers is to dispose of all business except contested probate proceedings, which latter are to be disposed of at a trial term. Provision is made for the publication of the appointments of terms and assignments of surrogates to hold them.²⁶ In counties in which the county judge is also surrogate, the Surrogate's Court is held at the times and places of holding the County Court.²⁷ The statute further provides that, unless prevented by sickness or other unavoidable casualty, the surrogate must attend at his office on Monday of each week, except during the month of August, or, where Monday is a public holiday, on the following Tuesday, to execute the duties imposed upon him. "But the surrogate of any county may, by an instrument in writing, under his hand, filed in the office of the clerk of the county, at least twenty days before the first of January, in any year, designate a day of the week, other than Monday, on which he will attend at his office, or a month, other than August, during which he will be absent therefrom, or both, during that year; and where the county judge is also surrogate, he is not required to attend at his office on any day when the County Court or Court of Sessions is sitting. The surrogate must also execute the duties of his office, at such other times and places, within his county, as the public convenience requires."²⁸ Any surrogate, during his designated vacation-month, "may sign decrees, letters testamentary, of administration and guardianship and orders, wherever he shall be passing such vacation within the State."²⁹

²⁴ Co. Civ. Proc., § 2504; *Gilman v. Gilman*, 1 Redf. 354; 38 Barb. 364.

²⁵ *Western v. Romaine*, 1 Bradf. 37.

²⁶ Co. Civ. Proc., § 2504, as amended 1893.

²⁷ Co. Civ. Proc., § 2506.

²⁸ Co. Civ. Proc., § 2505; *People v. Supervisors*, etc., 34 Hun. 599.

²⁹ Co. Civ. Proc., § 2505, as amended 1892. Before this amendment, only the surrogate of New York could so sign outside his own county.

TITLE SECOND.

DISQUALIFICATIONS OF SURROGATE.

§ 7. **General disqualifications.**—The surrogate is a judge³⁰ of a court of record.³¹ Besides his disability to act, by reason of sickness, absence, or lunacy, he is subject to the general disqualifications of a judicial officer.³² Accordingly it has been held that a surrogate is disqualified to make an order for the sale of a testator's real estate to satisfy a judgment recovered against the executors, in an action in which he was the creditor's attorney, although the relation of attorney and client had ceased more than four years before the application.³³

A surrogate cannot, of course, act as an attorney or counselor in his own court, or in a cause originating therein, or in a special proceeding which has been before him in his official character. Nor can his law partner or any person connected in law business with him, practice or act as attorney or counselor in his court or in a cause originating therein. He is not allowed to demand or receive any compensation for giving advice in a matter before him, or which he has reason to believe will be brought before him for decision, or for preparing a paper or other proceeding relating to such a matter.³⁴

³⁰ Co. Civ. Proc., § 3343, subd. 3. But he is not a "justice or judge" within the constitutional provision that a judge or justice cannot hold office "longer than until and including the last day of December next after he shall be seventy years of age." (*People v. Carr*, 100 N. Y. 236.) *Query*, whether this is so with regard to the surrogates of New York county, whose "*disability of age*" is provided for by L. 1892, c. 642, § 2.

³¹ Co. Civ. Proc., § 2, subd. 20.

³² Co. Civ. Proc., § 46, as amended 1883.

³³ *Darling v. Pierce*, 15 Hun. 542. See *Matter of Ryers*, 72 N. Y. 1; *Matter of Manufacturing Co.*, 77 id. 101. A surrogate who, before his election, had given general legal advice to an executor as to his rights and duties as such, and performed other legal services for him, and appeared as his attorney in foreclosure suits brought by him as such, and who, after his election, assumed jurisdiction as surrogate over the executor, and settled the accounts, embracing payments to

himself for such services performed as attorney, and, after exercising such jurisdiction, continued to act as attorney of record in litigations brought by the executor in adjoining counties, was held to be disqualified, and his decree passing the account declared void. (*Wigand v. Dejonge*, 8 Abb. N. C. 260.) A surrogate with whom, pending a probate contest, the funds of the estate are deposited by stipulation of the parties to abide the result, has not a disqualifying interest. (*Matter of Hancock*, 91 N. Y. 284.) He is not disqualified to pass upon the probate of a will by the fact of a gift to a church of which he is warden, and, it seems, he is competent to entertain probate proceedings though his wife is a legatee, where her legacy fails by reason of her being a subscribing witness. (*Hopkins v. Lane*, 6 Dem. 12.) See *Matter of Van Wagonen*, 69 Hun. 365.

³⁴ Co. Civ. Proc., §§ 49, 50, 51. As Surrogates' Courts were not courts of record until 1877, it may be a question whether the surrogates of New

§ 8. **Particular disqualification.**—The statute particularly provides that a surrogate shall not be counsel, solicitor, or attorney in a civil action or special proceeding, for or against any executor, administrator, temporary administrator, testamentary trustee, guardian, or infant, over whom or whose estate or accounts he could have any jurisdiction by law.³⁵ So he is disqualified from acting upon an application for probate or for letters testamentary, or letters of administration, in any case where he is, or claims to be, an heir or one of the next of kin to the decedent, or a devisee or legatee of any part of the estate; or, where he is a subscribing witness, or is necessarily examined or to be examined as a witness, to any written or nuncupative will; or, where he is named as executor, trustee, or guardian, in any will or deed of appointment involved in the matter.³⁶ Beyond these particularly defined disqualifications the surrogate has a discretion whether or not he will act in a particular case, and, in general, the appellate court will not interfere with the exercise of that discretion.³⁷

§ 9. **Waiver of disqualification.**—The last above-mentioned disqualifications cannot be waived; but “an objection to the power of a surrogate to act, based upon a disqualification established by special provision of law, *other* than one of those enumerated in the last section (2496), is waived by an adult party to a special proceeding before him, unless it is taken at or before the joinder of issue by that party; or, where an issue in writing is not framed, at or before the submission of the matter or question to the surrogate.”³⁸

York, Kings, and Erie counties were subject to the constitutional provision adopted in 1869 (art. 6, § 21), to the effect that no “judge of a court of record in the cities of New York, Brooklyn, or Buffalo shall practice as an attorney or counselor in any court of record in this State, or act as referee.” But by the present Constitution (art. 6, § 20, adopted in 1894), no surrogate “hereafter elected in a county having a population exceeding 120,000” may practice as an attorney or counselor in any court of record in the State, or act as referee. The surrogate of Monroe county is expressly disqualified by Co. Civ. Proc., § 2495, as amended 1893.

As to the surrogate of Westchester county, see *Brown v. Brown*, 64 App. Div. 544, 72 N. Y. Supp. 309.

³⁵ Co. Civ. Proc., § 2495.

³⁶ Co. Civ. Proc., § 2496, following substantially 2 R. S. 79, § 48, as

amended L. 1830, c. 320, § 19. See *Cornwell v. Wooley*, 1 Abb. Ct. App. Dec. 441.

³⁷ In *Matter of Newcombe* (45 St. Rep. 806; 18 N. Y. Supp. 549), a party filing objections to the probate of a will, moved to have the matter sent to the Common Pleas for trial before a jury, upon the allegation that the surrogate was a personal friend of decedent and of the principal beneficiary under the will; that the trial would require the examination of many witnesses; that the testimony would be conflicting, and consequently a jury trial was necessary. Held, that the surrogate's denial of the motion was a matter of discretion, with which the general term would not interfere.

³⁸ Co. Civ. Proc., § 2497, substantially following 2 R. S. 276; L. 1844, c. 300, § 6.

TITLE THIRD.

SUBSTITUTES FOR SURROGATE, IN CASE OF VACANCY IN OFFICE, DISABILITY, OR DISQUALIFICATION.

§ 10. Vacancy or disability in counties other than New York.—

The Code provides that “where, in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled, by reason of sickness, absence, or lunacy; and special provision is not made by law for the discharge of the duties of his office in that contingency, the duties of his office must be discharged, until the vacancy is filled or the disability ceases, as follows: 1. By the special surrogate. 2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.³⁹ 3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge. 4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.”⁴⁰

It is also provided, that “in any county, except New York, if the surrogate is disabled, *by reason of sickness*, and there is no special surrogate, or special county judge of the same county, the board of supervisors may, in its discretion, appoint a suitable person, to act as surrogate, until the surrogate's disability ceases; or until a special surrogate or a special county judge is elected or appointed.”⁴¹

§ 11. Disqualification in counties other than New York.—In case the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his jurisdiction and powers with respect to that matter vest in the several officers designated above, in the order named. “If there is no such officer qualified to act therein, the surrogate may file in his office a certificate stating that fact; specifying the reason why he is disqualified or precluded, and designating the surrogate of an adjoining county, other than New York, to act in his place in the particular matter. Thereupon the surrogate so designated has,

³⁹ See *Matter of Frye*, 48 St. Rep. 572; 20 N. Y. Supp. 588.

⁴⁰ Co. Civ. Proc., § 2484. “Before such an officer is entitled to act, proof of his authority to act, as prescribed in section 2487, must be made.” (Id.) For definition of “disability,” see Co. Civ. Proc., § 3343, subd. 15. The district attorney so acting may issue citations upon which attachments for

contempt may issue. (*People v. Petty*, 32 Hun, 443.)

⁴¹ Co. Civ. Proc., § 2492, as amended 1893. “A person so appointed must, before entering upon the execution of the duties of his office, take and file an oath of office, and give an official bond, as prescribed by law, with respect to a person elected to the office of surrogate.” (Id.)

with respect to that matter, all the jurisdiction and powers of the surrogate making the designation, and may exercise the same in either county." ⁴²

§ 12. **Vacancy, disability, or disqualification in New York county.**—Special provision is made for cases of vacancy in the office of surrogate in the county of New York, and for cases of the disability or disqualification of the surrogates of that county. The Supreme Court, at a special term thereof, must exercise all the powers and jurisdiction of the Surrogate's Court where the surrogate is precluded or disqualified from acting, with respect to a particular matter. Where the office of surrogate is vacant, or the surrogate is disabled by reason of sickness, absence, or lunacy, it must exercise all the powers and jurisdiction of that court until the vacancy is filled, or the disability ceases, as the case may be. ⁴³

§ 13. **Vacancy, etc., in Kings county.**—Since the amendments of 1893, sections 2485, 2486, 2487, and 2492 are no longer applicable to the surrogate of Kings county; and vacancies in the office, and the disability of the surrogate to discharge his official duties, are provided for under section 2484, applicable to surrogates of other counties except New York. It is provided, however, in the case of Kings county, that in any proceeding in its Surrogate's Court, before either of the officers authorized by section 2484 to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order, transfer such cause to the Supreme Court, to be heard and decided at a special term thereof, held in such county. ⁴⁴

⁴² Co. Civ. Proc., § 2485, as amended 1893.

⁴³ Co. Civ. Proc., § 2486, as amended 1895. Prior to 1896 (L. 1895, c. 946) the Court of Common Pleas was required to exercise the powers of the surrogate, in case of his disqualification, whether the proceeding was commenced before or after the adoption of the Code. (Matter of Gilman, 42 St. Rep. 474; 17 N. Y. Supp. 494.) Before the adoption of the eighteenth chapter of the Code of Civil Procedure, the Supreme Court might issue a commission empowering a suitable person to act as surrogate in case there was no person capable of acting. (L. 1830, c. 320, § 21. And see Matter of Hathaway, 9 Hun. 79.) See, for a construction of the former statute (L. 1871,

c. 859, § 8), *Holmes v. Smith*, 3 Hun. 413; 6 T. & C. 57. Chapter 311 of L. 1879 is to the same effect as this section of the Code.

⁴⁴ Co. Civ. Proc., § 2484, as amended 1893; which is an adoption of the provision of L. 1884, c. 490, §§ 1, 2, 4. "A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the Supreme Court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the Supreme Court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to

§ 14. Proof of authority of other officer or court to act.—In order to invest another officer, or, in New York county, the Supreme Court, with the jurisdiction and powers of a surrogate, his or its authority must be proved in one of the following modes:

“1. Where the surrogate is disqualified, or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof; or, except as otherwise prescribed in section 2485 (*above*), by affidavit or oral testimony.

“2. The fact that the surrogate is so disqualified or precluded, or that he is disabled, or that the office is vacant, and also the authority of the officer, or of the court as the case may be, to act in his place, may be proved, and are deemed conclusively established, by an order of a justice of the Supreme Court of the judicial district embracing the county. After such an order is made, the surrogate shall not make the certificate specified in section 2485 (*above*), and if such a certificate has been theretofore made and filed, the powers and duties of the surrogate therein designated, as specified in that section, thenceforth cease.”⁴⁵

In the case of a transfer of a proceeding to the Supreme Court, by an officer acting as surrogate of Kings county, his order, as we have seen above, is conclusive evidence of the authority and jurisdiction of the Supreme Court.

§ 15. Supreme Court justice's appointment.—An order under the second subdivision (*above*) may be made upon or without notice, as the justice thinks proper. The order itself must recite the cause of the making thereof; it must designate the officer or court, empowered to discharge the duties of the office of surrogate; and, if it relates to a particular matter only, it must designate that matter. It may, in the discretion of the justice, require an officer to give security for the due discharge of his duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney-general, if directed by the governor, must, or the district attorney, upon his own motion, may, apply for the order; and a Supreme Court justice of the judicial district embracing the county must grant it upon his application. The justice may also grant the order, upon the application of a party,

be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the Surrogate's Court of such county.”

⁴⁵ Co. Civ. Proc., § 2487, as amended

1895. The making of the certificate by the surrogate, or obtaining the order, as provided in sections 2487, 2488, is a condition precedent to the right of another officer to act in the place of the surrogate, under section 2484. (*Matter of Tyler*, 60 Hun, 566.)

or a person about to become a party, to any special proceeding in the Surrogate's Court. Where the surrogate is sick or absent, the granting of the order rests in the discretion of the justice, and its effect may be qualified, as the justice thinks proper.⁴⁶

§ 16. Proceedings in Supreme Court.— Where, in the foregoing cases, a special proceeding, which is cognizable before a surrogate, has been brought in the Supreme Court, it must be entitled in that court, and the papers therein must be filed or recorded, as the case may be, and the issues must be tried, as in an action brought in that court. Where a seal is necessary, the seal of the court in which the special proceeding is pending must be used: and the clerk of that court must sign each record which is required to be signed by the surrogate or the clerk of the Surrogate's Court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made, by a judge of the court.⁴⁷

§ 17. Revoking authority of appointee.— The order of appointment made by a Supreme Court justice as above or by the board of supervisors under section 2492, may be revoked by a Supreme Court justice for any cause (except a vacancy in the office of surrogate), without prejudice to any proceedings theretofore taken by virtue of the order, or of the appointment, upon proof that the order or the appointment was "improvidently made, or that the cause of making it has become inoperative. Such an order of appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order or appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business, in any proceedings taken by virtue of the order or appointment, must be transferred to, and may be completed by, the surrogate, in the same manner and with like effect, as where a new surrogate completes the unfinished business of his predecessor."⁴⁸

§ 18. Remitting proceedings to Surrogate's Court.— The court entertaining any special proceeding ordinarily cognizable by a surrogate, may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the Surrogate's Court any

⁴⁶ Co. Civ. Proc., § 2488, as amended 1889.

⁴⁷ Co. Civ. Proc., § 2490, as amended 1895.

⁴⁸ Co. Civ. Proc., § 2489, as amended

1889. See Co. Civ. Proc., § 2481, subds. 8 and 9; *Matter of Martinhoff*, 4 Redf. 286; *People v. Shaw*, 3 Hun, 272; *affd.*, 63 N. Y. 36.

matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of appointment, the surrogate must cause entries to be made in the proper book in his office, referring to all the papers filed, and orders entered, or other proceedings taken, in the Supreme Court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.⁴⁹

§ 19. Recording proceedings taken before special officer, etc.— All acts and proceedings taken by, before, or by authority of, an officer or a person temporarily acting as surrogate of any county, must be recorded, or the proper minutes thereof must be entered, in the books of the Surrogate's Court, the same as if done or taken by, before, or by authority of, the surrogate of the county; and the officer or person so acting, or the clerk of the Surrogate's Court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book.⁵⁰

TITLE FOURTH.

SURROGATES' CLERKS AND OTHER OFFICERS OF THE COURT, THEIR POWERS AND DUTIES.

§ 20. Appointment of office clerks.— Each surrogate may appoint, and at his pleasure remove, clerks *for his office*, and he may also appoint "*the clerk of the Surrogate's Court.*" As to his office clerks, he may appoint as many, to be paid by the county, as the board of supervisors of his county authorizes him to appoint. The board of supervisors must fix the compensation of the clerk or clerks so appointed, and may authorize them, or either of them, to receive, for their or his own use, the legal fees for making copies of any record or paper in the office of the surrogate. A surrogate may appoint, and at pleasure remove, as many additional clerks, to be paid by him, as he thinks proper.⁵¹ In New York county, the court may appoint, and at pleasure remove, all clerks, officers, attendants, and employees in his office, or connected with his court, subject to the revision of the board of estimate and apportionment as to the number and duties of all such clerks, etc., with their respective salaries to be paid by the county. The surrogate may

⁴⁹ Co. Civ. Proc., § 2491, as amended 1895.

⁵⁰ Co. Civ. Proc., § 2494.

⁵¹ Co. Civ. Proc., § 2508.

require from his assistants security for the faithful performance of their duties.⁵²

§ 21. **The clerk of the court.**— A surrogate may appoint a clerk employed in his office to be “the clerk of the Surrogate’s Court.” The appointment must be by a written order filed and recorded in his office, which he may in like manner revoke at pleasure. Such clerk is authorized to exercise, concurrently with the surrogate, the following powers of the surrogate: (1) He may certify and sign as clerk of the court, any of the records of the court, including a certificate of probate (see Code Civ. Proc., § 2629), and the records and papers left uncompleted or unsigned by the surrogate’s predecessor. (2) He may issue any mandate, to which a party is entitled as of course, either unconditionally, or upon the filing of any paper, and may sign, as clerk of the court, and affix the seal of the court to, any letters or mandate issued from the court. (3) He may certify, in the manner prescribed by the ninth chapter of the Code of Civil Procedure, a copy of any paper required or permitted by law to be filed or recorded in the surrogate’s office. (4) He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same. (5) He may take the acknowledgment or proof of any instrument to be used or filed in the court of which he is clerk.⁵³

In *New York county*, the clerk of the Surrogate’s Court may, with the approval of the surrogates, authorize and deputize, one or more of the other clerks, employed in the Surrogate’s Court of that county, to sign his name, and exercise such of the other powers conferred upon him by section 2509, as he shall designate.⁵⁴

The surrogate, however, may prohibit the clerk from exercising any of the foregoing powers, but the prohibition will not affect the validity of any act of the clerk done in disregard of the prohibition.⁵⁵ A surrogate’s clerk cannot file an unsigned decree or other-

⁵² L. 1884, c. 530; L. 1892, c. 642, acting business; and the surrogate is § 4, superseding Co. Civ. Proc., §§ 2502, 2508, so far as they relate to the county of New York. See also §§ 1180, 1189, 1191, and 1204 of the Consolidation Act. In New York county, no person not officially connected with the surrogate’s office or court is allowed permanently to have or occupy any desk or position in the office or court as his place of trans-

acting business; and the surrogate is expressly prohibited from allowing any person not duly appointed clerk, officer, or employee, to have any special privileges in or about the office. (L. 1884, c. 530, § 10.)

⁵³ Co. Civ. Proc., § 2509, as amended 1900.

⁵⁴ Id.

⁵⁵ Co. Civ. Proc., § 2509, as amended 1893.

wise make it valid.⁵⁶ The clerk of the court has a general power to take and certify any oath or affidavit required or authorized by law, except an oath to a juror or a witness upon a trial, an oath of office, and an oath required to be taken before a particular officer.⁵⁷ He may also administer oaths, take affidavits and the proof and acknowledgment of deeds, and all other instruments in writing, and certify the same, with like force and effect as if taken and certified by a county judge.⁵⁸

The clerk of the Surrogate's Court, in addition to the powers enumerated above, may exercise concurrently with the surrogate of the county, the following powers of the surrogate: "On the return of a citation issued from such Surrogate's Court on a petition for the probate of a will, where no objection to the same is filed; or, where all the persons entitled to be cited, sign and verify the petition, or personally, or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. Such examinations must be reduced to writing, and for such purpose, he is authorized to administer and certify oaths and affirmations in such cases in the same manner and with the same effect as if administered and certified by the surrogate."⁵⁹

§ 22. Clerk's disabilities.—The clerk or other person employed in any capacity, in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee or special guardian, in any matter before the surrogate.⁶⁰

§ 23. Surrogate liable for clerk's acts.—The surrogate is declared to be liable, as well as the sureties in his official bond, for any act of the clerk, during the surrogate's term of office, as if the act was performed by the surrogate. To indemnify him against the liability, he may take security from the clerk.⁶¹ As to the surrogate's bond, and the prosecution thereof, see title sixth of this chapter.

⁵⁶ *McNaughton v. Chave*, 5 Abb. N. C. 225; *Roderigas v. East River Savings Bank*, 76 N. Y. 316.

⁵⁷ Co. Civ. Proc., § 842.

⁵⁸ L. 1900, c. 510, amending L. 1884, c. 309.

⁵⁹ Co. Civ. Proc., § 2510, adopted in 1893 from L. 1885, c. 367. This section originally applied solely to Kings county, but by L. 1894, c. 211, the additional powers conferred upon the clerk of the Surrogate's Court in that county were extended to the clerks of Surrogates' Courts in every county.

⁶⁰ Co. Civ. Proc., § 2509, as amended

1893, formerly section 2511. See *Id.*, §§ 61, 90. It has been held, though erroneously, we think, that where all the parties consent, a clerk of the court may be appointed referee. (*Thorne's Estate*, 4 Law Bull. 48.) The official stenographer of the court has not such a relation to the court as to disqualify him from acting as referee. (*Benedict v. Cooper*, 3 Dem. 362.)

⁶¹ Co. Civ. Proc., § 2511, as amended 1893, formerly section 2510. See L. 1884, c. 530, § 5.

TITLE FIFTH.

RECORDS TO BE KEPT BY THE SURROGATE.

§ 24. **Books of surrogate.**— Each surrogate is required to provide (at the expense of the county) and keep a record-book of wills, etc.; a record-book of letters testamentary and letters of administration, issued out of his court; a record-book of every decree whereby the account of an executor, administrator, trustee, or guardian is settled; a book, containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree made thereon; a book recording every decree or order, the record of which is not required to be kept elsewhere, together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein; a book recording all letters of guardianship, and a book of fees and disbursements.⁶² To each of the books so kept must be attached an alphabetical index, referring to the page of the book where each subject may be found. Each decree revoking the probate of a will, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modifying or otherwise affecting any other decree, must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with reference to the book and page where the subsequent decree is recorded. The books so kept pertain to the surrogate's office, and must be open at all reasonable times to the inspection of any person.⁶³

The statute also provides that there shall be kept a book wherein shall be recorded a statement of all moneys directed, by the order of the surrogate, to be deposited with the county treasurer, or, in the city of New York, with the city chamberlain.⁶⁴

§ 25. **Stenographer's notes.**— The Code provides for the appointment of stenographers,⁶⁵ whose duties are to take full stenographic notes of proceedings in which oral proof is given, unless his services are dispensed with by the surrogate, to write out such notes legibly and at length, and to file them in the surrogate's office.⁶⁶ The notes so written out are then authenticated by the signature

⁶² Co. Civ. Proc., § 2498.

⁶³ Co. Civ. Proc., § 2499.

⁶⁴ L. 1895, c. 544.

⁶⁵ Co. Civ. Proc., §§ 2512, 2513. For amount of stenographer's fees, see Co. Civ. Proc., § 3311, as amended 1891.

⁶⁶ Co. Civ. Proc., § 2541.

of the stenographer, referee, the surrogate, or the clerk of his court, as the case may be, and, in New York and Kings counties, and in any other county where the supervisors direct, are to be bound at the expense of the county. Upon the record of a decree, in a contested case, a reference is required to be made to the bound volume, and the page of such minutes.⁶⁷

§ 26. Papers, etc., to be preserved.—The surrogate is required to carefully file and preserve in his office, every deposition, affidavit, petition, report, account, voucher, or other paper, relating to any proceeding in his court; and to deliver to his successor all the papers and books kept by him.⁶⁸

§ 27. Custody of records.—Except in New York and Kings counties, the general charge of the books and records of the office is, by the statute, given to the board of supervisors of each county, who may authorize the surrogate to cause certified copies to be made for public use; and they are required to do so, whenever, by reason of age or exposure, or any casualty, the same shall be necessary for the public service; and provision is made for determining the necessity for such copying and the payment for the same.⁶⁹

TITLE SIXTH.

SURROGATE'S BOND AND THE PROSECUTION THEREOF.

§ 28. Surrogate's bond.—Within twenty days after notice of his appointment or election, the surrogate must execute to the people of the State, a bond for the application and payment of all moneys and effects that may come into his hands as surrogate.

In the city and county of New York, the amount required is \$50,000; in Kings county, \$25,000, and in other counties, \$10,000. The bond must be joint and several, with at least two resident freeholders as sureties. It must be acknowledged by all the persons executing it, and the sureties must justify, in the aggregate, in double the penalty of the bond. The county clerk is made the judge of the sufficiency of the sureties, and being satisfied of that fact, he must indorse his approval on the bond, and file it in his office, and also record it in the records of deeds. And such record, or a certified copy thereof, is made original evidence of the con-

⁶⁷ Co. Civ. Proc., § 2543.

⁶⁸ Co. Civ. Proc., § 2500, as amended 1893. Section 961, requiring certain officers to search files and records and

to furnish certified copies, includes surrogates.

⁶⁹ L. 1869, c. 855, § 7.

tents of the bond in any action against the surrogate or his sureties.⁷⁰ In like manner, a person appointed, in any county, except New York, to act as surrogate, during the disability of that officer by reason of sickness, absence, or lunacy, or in certain cases of vacancy, is required, before entering upon the execution of the duties of his office, to give an official bond, as prescribed by law with respect to a person elected to the office of surrogate.⁷¹

§ 29. **Bond of officer acting as surrogate.**—The former statute,⁷² requiring every county judge, special county judge, or other officer authorized to act as surrogate, before entering upon or discharging any of the duties of surrogate, to execute a bond, in the same manner and with the same conditions as are required of surrogates, has been repealed,⁷³ and replaced by a provision that the justice of the Supreme Court, of the department embracing the county of the surrogate, may, in his discretion, by his order designating the officer empowered to discharge the duties of the office of surrogate, require the officer to give security for the due discharge of his duties therein.⁷⁴ The nature and form of the security so to be given are left to the court to prescribe.

§ 30. **Liability upon surrogate's bond.**—The surrogate's bond is deemed to be in force and obligatory upon the principal and sureties therein, so long as he continues to discharge the duties of his office, and until his successor is elected and duly qualified.⁷⁵ But the sureties in the bond are exonerated from all liability by reason thereof, for all acts or omissions of their principal, after he has duly renewed his official bond.⁷⁶ Where a surrogate received from his predecessor a fund in court, and, although in ignorance of any deficiency, paid orders of his predecessor, as presented to him, until the fund was exhausted, and in so doing paid out to one person moneys belonging to another, he was held personally liable.⁷⁷ It was his duty, on entering upon his office, before paying out any portion of the surrogate's fund turned over to him

⁷⁰ 1 R. S. 382, §§ 77, 87, as amended by L. 1871, c. 239, § 1; L. 1882, c. 410, § 1178.

⁷¹ Co. Civ. Proc., § 2492.

⁷² L. 1858, c. 213.

⁷³ L. 1880, c. 245.

⁷⁴ Co. Civ. Proc., § 2488.

⁷⁵ 1 R. S. 120, § 29.

⁷⁶ Id., § 30.

⁷⁷ *Disbrow v. Mills*, 62 N. Y. 604, affg. 4 Sup. Ct. (T. & C.) 682. In that case, the surrogate received from his predecessor \$7,267.89, as balance of

funds in the hands of the latter, as surrogate. Included in this fund was \$2,653.19 belonging to plaintiff. The surrogate made no attempt to ascertain to whom the several sums belonged, but paid therefrom various claims other than plaintiff presented, until the sum in his hands was reduced to \$1,400. Held liable to the plaintiff for the entire sum belonging to him. See *Matter of Coffin*, 36 Hun, 236.

by his predecessor, to ascertain from what sources it was derived and who was entitled thereto. The transfer of the fund should be accompanied with an account showing the estates or persons to whom it belongs, and this he should properly examine and test; and if he receives the fund without such an account and examination, he incurs the risk of any errors resulting from such neglect.

The appropriation to his own use by the surrogate of any county, or other misappropriation, or the withholding by him of any moneys directed by the board of supervisors of the county to be paid for clerk hire, is a misdemeanor.⁷⁸

§ 31. Application for leave to prosecute bond.—Where a surrogate, or an officer acting as surrogate, is guilty of any actionable default or misconduct in his office, the person injured thereby may apply for leave to prosecute the delinquent's official bond.⁷⁹ The application may be made to the Supreme Court having jurisdiction;⁸⁰ and may be made without notice, but in that case, the surrogate, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground showing that it ought not to have been granted.⁸¹ The application must be accompanied with proof, by affidavit, of the default or misconduct complained of, and that satisfaction of the same has not been received; and with a certified copy of the official bond.⁸²

§ 32. Order for prosecution.—Upon such an application, the court must grant an order permitting the applicant to maintain an action upon the bond; which must be brought in the court which granted the order, by the applicant as plaintiff, and it may be maintained, in general, as if the applicant was the obligee named in the bond.⁸³ The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain from the court which made the first order, but not from any other court, an order permitting him to maintain another action in the same court, upon the same bond, for another default or misconduct; and any number of such orders may be successively made—neither of the actions so authorized being, in general, affected by the pendency of, or the recovery of judgment in, any other.⁸⁴

⁷⁸ L. 1877, c. 401, § 4. As to surrogate's liability for official acts of the clerk of his court, see *ante*, § 23.

⁷⁹ Co. Civ. Proc., § 1886.

⁸⁰ Id., §§ 1880, 1888.

⁸¹ Id., § 1892. See *Matter of Van Eps*, 56 N. Y. 599.

⁸² Id., § 1880.

⁸³ Co. Civ. Proc., § 1881. Formerly the action was required to be brought in the name of the people.

⁸⁴ Co. Civ. Proc., § 1882.

§ 33. **Proof in action on bond.**— Where the default, by reason of which an application to prosecute the official bond is made, consists of the nonpayment of money, the applicant must⁸⁵ prove a demand of the money from the surrogate, or that a demand cannot be made with due diligence; but such proof is not necessary where the applicant has recovered a judgment against the surrogate.⁸⁶

§ 34. **Defenses in action on bond.**— It is a defense by a surety, against whom an action is brought upon a surrogate's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the surrogate, to pay, upon one or more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers' fees and expenses, equal to the sum for which the defendant is liable by reason of the bond; and it is a partial defense that the difference between the aggregate amount, so paid or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.⁸⁷

§ 35. **Execution in action on bond.**— Where an execution is issued upon a judgment recovered against the surrogate and any of his sureties, in an action so brought, the plaintiff's attorney must indorse thereon a direction to collect the same, in the first place, out of the property of the surrogate, and, if sufficient property of the surrogate cannot be found, then to collect the deficiency out of the property of the surety or sureties.⁸⁸

§ 36. **Apportionment of recovery.**— If the aggregate amount of the liabilities, which might be so recovered by actions upon the surrogate's official bond, exceeds the sum for which the sureties are liable, the court must, upon the application of a person who has obtained leave to prosecute the bond, made upon notice to the plaintiff's attorney, in each action then pending upon the surrogate's official bond, and in each uncollected judgment recovered thereupon, direct and provide for the distribution of the money collected out of the property of the sureties, among the persons in favor of whom the liabilities have accrued, in proportion to the amount which each one is entitled to recover, to be ascertained by a reference, or in such other manner as the court directs.⁸⁹

For the purposes of the motion, an order may be made by a

⁸⁵ Unless special provision is otherwise made by law.

⁸⁶ Co. Civ. Proc., § 1891.

⁸⁷ Co. Civ. Proc., § 1884.

⁸⁸ Co. Civ. Proc., § 1883.

⁸⁹ Co. Civ. Proc., § 1885.

judge, forbidding the payment, to the plaintiff in any action, of the sum collected or to be collected by virtue of a judgment therein; but the court is not authorized to compel a plaintiff to refund any money collected and received by him in good faith, before service of notice of such an order.⁹⁰

The subject of the remedy upon a surrogate's bond has become of less moment since the adoption of the provision of the present Code, relieving him from the burden incident to the functions of depository, custodian, and distributor of moneys paid into his court.⁹¹

TITLE SEVENTH.

COMPENSATION AND FEES OF SURROGATE.

§ 37. Compensation of surrogate.— By the Constitution, the surrogate, being a judicial officer, is not allowed to receive to his own use any fees or perquisites of office. His compensation consists exclusively of a salary, the amount of which was formerly fixed by the board of supervisors of the county; but at present is provided for by special statutes, as required by the Constitution.⁹²

§ 38. Compensation of temporary and acting surrogates.— An officer, or a person appointed by the board of supervisors, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in the Code, is entitled to be paid, for the time during which he so acts, a compensation equal, *pro rata*, to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid, in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate, with respect to a particular matter, wherein the surrogate is disqualified or precluded from acting, the supervisors of the county must allow him a just compensation for his services therein, to be audited and collected in the same manner.⁹³

⁹⁰ Co. Civ. Proc., § 1885.

⁹¹ See Co. Civ. Proc., § 2537, as amended 1882, and c. II, tit. 6, *post*.

⁹² See L. 1892, c. 686, § 222. As to the salaries of the surrogates of Suffolk, Chautauqua, Fulton, and Orange counties, see L. 1897, c. 232 (amending L. 1892, c. 686), L. 1900, c. 306, L. 1901, c. 161, and L. 1901, c. 505, respectively.

⁹³ Co. Civ. Proc., § 2493. The compensation to be paid is only for the time of *actual service*. (Matter of Tyler, 60 Hun. 566; 15 N. Y. Supp. 366.) As to the compensation of the special surrogate of Oneida county, see *People ex rel. Sholes v. Supervisors, etc.*, 82 Hun. 105; 31 N. Y. Supp. 63.

§ 39. Fees of surrogate.— In counties other than New York, the surrogate, or the clerk of the Surrogate's Court, may charge for searches of the records, and for copies and transcripts thereof, the same fees as by law are allowed to a county clerk for a similar service.⁹⁴ No surrogate is allowed to receive any fee for the performance of any official service, except that where, in a case prescribed by law, or in any other case, upon the application of a party, he goes to a place, other than his office, or the courtroom where he is required to hold court, in order to take testimony, he may charge and receive to his own use, ten cents for each mile for going, and the same sum for returning.⁹⁵

In New York county, neither the surrogate, nor his associates, or other clerks, employees, or subordinates in or attached to the surrogate's office or court, is permitted to charge or receive to his or their own use, or otherwise than for the benefit of the county, any fees, perquisites, or emoluments for any services rendered by him or them by virtue of his or their official positions, except mileage as above; and ten cents a folio for a copy of a paper, to be received for the use of the county.⁹⁶

§ 40. No fees to be charged in certain cases.— No fees for any services done or performed by a surrogate are to be charged to, or received from, an executor or administrator, in a case where "the inventory of personal property of a testator or intestate, filed in the office of the surrogate, does not exceed the sum of one thousand dollars." If the petition for letters testamentary or of administration shall allege that in the belief of the petitioner the inventory will not exceed such amount, no fees shall be received until it appears from the inventory, when filed, that the personal property does exceed that sum. On the appointment of a guardian, if it appears that the application is made for the purpose of enabling the minor to receive bounty, arrears of pay, or prize money, or pension due, or other dues or gratuity from the Federal or State government, for the services of the parent or brother of such minor in the military or naval service of the United States, no fees shall be charged or received.⁹⁷

⁹⁴ Co. Civ. Proc., § 961. He must charge, and receive to the use of the county, for a copy of a paper, ten cents for each folio, except where the board of supervisors have allowed his clerk to receive fees for his own use; and in that case, his clerk may charge and receive the same fee. (Co. Civ. Proc., § 2567.)

⁹⁵ Id., § 2567.

⁹⁶ L. 1884, c. 530, §§ 6, 7. He must cause a printed notice to be posted in his office, that no clerk or assistant is authorized to charge any fee or receive any gratuity for any official service rendered by him, except ten cents a folio for making copies of papers on file. (Id., § 8.)

⁹⁷ Co. Civ. Proc., § 2501, as amended 1893.

§ 41. **Report of fees.**— In each county, except New York, the surrogate is required, at his own expense, to make a report to the board of supervisors of the county, on the first day of each annual meeting thereof, containing a verified statement, of all fees received or charged by him for services or expenses since the last report, and of all disbursements chargeable against the same, or to the county, stating particularly each item thereof.⁹⁸ In New York county, the surrogate is required to keep a book showing in detail the fees received for copies of papers, the nature of the papers copied, and the name of the person paying the fees; and he must account for, and pay monthly to the comptroller, the amount of fees received.⁹⁹

⁹⁸ Co. Civ. Proc., § 2501, as amended 1893. ⁹⁹ L. 1884, c. 530, § 9.

CHAPTER II.

JURISDICTION AND POWERS OF SURROGATES' COURTS.

TITLE FIRST.

GENERAL STATUTORY JURISDICTION.

§ 42. **Jurisdiction under the Revised Statutes.**—The Revised Statutes, as originally adopted, and taking effect in 1830, after conferring specified powers upon the surrogates, declared (2 R. S. 221, § 1, last clause) that the powers thus conferred should be exercised in the cases and in the manner prescribed by the statutes of this State, adding, “and in no other; and no surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this State.” This restriction gave rise to much difficulty, and seriously embarrassed the due exercise of the functions of these courts, and was consequently repealed in 1837.¹ In the language of Chancellor Walworth,² “it was found that the exercise of certain incidental powers by courts, was absolutely essential to the due administration of justice, and that the revisers and the Legislature had not, by their care and forethought, been able to take the case of these Surrogates' Courts out of the operation of the general rule.”

The effect of this repeal of the restrictive clause was, of course, to restore to these courts substantially the same powers which they possessed before the enactment of the Revised Statutes, except so far as they had been meanwhile specifically restricted by statute, and thus to restore to them such powers as were incidental and necessary to a proper discharge of the functions of the court.³

¹ L. 1837, c. 460, § 71.

² *Pew v. Hastings*, 1 Barb. Ch. 452.

³ *Sipperly v. Baucus*, 24 N. Y. 46; *Brick's Estate*, 15 Abb. Pr. 12; *Dobke v. McClaran*, 41 Barb. 491; *Campbell v. Thatcher*, 54 id. 382; *Pew v. Hastings*, *supra*. The powers which Sur-

rogates' Courts possessed before the enactment of the Revised Statutes, and which were continued by the provisions of 2 R. S. 220, § 1, as amended by L. 1837, p. 536, c. 460, § 71, were as follows: (1) To take proof of the execution of wills, and to admit them

This principle has been asserted, not only with respect to incidental powers, such as inhere by reason of necessity in the exercise of the judicial function, but also with respect of matters of jurisdiction, to supply a *casus omissus* in those provisions of the statute which attempt to enumerate, or define in detail, the general jurisdiction over estates. Thus, it was held that the provisions of the former statute (2 R. S. 73, § 23), declaring that the surrogate of each county shall have sole exclusive power, within his county, to grant administration in specified cases, was not to be regarded as covering all the cases in which he might grant administration; and, in a case within the general principle of jurisdiction, he should not decline to exercise that jurisdiction because the mode was not prescribed by the statute.⁴

to probate. (2) To grant letters testamentary and of administration. (3) To swear executors or administrators to the truth of the inventories and accounts exhibited by them. (4) To call administrators to account; to decree the just and equal order of distribution after the payment of debts and expenses; to compel administrators to observe and pay the same; and to enforce it by execution against the person. (5) To hear and determine any cause touching a legacy or bequest in any will; to decree the payment of it, and to enforce it by execution against the person. (6) To order the admeasurement of dower, upon the application of the widow, of any heir, or of the guardian of a minor. (7) To order the sale of real estate for the payment of debts, when the personal estate was insufficient, and when the real estate proved insufficient, to divide the proceeds, after the payment of expenses, proportionally among creditors; to confirm all such sales, and direct conveyances to be made by executors or administrators, and to order the mortgaging or leasing of the real estate of any testator or intestate for the same purpose, where infants are interested. (8) To appoint guardians for infants, as the chancellor might do. (9) To record all wills proved before them, with the proofs thereof, letters testamentary and of administration granted by them with all things concerning the same, or orders or decrees made by them for the sale of real estate, and all instruments, writings, or documents of a like nature, left unrecorded by their predecessors, and to complete the unfinished business of their predecessors. (10) To institute inquiry respecting the personal estate of intestates, not delivered to the public administrator, nor accounted for lawfully by persons into whose hands it was supposed to have fallen. (11) They had authority to compel the attendance of witnesses, the production of wills, documents, or writings, and, for disobedience in such cases, to commit the party offending for contempt; and, lastly, in all matters submitted to their cognizance, they were authorized to proceed according to the course of the court having, by the common law, jurisdiction of such matters, except so far as they were restricted by statute; and they had such incidental powers as were necessary to carry those which were necessary into effect. (Brick's Estate, 15 Abb. Pr. 12.) The foregoing enumeration is now substantially superseded by the express provisions of the statute conferring or preserving most of these and also additional powers. See Co. Civ. Proc., particularly §§ 2472, 2481, 2538, and 3347. Clause (11) is partly embodied in Co. Civ. Proc., § 2481, subd. 11, but with some material modifications.

⁴ Kohler v. Knapp, 1 Bradf. 241. And see Campbell v. Logan, 2 id. 90. The decision in Kohler v. Knapp seems to border closely upon judicial legislation; but the necessity for so liberal a ruling, in respect to the provision construed in that case, has been removed by the phraseology of Co. Civ. Proc., § 2476, which remedies a notable defect in the original statute.

So, also, where the statute authorized the surrogate to direct and control the conduct of guardians, and to settle their accounts, etc., it was held ⁵ that the surrogate had the power, not only to settle the account, and to ascertain and declare the quantity, quality, and condition of the ward's estate, but to decree and adjudge the time when, and the person to whom, and the manner in which, the same was to be paid or delivered over. The power to direct and control could not be a barren power, and it was, therefore, held to comprehend the power of compelling the guardian to do whatever the law required he should do. An authority, therefore, which may be fairly and reasonably inferred from the general language of the statute, or which is necessary to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, may be taken as granted.

§ 43. Courts of record, but of limited jurisdiction.—Until the adoption of the Code of Civil Procedure, Surrogates' Courts were courts not of record.⁶ The commissioners who framed the Code left them in that category, and manifestly composed the entire work in view of such classification. The Code was enacted expressly in the form in which it was reported to the Legislature,⁷ but was shortly afterward amended ⁸ by placing these courts in the list of courts of record, leaving unchanged many provisions which were based upon the former rule. Owing to these circumstances, that statute presents certain incongruities which did not originally exist. They were repeatedly declared by the courts to be mere creatures of the statute, possessing no jurisdiction or powers, except those which by a favorable construction of the statute might be found to be conferred upon them.⁹

This is still true, notwithstanding they have become courts of record. The courts are continually compelled to reiterate the doctrine that these courts can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted.¹⁰

⁵ *Seaman v. Duryea*, 10 Barb. 523. See *Danşer v. Jeremiah*, 3 Redf. 130, and cases cited.

⁶ *Paff v. Kinney*, 1 Bradf. 1; *Matter of Writner*, 1 Tuck. 75; *Westervelt v. Gregg*, 1 Barb. Ch. 469.

⁷ L. 1876, c. 448.

⁸ L. 1877, c. 416, § 1.

⁹ *Cleveland v. Whiton*, 31 Barb. 544; *Sibley v. Waffle*, 16 N. Y. 180. And see *Seaman v. Duryea*, 11 id. 324;

Wilcox v. Smith, 26 Barb. 316; *Magee v. Vedder*, 6 id. 352; *Wilson v. Baptist, etc., Society*, 10 id. 308; *Dakin v. Hudson*, 6 Cow. 221; *Corwin v. Merritt*, 3 Barb. 341; *People v. Corlies*, 1 Sandf. 228; *People v. Barnes*, 12 Wend. 492; *Harris v. Meyer*, 3 Redf. 450.

¹⁰ *Matter of Underhill*, 117 N. Y. 471; 27 St. Rep. 720; *Matter of Bolton*, 159 N. Y. 129; 53 N. E. Rep. 756.

The statute specifies a great variety of cases in which the surrogate is to exercise his powers, and the manner of their exercise. So far as the statute goes, therefore, it regulates imperatively the exercise of the jurisdiction in the particular classes of cases specified.¹¹

It is not to be forgotten, however, that the Surrogate's Court is a tribunal proceeding according to the course of the common law, and is recognized by the common law. In all matters relative to the probate of testaments, and the administration of the estates of deceased persons, the court proceeds in conformity with prescription and established usage, except as modified from time to time by statutory regulations.¹²

Recent legislation, especially the Code of Civil Procedure, has conferred upon Surrogates' Courts some of the characteristics of courts of general jurisdiction, as will be hereafter pointed out, but, although the argument as to their status, based upon the fact that they were included, in the Revised Statutes,¹³ among the "courts of peculiar and special jurisdiction," fails, since the repeal¹⁴ of the portions of those statutes relating to these courts, they are still courts of a special and limited jurisdiction; and, therefore, it is still true that where the court, in a matter regulated by the statute, has departed therefrom, or has assumed to exercise powers for which it has no authority, or to exercise them in a manner different from that prescribed by statute, its acts, like similar acts of other courts of special and limited statutory jurisdiction, are void.¹⁵

It will be seen, however, hereafter, that in the class of cases in which this principle has been found most important and has been most frequently invoked, viz., that of sales, etc., of real property by the surrogate's order, for the payment of debts, the principle is now no longer applicable, by reason of the statute¹⁶ which makes the validity of sales, etc., to depend upon the same principles as if the sales were made pursuant to directions contained in a judgment rendered by the Supreme Court in an action.

¹¹ Co. Civ. Proc., § 2472. See *Bevan v. Cooper*, 72 N. Y. 317, and cases *infra*.

¹² *Campbell v. Logan*, 2 Bradf. 90. It is not, however, a court of equity. (*Brittin v. Phillips*, 1 Dem. 57; *Matter of Geis*, 27 Misc. 490; 59 N. Y. Supp. 175.)

¹³ 2 R. S. 220, part 3, c. 2.

¹⁴ L. 1880, c. 245, § 1, subd. 3 (2).

¹⁵ *People v. Corlies*, 1 Sandf. 228; *People v. Barnes*, 12 Wend. 492; *Corwin v. Merritt*, 3 Barb. 341; *Paff v.*

Kinney, 1 Bradf. 1; *Sheldon v. Wright*, 5 N. Y. 497; *Riggs v. Cragg*, 89 id. 479, distinguishing *Bevan v. Cooper*, 72 id. 317; *Thompson v. Mott*, 5 Redf. 574. The jurisdiction of the Surrogate's Court is limited, yet within that limitation its decree is conclusive until reversed on appeal. (*O'Connor v. Huggins*, 113 N. Y. 511.)

¹⁶ L. 1850, c. 82, § 1; L. 1869, c. 260, now substantially replaced by Co. Civ. Proc., §§ 2473, 2474, 2784, and 2785.

§ 44. **Subjects within the jurisdiction.**—Having considered the general nature of the jurisdiction of the Surrogate's Court and its limitations, it will now be convenient to give the statutory enumeration of the subjects within that jurisdiction. The powers and jurisdiction of the Surrogate's Court, which are particularly defined by the Revised Statutes, have been enlarged and extended from time to time by subsequent legislation, the disposition being apparent to amplify rather than confine the limits. This various legislation has been reduced to order in the present Code, which provides as follows:

“Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

“1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.

“2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

“3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee so removed.

“4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate.

“5. To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof.

“6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.

“7. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and, in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts. This jurisdiction must be exercised in the cases, and in the manner, prescribed by statute.”¹⁷

¹⁷ Co. Civ. Proc., § 2472. By L. 1884, c. 309, amending L. 1884, c. 510, proof and acknowledgment of deeds and other instruments, and certify

Each of the foregoing paragraphs has repeatedly come before the courts for application to particular cases. After stating, as we have, the statutory enumeration of the subjects of the jurisdiction of these courts, we reserve all consideration of their application until we come to speak of the particular subjects themselves, such as the probate of wills, letters in cases of testacy and of intestacy, the accounting of executors, administrators, and guardians, etc.

§ 45. **Admeasurement of dower.**—The jurisdiction to admeasure dower which Surrogates' Courts formerly enjoyed has been taken away; the only existing remedy therefor now being a civil action under Code Civ. Proc., §§ 1596-1625.

§ 46. **Adoption of children.**—By L. 1896, c. 272, § 60, *et seq.*, known as the Domestic Relations Law, revising and consolidating previous statutes upon the subject, provision is made for an application to a Surrogate's Court by a foster-parent to confirm a voluntary adoption of a child. By the same act an application may be made by any child which may have been adopted in pursuance of the provisions of the act, or by any corporation adopting it, or by any person in behalf of such child, for the termination and cancellation of the adoption, and of the relation of parent and child between a foster-parent and such child, upon the ground of cruelty, misuseage, refusal of necessary provisions or clothing, or inability to support, maintain, or educate such child, or any violation of duty on the part of such foster-parent toward such child.¹⁸ The statute declares the form of the proceeding.¹⁹

TITLE SECOND.

LIMITATION ON GENERAL POWERS.

§ 47. **In general.**—As already stated, the general rule as to the limitation of the jurisdiction of the Surrogate's Court, is that no powers can be exercised by it which are not fairly and reasonably inferred from the general language of the statute as necessary to accomplish its objects. The application of this principle is ex-

the same, with like force and effect, as if taken and certified by a county judge.

¹⁸ See L. 1897, c. 408; L. 1899, c. 498. The adoption of children was unknown to the common law of England and exists in this country only

by virtue of statute. (*Matter of Thorne*, 155 N. Y. 140; 49 N. E. 661; citing *Carroll v. Collins*, 6 App. Div. 106.)

¹⁹ The County Court and the Surrogate's Court having concurrent jurisdiction over proceedings for the adop-

hibited in a great variety of cases, which will be mentioned more appropriately hereafter, under the titles of Probate of Wills; Construction of Wills; Letters Testamentary, and of Administration; Accountings, and other special proceedings in Surrogates' Courts. It is only proposed to give here some instances of general application, showing the extent to which the statute conferring jurisdiction, notwithstanding its general language, has been limited.

Surrogates' Courts do not possess the general powers of a court of equity.²⁰ Hence, for example, they have no authority to set off mutual judgments;²¹ nor to pass on the validity of a claim of indebtedness of a legatee to the estate, such claim being set up by the executor in reduction of the legacy;²² nor to adjudge that the next of kin who have received assets shall pay to the administrator their share of the debts incurred by him, and giving the latter execution therefor;²³ nor to pass upon the validity of a release from the beneficiary to the trustee.²⁴

A surrogate has no jurisdiction to order an administrator to pay over to the widow and children of decedent funds received by him belonging to them, but which are not assets of the estate.²⁵

tion of an infant under the Domestic Relations Law, a proceeding to abrogate an adoption can only be entertained by the court that granted the order therefor. (*Matter of Trimm*, 30 Misc. 493; 63 N. Y. Supp. 952.)

²⁰ *Brittin v. Phillips*, 1 Dem. 57; *Matter of Geis*, 27 Misc. 490; 59 N. Y. Supp. 175.

²¹ *Stilwell v. Carpenter*, 59 N. Y. 414; *Charlick's Estate*, 11 Abb. N. C. 56; *Matter of Livingston*, 27 Hun. 607; *Rudd v. Rudd*, 4 Dem. 335. A claim of a testamentary trustee against a balance of income of the trust in his hands, arising from an alleged indebtedness to him of the beneficiary of such income, cannot be adjusted in a Surrogate's Court. (*Matter of Rutherford*, 5 Dem. 499.)

²² *Matter of Colwell*, 15 St. Rep. 742; *Matter of Jones*, 10 id. 176; *Bauer v. Kastner*, 1 Dem. 136; *Kintz v. Friday*, 4 id. 540. Nor has he any power to determine the claim of an administrator for advances in the form of merchandise made to a distributee, where the latter denies the receipt of such merchandise and disputes its value. (*Barker v. Laney*, 90 Hun. 108; 35 N. Y. Supp. 626.) See s. c. in 7 App. Div. 352.

²³ *Matter of Keef*, 43 Hun. 98. See

Matter of Lang, 144 N. Y. 275; 63 St. Rep. 694.

²⁴ *Van Sinderin v. Lawrence*, 14 St. Rep. 412; *Matter of Wagner*, 52 Hun. 23; aff'd 119 N. Y. 28; *Sanders v. Soutter*, 126 id. 193; 37 St. Rep. 1. The surrogate has no jurisdiction to determine the right of inheritance to a fund received by the administrator which belonged to his intestate, but which in law is to be regarded as real estate. (*Matter of Woodworth*, 5 Dem. 156.) To the same effect, *Matter of McKay*, 37 Misc. 590; 75 N. Y. Supp. 1069. Nor has he jurisdiction to pass upon the equitable claim of a beneficiary who has assigned his interest to the effect that such assignment, although absolute on its face, was intended merely as collateral security for a loan; and the surrogate must recognize such assignment as valid. (*Young v. Purdy*, 4 Dem. 455.) And see *McMahon v. Macy*, 51 N. Y. 155; *Hodges v. Tennessee Ins. Co.*, 8 id. 416; *Despard v. Wallbridge*, 15 id. 374; *Henderson v. Fullerton*, 54 How. Pr. 422; *Stilwell v. Carpenter*, 59 N. Y. 414; *Bevan v. Cooper*, 72 id. 317; *McNulty v. Hurd*, id. 518; *Boughton v. Flint*, 74 id. 476; *Sheridan v. The Mayor*, 68 id. 30.

²⁵ *Matter of Cooley*, 6 Dem. 77. An executor received the amount of a

He has no jurisdiction to try and determine the question of the validity of an assignment, procured by the administrator of an intestate's estate, from one interested therein, of the interest of the latter, where the same is attacked on the ground of alleged fraud in its procurement.²⁶ Nor can he inquire into the validity of sales of real estate made by the representative alleged to be fraudulent.²⁷ So a Surrogate's Court has no power, on the accounting of an executor, to decide that a transfer made during the lifetime of the deceased to the person who was afterward appointed his executor, and valid as between the parties, was void as to creditors; and cannot thereupon require the executor to account for what he has thus received.²⁸ And an executor, on his accounting, can-

policy of insurance upon testator's life, which by its terms was payable to his personal representative for the benefit of the widow. Held, that a Surrogate's Court had no jurisdiction to enforce such trust by compelling the executor to pay the amount received to the widow. (*Matter of Van Dermoor*, 42 Hun, 326.) See *Matter of McFarland*, N. Y. Law Jour., December 14, 1892. The surrogate cannot pass upon the validity of a collector's claim of title to property alleged to belong to the estate, the title having been acquired prior to the period of his collectorship. Nor can he compel an executor to account for property received by his testator, as executor, unless it has come into the last executor's possession. (*Montross v. Wheeler*, 4 Lans. 99; *Gottsberger v. Smith*, 2 Bradf. 86.)

²⁶ *Woodruff v. Woodruff*, 3 Dem. 505; *Matter of Evans*, 58 App. Div. 502; *Matter of Cook*, 68 Hun, 280; 22 N. Y. Supp. 969. Nor can he determine the validity of an assignment of a distributive share, attacked for fraud; but where such validity is conceded, he may, on an accounting, decree distribution accordingly. (*Matter of Randall*, 152 N. Y. 508; 46 N. E. 945.) See *Matter of Redfield*, 71 Hun, 344; *Matter of Arkenburgh*, 58 App. Div. 473; 56 N. Y. Supp. 523. Compare *Matter of Browne*, 35 Misc. 366; 71 N. Y. Supp. 1037. A decedent's discharge in bankruptcy may be attacked collaterally, in a special proceeding relating to his estate, and declared void, as against a creditor as to whom the same was fraudulently procured.

(*Jones v. Le Baron*, 3 Dem. 37.) See § 968, *post*.

²⁷ *Matter of Valentine*, 1 Misc. 491; 23 N. Y. Supp. 289, and cases cited.

²⁸ *Matter of Kellogg*, 39 Hun, 275. In this case the court cited *Geery v. Geery*, 63 N. Y. 252; *Southard v. Benner*, 72 id. 424; *Adsit v. Butler*, 87 id. 585; *Lichtenberg v. Herdtfelder*, 5 Civ. Proc. Rep. 426; *Estes v. Wilcox*, 67 N. Y. 264; *Ocean Nat. Bank v. Olcott*, 46 id. 12; *Dewey v. Moyer*, 72 id. 70; *Genesee River Nat. Bank v. Mead*, 18 Hun, 303; 92 N. Y. 637; *Richardson v. Root*, 19 Hun, 473; *Hyland v. Baxter*, 98 N. Y. 610; *Matter of Raymond*, 27 Hun, 508; *Merchant v. Merchant*, 2 Bradf. 432; *Martin v. Root*, 17 Mass. 222; *Holland v. Cruft*, 20 Pick. 338. *Landon, J.*, dissenting, cited *Southard v. Benner*, 72 N. Y. 424; *Hyland v. Baxter*, 98 id. 610; *Richardson v. Root*, 19 Hun, 473. He has no power to try issues arising out of an administrator's interest as mortgagee of real estate of the intestate, nor to compel him to account for alleged profits in his hands as belonging to the estate. (*Matter of Monroe*, 142 N. Y. 484; 60 St. Rep. 102.) But upon a representative's accounting, the court has power to construe or determine the validity of an antenuptial agreement made by a testator, in contemplation of the future distribution of his property, it appearing that the agreement was obtained through deceit or false representations, and the provision made for the wife under it is less than her legal share. (*Matter of Jones*, 3 Misc. 586.) See *Pierce v. Pierce*, 71 N. Y. 154; *Matter of Davenport*, 37 Misc. 179; 74 N. Y. Supp. 940.

not have an affirmative judgment against a legatee, a party to the proceeding, for the excess overpaid him on his legacy, the surrogate having no authority to grant such relief.²⁹

§ 48. **Surrogate's control of attorneys.**—The surrogate has no control over attorneys, as such.³⁰ He cannot, therefore, compel an attorney for a guardian to account for moneys in his hands, belonging to the infant, or punish him for an injury to the estate.³¹ Nor can he prescribe the terms upon which a change of attorneys may be effected in a proceeding before him, or determine the amount of compensation to which the retiring attorney is entitled.³² He has no power to protect or enforce the lien of an attorney upon his client's interest in an estate pursuant to an agreement giving him a share therein for his services, so far as the same relates to real estate which the executors have not converted and are not accountable for.³³ But as to assets in the executor's hands, the court may protect the attorney under such agreement, by requiring that he be secured before permitting a discontinuance of the proceedings instituted in behalf of his client.³⁴ So, too, he may vacate a legatee's satisfaction of a decree of distribution, given in violation of the attorney's lien for services.³⁵

§ 49. **Determining creditor's disputed claims.**—By the Revised Statutes surrogates were empowered upon the final accounting of an executor or administrator to enforce the payment of debts,³⁶ and to "settle and determine all questions concerning any *debt, claim*, etc., to whom the same shall be payable, and the sum to be paid to each person."³⁷ It was, nevertheless, held that Surrogates' Courts were not constituted or intended for the trial of

²⁹ Matter of Underhill, 117 N. Y. 471; 27 St. Rep. 720; Matter of Lang, 144 N. Y. 275; 63 St. Rep. 694; Johnson v. Weir, 34 Misc. 683; 70 N. Y. Supp. 1020; Matter of Hodgman, 140 N. Y. 421. See § 774, *post*.

³⁰ He cannot enforce the liability of an attorney for costs under Co. Civ. Proc., § 3278, as that section does not apply to Surrogates' Courts. (Matter of Rasch, 26 Misc. 459; 55 N. Y. Supp. 434.)

³¹ Matter of Writner, 1 Tuck. 75.

³² Matter of Halsey, 13 Abb. N. C. 353; Chatfield v. Hewlett, 2 Dem. 191; Pryer v. Clapp, 1 id. 387; Matter of Krakauer, 33 Misc. 674; 68 N. Y. Supp. 935.

³³ Matter of Fernbacher, 5 Dem. 219; 18 Abb. N. C. 1.

³⁴ *Ib.*

³⁵ Matter of Regan, 167 N. Y. 338; 60 N. E. 658, revg. 58 App. Div. 1, and cases cited. An attorney has a lien upon a surrogate's decree in favor of his client rendered on an executor's accounting even though such decree was entered before the amendment of section 66 of the Code securing to an attorney a lien for services in a special proceeding. (*Ib.*) But the attorney cannot, for his own benefit, continue the proceeding after settlement between the parties. (Matter of Evans, 58 App. Div. 502; 69 N. Y. Supp. 482.)

³⁶ R. S. 221, § 1; Co. Civ. Proc., § 2472, subd. 4.

³⁷ R. S. 96, § 71; Co. Civ. Proc., § 2743.

disputed claims. And even if a contested claim was submitted to the surrogate by all the parties in the interest, his decision in regard to it, and a decree made thereon, would not be binding on any of the parties, and could not be sustained even as an arbitration.³⁸ Nor did the surrogate of New York county, under L. 1870, c. 359, § 6,³⁹ giving him power in any accounting, etc., to appoint a referee "to hear and determine all disputed claims and other matters relating to said accounts," have power to pass upon the disputed claim of a *creditor* against the estate, so as to bar the creditor's common-law remedy.⁴⁰ Nor had he the power, under 2 R. S. 116, § 18,⁴¹ allowing him six months after the time of granting letters of administration to decree payment of a debt of the intestate, etc., to order payment of a contested claim.⁴² The rule contained in these decisions, withholding from surrogates the power, upon the final accounting (now termed the "judicial settlement of the account") of an executor or administrator, to pass on a claim against the estate of a decedent, which is disputed by the representative, was, until 1895, retained by the Code of Civil Procedure, which provided that where, upon the judicial settlement of the account of an executor or administrator, "the validity of a debt, claim, or distributive share *is not disputed or has been established*, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same."⁴³ In 1895, however, power was conferred upon the surrogate to pass upon a claim which "is admitted, or has been established upon the accounting or other proceeding in the Surrogate's Court, or other court of competent jurisdiction,"⁴⁴ provided "a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator."⁴⁵

³⁸ *Tucker v. Tucker*, 4 Abb. Ct. App. Dec. 428; *Bevan v. Cooper*, 72 N. Y. 317.

³⁹ Co. Civ. Proc., § 2546.

⁴⁰ *Cooper v. Felter*, 6 Lans. 485. See *Leviness v. Cassebeer*, 3 Redf. 491; *Matter of Leslie*, id. 280; *Garvey v. McCue*, id. 313.

⁴¹ Co. Civ. Proc., § 2717.

⁴² *Ruthven v. Patten*, 1 Robt. 416; 2 Abb. Pr. (N. S.) 121.

⁴³ Co. Civ. Proc., § 2743, in part. See *Matter of Callahan*, 152 N. Y. 320; *Greene v. Day*, 1 Dem. 45; *Kammerrer v. Ziegler*, id. 177; *Dubois v. Brown*, id. 317; 3 Civ. Proc. Rep. 39; *Martine's*

Estate, 11 Abb. N. C. 50; *Giles' Estate*, id. 57; *Van Valkenburgh v. Lasher*, 53 Hun. 594; *Matter of Schmidt*, 58 N. Y. Supp. 595. Where a claim is compromised and an agreement to that effect made between the creditor and representative, the surrogate may not order payment, as it is in effect the specific performance of a contract. (*Matter of Bronson*, 69 App. Div. 487; 74 N. Y. Supp. 1052.)

⁴⁴ L. 1895, c. 595, amending Co. Civ. Proc., § 2743.

⁴⁵ Co. Civ. Proc., § 1822, as amended 1895; *Matter of Kirby*, 36 Misc. 312; 73 N. Y. Supp. 509.

For reasons which may be deemed not fully apparent, the surrogate had, under the former statute, and still possesses such power, in proceedings to sell the real property of a decedent for payment of debts or funeral expenses,⁴⁶ as well as upon the judicial settlement of the account of a testamentary trustee.⁴⁷ A contest between an accounting *executor or administrator* and any of the other parties, respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the court has jurisdiction to try and determine.⁴⁸ It should be noticed that the statute does not extend to the case of the claim of a third person against a general guardian as such. No provision is made for the compulsory payment by a general guardian of a debt already incurred, *e. g.*, for the board of the ward.⁴⁹

§ 50. **Incidental nonstatutory powers.**—Where, in a subject within his jurisdiction, the surrogate deems justice to require the exercise of an incidental power which has not been expressly given him by the statute, he should not for that reason decline to exercise it. For instance, where the statute made no express provision for revoking a probate, in case another and later will was discovered, the power to do so was implied from the section declaring the force of the probate as evidence, until reversed on appeal, revoked on allegations, or declared void by a competent tribunal.⁵⁰ So a decree admitting a will may be opened at the instance of a former contestant to enable him to apply for a judicial construction of its provisions.⁵¹ As an incident to his power to determine questions concerning distributive shares, etc.,⁵² the surrogate has power to determine the validity of alleged gifts *causa mortis* by a decedent.⁵³ Within the domain of his statutory jurisdiction of the subject-matter, he may exercise any powers not inconsistent with existing law, which were enjoyed by the colonial courts of probate, or the successors of such courts, previous to the adoption of the Revised Statutes.⁵⁴

⁴⁶ Co. Civ. Proc., § 2755, as amended 1887; § 2758; Matter of Haxtun, 102 N. Y. 157. See § 858, *post*.

⁴⁷ Co. Civ. Proc., § 2812.

⁴⁸ Co. Civ. Proc., § 2731, as amended 1893. Matter of Marcellus, 165 N. Y. 70; 58 N. E. 796, and cases cited. The statute is as applicable to temporary as to general administrators. (Matter of Eisner, 5 Dem. 383.)

⁴⁹ Welch v. Gallagher, 2 Dem. 40;

Hampton v. Stoeck, 51 St. Rep. 560; 23 N. Y. Supp. 280. See chapter XX, *post*.

⁵⁰ Campbell v. Logan, 2 Bradf. 90.

⁵¹ Matter of Keeler, 5 Dem. 218.

⁵² 2 R. S. 95, § 71; Co. Civ. Proc., § 2743.

⁵³ Fowler v. Lockwood, 3 Redf. 465; Matter of Pearson, 21 St. Rep. 128.

⁵⁴ Skidmore v. Davies, 10 Paige, 316; Proctor v. Wanmaker, 1 Barb.

§ 51. **Power to grant naturalization.**— Since they are courts of record, having a clerk and seal, Surrogates' Courts possess common-law jurisdiction, within the meaning of the Federal statute, to grant naturalization.⁵⁵

TITLE THIRD.

INCIDENTAL JURISDICTION AND POWERS.

§ 52. **Incidental statutory powers.**— In order to render effective the general powers conferred upon surrogates, and provide them with proper and adequate means of exercising their jurisdiction, the Legislature has given them certain special or incidental powers relating to their mode of procedure, etc. These powers are:⁵⁶

" 1. To issue citations to parties, in any matter within the jurisdiction of this court; and, in a case prescribed by law, to compel the attendance of a party.

" 2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

" 3. To issue, under the seal of the court, a subpoena, requiring the attendance of a witness residing or being in any part of the State, or a subpoena *duces tecum*, requiring such attendance, and the production of a book or paper material to an inquiry pending in the court.

" 4. To enjoin, by order, an executor, administrator, testamentary trustee, or guardian, to whom a citation or other process has been duly issued from his court, from acting as such, until the further order of the court.

" 5. To require, by order, an executor, administrator, testamentary trustee, or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute, or by the Surrogate's Court, under authority of a statute.

" 6. To open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new

Ch. 302; *Isham v. Gibbons*, 1 Bradf. 69; *Vreedburgh v. Calf.* 9 Paige, 128; *Matter of Parker*, 1 Barb. Ch. 154; *Campbell v. Thatcher*, 54 Barb. 382. Compare *Farnsworth v. Oli-* phant, 19 id. 30; *Halsey v. Van Amringe*, 6 Paige, 12.
55 *Matter of Harstrom*, 7 Abb. N. C. 391.
56 Co. Civ. Proc., § 2481.

trial or a new hearing for fraud, newly-discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the surrogate, made upon an application pursuant to this subdivision, the general term (Appellate Division) of the Supreme Court has the same power as the surrogate; and his determination must be reviewed, as if an original application was made at that term.

" 7. To punish any person for contempt of his court, civil or criminal, in any case, where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.

" 8. Subject to the provisions of law relating to the disqualification of a judge in certain cases, to complete any unfinished business pending before his predecessor in the office, including proofs, accountings, and examinations.

" 9. To complete, and certify and sign in his own name, adding to his signature the date of so doing, all records or papers left uncompleted or unsigned by any of his predecessors.⁵⁷

" 10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein.

" 11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers, as are necessary to carry into effect the powers expressly conferred."

It is only necessary in this place to remark upon two or three of these incidental powers, as not naturally falling under any of the general subjects of jurisdiction hereafter separately treated.

§ 53. Power to grant injunction.— The authority of a Surrogate's Court to issue injunctions is extended by the fourth subdivision *above*, the former statute having confined it to executors,

⁵⁷ "All acts hitherto of surrogates and officers acting as such in completing by certifying in their own names any uncertified wills, and by signing and certifying in their own names the unsigned and uncertified records of wills and of other proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements." (Co. Civ. Proc., § 2482, as amended 1893.) For similar previous statutes, see L. 1870, c. 74; L. 1890, c. 155.

administrators, and guardians, and to cases where a citation *for their removal* had been issued.⁵⁸ The same observation may be made as to the effect of the fifth subdivision, in respect to the court's power to order representatives, trustees, and guardians to perform any duty imposed on them. The power given to surrogates by the Revised Statutes⁵⁹ to direct and control the conduct of executors and administrators, is now extended to the case of testamentary trustees and guardians; but this power was never understood to give a surrogate authority to direct them in regard to the prosecution of suits in other courts affecting the estate,⁶⁰ nor in respect to such a matter as the charging of a legacy on the residuary real estate by an executor.⁶¹ Previously to L. 1865, c. 733,⁶² a surrogate had no authority to compel a representative, who had been removed from office, to deliver over to his successor the assets in his hands;⁶³ though he now has such power.⁶⁴ He cannot, however, on a summary application, compel an administrator to deliver to a claimant property taken possession of as part of the estate.⁶⁵ The court may compel executors to perform their duty by expending for the benefit of infant legatees the interest of a sum of money intrusted to them for that purpose by the testator, notwithstanding that the executors might be made liable in an equitable action in the Supreme Court.⁶⁶ A Surrogate's Court has no jurisdiction to order the satisfaction of record, of a mortgage upon the real estate of an infant, although his estate is subject to its jurisdiction.⁶⁷

§ 54. **New trial or rehearing for fraud, etc.**—The interpretation of the sixth subdivision, giving a Surrogate's Court power to open, vacate, modify, or set aside its decrees or orders, and to grant a new trial or a new hearing for fraud, newly-discovered evidence, clerical error, *or other sufficient cause*, has been a subject of frequent controversy. Even before the adoption of the present Code, the power of a surrogate to open and vacate a decree obtained through mistake, accident, or fraud, was held to be equal to that

⁵⁸ L. 1837, c. 469, § 61.

⁵⁹ 2 R. S. 220, § 1, subd. 3; Co. Civ. Proc., § 2472, subd. 3. See, on the general subject of the surrogate's control and supervision of executors, etc., chapter XVII, tit. 1, art. 2, *post*.

⁶⁰ *Matter of Parker*, 1 Barb. Ch. 154. He may authorize a compromise. (L. 1888, c. 571.)

⁶¹ *Bevan v. Cooper*, 72 N. Y. 317; *Matter of Woodworth*, 5 Dem. 156.

⁶² Co. Civ. Proc., § 2605.

⁶³ *Annett v. Kerr*, 2 Robt. 556; *Marston v. Paulding*, 10 Paige, 40.

⁶⁴ But see *Breslin v. Smyth*, 3 Dem. 251.

⁶⁵ *Marston v. Paulding*, 10 Paige, 40; *Thompson v. Mott*, 5 Redf. 574.

⁶⁶ *Dubois v. Sands*, 43 Barb. 412.

⁶⁷ *Cromwell v. Kirk*, 1 Dem. 599.

exercised by a court of equity on a bill filed for relief against a judgment or decree for fraud or mistake.⁶⁸ But the powers of the surrogate in this regard are confirmed and largely extended by the Code. He has the power of a court of general jurisdiction to vacate his decrees, or those of his predecessor,⁶⁹ and grant relief as in the Supreme Court, for sufficient reason, in furtherance of justice;⁷⁰ and the exercise of this power is not subject to the limitations of time, prescribed with reference to motions to set aside judgments for irregularity or for error of fact not arising on the trial.⁷¹ The statute is not to be construed, however, as granting power to set aside a decree without any assigned cause, and to grant a new trial only for the specified cause; but the causes specially indicated, or other "sufficient cause," should be shown to induce the setting aside of a decree duly entered after full litigation.⁷² The opening of a surrogate's decree, formally and lawfully made, requires the exercise of the soundest discretion. "It should only be done in extraordinary cases, and where errors are plain, palpable, and beyond any question. The greatest caution should, at all times, be observed, in thus furnishing the opportunity to correct errors in the judgment of a competent tribunal, and it should never be done to the extent of allowing the whole subject-matter to be investigated and tried over again. Such a practice would be virtually permitting the tribunal to review its own pro-

⁶⁸ *Vreedenburgh v. Calf*, 9 Paige, 128; *Skidmore v. Davies*, 10 id. 316; *Bailey v. Hilton*, 14 Hun, 3, affg. *Bailey v. Stewart*, 2 Redf. 212; *Sipperly v. Baucus*, 24 N. Y. 46; *Pew v. Hastings*, 1 Barb. Ch. 452; *Harrison v. McMahon*, 1 Bradf. 283; *Campbell v. Logan*, 2 id. 92; *Brick's Estate*, 15 Abb. Pr. 12; *Yale v. Baker*, 2 Hun, 468; *Janssen v. Wemple*, 3 Redf. 229; *Dobke v. McClaran*, 41 Barb. 491; *Farmers' Loan & T. Co. v. Hill*, 4 Dem. 41.

⁶⁹ *Matter of Smith*, 89 Hun. 606; 34 N. Y. Supp. 1057. See *Matter of Hancock*, 27 Hun. 78, revd. on another point in 91 N. Y. 284.

⁷⁰ *Matter of Flynn*, 136 N. Y. 287; *Ladd v. Stevenson*, 112 id. 325; *Matter of Tilden*, 5 Dem. 230; 98 N. Y. 434; *Singer v. Hawley*, 3 Dem. 571, affd., 100 N. Y. 206; *Matter of Robertson*, 51 App. Div. 117; 64 N. Y. Supp. 385; affd., 165 N. Y. 675; *Matter of Henderson*, 157 N. Y. 423; 28 Civ. Proc. Rep. 389; *Matter of Fulton*, 30 Misc. 70; 62 N. Y. Supp. 995.

⁷¹ See Co. Civ. Proc., §§ 1282, 1290; *Matter of Flynn*, *supra*; *Matter of Henderson*, *supra*.

⁷² *Matter of Douglas*, 52 App. Div. 303; 65 N. Y. Supp. 103; *Matter of White*, 52 App. Div. 225; 65 N. Y. Supp. 168; *Matter of Olmsted*, 17 Abb. N. C. 320; s. c. as *Olmstead v. Long*, 4 Dem. 44. The discovery of further evidence in a book, which was in the possession of a party pending the litigation previous to a decree, cannot be deemed newly-discovered evidence upon which the decree should be opened. (Ib.) The surrogate may, however, open a decree on the motion of the personal representatives of a deceased administrator for newly-discovered evidence exonerating him for amounts with which his account has been surcharged; though the power will be exercised only in like case and in the same manner as by a court of general jurisdiction. (*Matter of McManus*, 35 Misc. 678; 72 N. Y. Supp. 409.)

ceedings, the same as upon an appeal, which was never intended, and should not be tolerated.”⁷³ There is, therefore, no warrant for opening a decree on the ground that it was based on an erroneous theory of the law; the remedy for that is by appeal.⁷⁴ Ignorance of the law at the time of the entry of the decree, and the nondiscovery of the mistake until after the expiration of the time to appeal therefrom, furnish no ground for the opening of the decree.⁷⁵ The fact that the surrogate to whom the application is made entertains different views of the merits from those of his predecessor who decided the case, is no “sufficient cause” why there should be a rehearing.⁷⁶ A reargument should only be ordered when it appears clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court; or that the decision is in conflict with an express statute or with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel.⁷⁷ But the mere fact that the attorney in drawing a decree made a mistake on a matter of law is not sufficient to authorize the opening of the decree,⁷⁸ though in a proper case the decree will be opened for the purpose of correcting clerical errors in the form of the decree; and a rehearing will be granted, so far, for example,

⁷³ Decker v. Elwood, 3 Sup. Ct. [T. & C.] 48. See Matter of Filley, 47 St. Rep. 428; Story v. Dayton, 22 Hun, 450.

⁷⁴ Matter of Humfreville, 8 App. Div. 312; 40 N. Y. Supp. 939; Matter of Mount, 27 Misc. 411; 59 N. Y. Supp. 176; Matter of Wallace, 28 Misc. 603; 59 N. Y. Supp. 1084 (distinguishing the case where the surrogate had no jurisdiction to make the decree sought to be corrected, as in Matter of Coogan, 27 Misc. 563); Matter of Douglas, 52 App. Div. 303; 65 N. Y. Supp. 103; Matter of Monteith, 27 Misc. 163; 58 N. Y. Supp. 375; Matter of Walrath, 37 Misc. 696. The provisions of Code Civ. Proc., § 2481, subd. 6, conferring on the surrogate power to vacate, modify, or set aside a decree, extends no further than to give the power inherent in every court of general jurisdiction to control its orders and judgments. (Matter of Hayward, 44 App. Div. 265; 60 N. Y. Supp. 636.)

⁷⁵ Matter of Ermand, 24 Hun, 1; Reed v. Reed, 52 N. Y. 651.

⁷⁶ Melcher v. Stevens, 1 Dem. 123, and many cases cited. A surrogate

may grant a new trial of a probate proceeding determined by his predecessor, on the ground that such predecessor had a disqualifying interest. (Matter of Hancock, 27 Hun, 78.) This judgment was reversed (91 N. Y. 284) on the ground that the interest was not disqualifying, but the power of the surrogate to grant a new trial for such cause was not called in question.

⁷⁷ Mount v. Mitchell, 32 N. Y. 702, and cases *supra*. In Matter of Wood (N. Y. Law Jour., June 2, 1881), Ransom, S., said: “The motion for a reargument is founded upon the opinion of new counsel that he might present the questions formerly argued and fully considered by the court so as to induce the court to reverse its former decision. Such practice would be contrary to the orderly administration of justice, and, if its sanction rested in the sound discretion of the court, ought not to be approved; but I do not find that the court is vested with any discretion.”

⁷⁸ Carr v. Tompkins, 46 St. Rep. 585; 19 N. Y. Supp. 647.

as to determine the executor's liability on a note credited to him for the full amount, but which he, in fact, settled for less than its face, without giving the estate the benefit thereof.⁷⁹ The court's power to open and vacate a decree is limited to cases where "fraud, newly-discovered evidence, clerical or other sufficient cause" of a like nature are shown.⁸⁰ The "other sufficient cause" must be one which the Supreme Court has been accustomed to recognize as legally sufficient.⁸¹ That certain testimony was not given on the trial, through "the inattention of counsel," is not a ground for setting aside a referee's report and granting a rehearing.⁸²

That an order or decree is void for want of jurisdiction is, of course, a sufficient cause for vacating it, and the objection may be raised by a motion.⁸³ Thus it is sufficient cause to open a decree that the service of a citation was made upon a person, *non compos mentis*, for whom no next friend had been appointed.⁸⁴

⁷⁹ Matter of Beach, 3 Misc. 393; 24 N. Y. Supp. 717.

⁸⁰ Matter of Hawley, 100 N. Y. 206; Wright's Accounting, 16 Abb. Pr. (N. S.) 429; 7 Hun, 608; Matter of Hodgman, 82 id. 419; 31 N. Y. Supp. 263.

⁸¹ Matter of Kranz, 41 Hun, 463; where it was held improper to send back to a referee for rehearing the matter of a contested account upon which he has reported, on the ground that the accounting administrator has discovered vouchers which had been mislaid, and asks to call witnesses who had been omitted by oversight, where no fraud or clerical error is alleged, no sufficient statement of the newly-discovered evidence being made, and it being apparent that no injustice has been done to the administrator. See Matter of Ramsdell, 20 St. Rep. 446 [newly-discovered evidence]. So also it is not a sufficient ground for opening a decree settling an executor's account that an item of credit, *c. g.*, his commissions, was not allowed him. When a party has had his day in court he must show that it was not his fault that he did not improve it, before he can get another day on the same matter. (Matter of O'Neil, 46 Hun, 500.) The fact that an executor erroneously charged himself, on the settlement of his accounts, with a sum which he knew did not belong to the estate as assets, but was a gratuity, to which the widow and children were entitled on

testator's death by virtue of his membership in a produce exchange, is not sufficient cause for afterward opening and modifying the decree by deducting such sum. (Matter of Watts, 2 Connolly, 415; 20 N. Y. Supp. 63.) But a surrogate, whose decree has omitted a provision for the payment of certain legacies, contained in his decision, may amend the decree, by inserting it. (Matter of Robertson, 51 App. Div. 117; 64 N. Y. Supp. 385; *aff'd* 165 N. Y. 675.) See Matter of McGorray, 48 St. Rep. 141; 20 N. Y. Supp. 366; Matter of Baity, 2 Connolly, 485; 20 N. Y. Supp. 70; Matter of Stringer, 22 id. 44.

⁸² Matter of Quin, 22 St. Rep. 338. The court will not grant a rehearing on allegations of the incompetency of the counsel who conducted the trial, nor to enable witnesses to contradict their former testimony. (Munro's Estate, 15 Abb. Pr. 363.)

⁸³ Matter of Coogan, 27 Misc. 563; Seaman v. Whitehead, 78 N. Y. 306. An order denying the motion is appealable. (*Ib.*) Matter of Odell, 1 Misc. 390, 23 N. Y. Supp. 143.

⁸⁴ Matter of Donlon, 66 Hun, 199; 21 N. Y. Supp. 114. A decree on an accounting will be opened on the petition of one who, though entitled to notice of the proceeding, was not notified of it. (Wells v. Wallace, 2 Redf. 58; Matter of Fuller, 86 Hun, 47; 33 N. Y. Supp. 194; Matter of Hodgman, 82 Hun, 419; 31 N. Y. Supp.

§ 55. **Application, how made.**—A question has arisen whether an application to set aside a decree probating a will of “personal and real property” (on the ground of a later will) must be made under subdivision 6 of this section, or under section 2647, which provides for setting aside a decree probating a will of “personal property.” Such application must be made under the former section.⁸⁵ A proceeding to vacate a decree under subdivision 6 may perhaps be initiated by a notice of motion or an order to show cause;⁸⁶ but the better practice is to petition for a citation.⁸⁷

While *laches* may defeat a motion to open and modify a decree, as where a motion to modify a decree as to commissions was made eighteen months after its entry,⁸⁸ yet the surrogate’s exercise of the power to open decrees is not subject to the limitations of time prescribed by section 1282 for motions to set aside judgments for irregularity, or for error in fact not arising upon the trial, prescribed by section 1290.⁸⁹

§ 56. **To complete unfinished business of predecessor.**—The eighth subdivision, authorizing a surrogate to complete the unfinished business of his predecessor in office, is supplemented by another provision giving such authority to a surrogate on the revocation of the order appointing his substitute in certain cases.⁹⁰ A similar provision of the Revised Statutes,⁹¹ to the effect that “upon the office of any surrogate becoming vacant, his successor shall have power and authority to complete any business that may have been begun or that was pending before such surrogate,” was held to apply to all cases where the actual incumbent vacates the office for any cause, and that the surrogate had the power to take up the probate of a will at the point where it was left by his predecessor in office, complete the proofs, and then decide the ques-

263.) But see *Matter of Tilden*, 56 App. Div. 277; 67 N. Y. Supp. 879, where it was suggested that the power to vacate a decree is to be exercised only on behalf of a party to the proceeding, as one not a party is not bound by its provisions. See also *Matter of White*, 52 App. Div. 225. One to whom an executor has assigned his commissions before they were ascertained and liquidated has no interest which will entitle him to move to vacate a decree refusing commissions to such executor. (*Matter of Worthington*, 141 N. Y. 9; 56 St. Rep. 561.) A surrogate who has allowed funds deposited in a land company to be paid out has power to direct a re-

payment. (*Matter of Gilman*, 7 St. Rep. 321.)

⁸⁵ *Matter of Hamilton*, 2 Connolly, 268; 20 N. Y. Supp. 73.

⁸⁶ *Cluff v. Tower*, 3 Dem. 253.

⁸⁷ See *Matter of Hamilton*, 2 Connolly, 268; 20 N. Y. Supp. 73, as to parties to be cited.

⁸⁸ *Ricard v. Laytin*, 2 Dem. 587; *Story v. Dayton*, 22 Hun. 450; *Matter of Cook*, 22 N. Y. Supp. 969.

⁸⁹ *Matter of Flynn*, 136 N. Y. 287; *Matter of Henderson*, 157 id. 423; 28 Civ. Proc. Rep. 389. See *Matter of Woods*, 70 App. Div. 321.

⁹⁰ Co. Civ. Proc., § 2489, as amended 1889. See § 17, *ante*.

⁹¹ 3 R. S. 223, § 11.

tion at issue upon the whole evidence, including that taken before his predecessor.⁹²

§ 57. **Other statutory powers.**—By section 2538, it is provided that "except where a contrary intent is expressed in, or plainly implied from, a provision of" chapter 18 of the Code, relating to Surrogates' Courts,—the provisions of certain other chapters, to wit, "title first and articles third and fourth of title sixth, of chapter eighth, and articles first and second of title third of chapter ninth," apply to Surrogates' Courts, and to the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form.⁹³ Surrogates' Courts have, therefore, all the powers possessed by other courts of record enumerated in the title of the Code concerning "*mistakes, omissions, defects, and irregularities.*" Thus the irregularity of a failure to subscribe a petition for probate may be cured by amendment, and the petitioner permitted to subscribe *nunc pro tunc*.⁹⁴ So a variance between the relief prayed for in a petition and that specified in the citation issued thereon, is curable by amendment;⁹⁵ and so is a variance between a citation and the copy served.⁹⁶

§ 58. **Power to make rules.**—The surrogate may of course make rules for the conduct of the business of his court; but it is clear that he cannot limit a power conferred upon him by statute, and

⁹² Matter of Martinhoff, 4 Redf. 286; Reeve v. Crosby, 3 id. 74; Matter of Espie, 2 id. 445; Johnston v. Smith, 25 Hun, 171; Matter of Johnston, 27 Misc. 167; 58 N. Y. Supp. 601; Matter of Lawrence, id. 597; Matter of Winslow, 12 Misc. 254; 34 N. Y. Supp. 637; Matter of Carey, 24 App. Div. 531; 49 N. Y. Supp. 32. In McNaughton v. Chave (5 Abb. N. C. 225), where a final accounting was had during the term of a surrogate, and the auditor's report was filed before he went out of office, but the decree was signed by the succeeding surrogate, and not by the immediate successor of the one before whom the accounting was had, held that the decree was invalid.

⁹³ See title second of chapter V, *post*, as to power of the surrogate to make discovery, issue a commission to take testimony, etc.

⁹⁴ Matter of Swift, 20 Daily Reg. 100 (N. Y. Surr. Ct. 1881).

⁹⁵ Spencer v. Popham, 5 Redf. 425.

⁹⁶ Pryer v. Clapp, 1 Dem. 387. A citation issued to persons who are executors, but not as such, may be amended by the surrogate so as to add to the names of the executors their representative character. (Matter of Soule, 46 Hun, 661; aff'd 109 N. Y. 662.) A petition of an infant next of kin by her general guardian for a compulsory accounting by an administrator was simply signed by the guardian and verified by him. A citation was issued to the administrators, and on the return day they appeared generally and objected to the sufficiency of the petition. Held, that the signature of the guardian at the end of the petition by reference to the body of the instrument would be deemed to have been written in that capacity, and that such signing was at most an irregularity which was cured by the appearance of the administrators who should have appeared specially if they desired to take the objection. (Matter of Hurlburt, 43 Hun, 311, citing Hyatt v. Seeley, 11 N. Y. 52, 58.)

a rule so made has no bearing whatever upon the validity of an order made by him.⁹⁷

TITLE FOURTH.

CONCURRENT AND EXCLUSIVE JURISDICTION.

§ 59. **Jurisdiction as to probate of wills.**—It may be stated generally, with certain exceptions hereafter mentioned, that the Surrogate's Court possesses jurisdiction, exclusive of every other court within the State, to grant probate of wills and issue letters thereupon. The surrogate must, upon an application for probate, determine all questions of fraud, imposition, undue influence, mistake, and other circumstances relating to the *factum* of the instrument propounded; and, in general, mistakes and variances between the will, as prepared, and instructions for preparing it, can be reformed only by him.⁹⁸ Before the Revised Statutes of 1830, probate of wills of real property could be had only in the Supreme Court or County Common Pleas.⁹⁹ But those statutes conferred jurisdiction to take probate of such wills (not lost or destroyed) upon Surrogates' Courts.¹ Until 1870, lost or destroyed wills, whether of real or personal estate, could not be proved in these courts.² The remedy was by a proceeding in the Supreme Court, under the statute.³ In that year, the surrogate of New York county was authorized to admit to probate a lost or destroyed will of real or personal estate,⁴ and the Code of Civil Procedure extends this power to all surrogates.⁵

§ 60. **Jurisdiction of other courts to determine validity, etc., of wills.**—The statute permits the validity, construction, or effect, under the laws of this State, of a testamentary disposition of *real* property situated within the State, or of an interest in such property, which would descend to the heir of an intestate, to be determined *in an action*, brought for that purpose, in like manner as the validity of a deed purporting to convey land may be determined.⁶ The provision is accompanied with a saving clause to prevent a conflict with the jurisdiction of the surrogate under another section of the Code,⁷ already referred to, in case of testa-

⁹⁷ Matter of Monell, 22 Civ. Proc. Rep. 377.

⁹⁸ Burger v. Hill, 1 Bradf. 360. See Vreeland v. McClelland, id. 393.

⁹⁹ For the statute regulating proof of wills of real property before the R. S., see 1 R. L. of 1813, 365, § 7, and introduction to this volume.

¹ 2 R. S. 58, 59.

² Bulkley v. Redmond, 2 Bradf. 281; Hook v. Pratt, 8 Hun, 102.

³ 2 R. S. 67, § 63.

⁴ L. 1870, c. 359, § 8.

⁵ Co. Civ. Proc., § 2621.

⁶ Co. Civ. Proc., § 1866; L. 1879, c. 316.

⁷ § 2624.

mentary disposition of chattel interests in real property. The phraseology of the present statute removes any doubt, which may have existed under the original,⁸ whether the court could go further than to determine the proper construction of the will,⁹ and apparently creates an exception to the former rule, that the jurisdiction conferred was restricted to wills of real estate, and that legatees could not maintain an action for the construction of a will.¹⁰ It is permitted, by another provision of the Code, to impeach a devise, as an incident to an action for partition, to which the devise, if valid, would be a bar. The section provides, substantially, that a person claiming a share in real property, as heir of one who died holding and in possession of the same, may maintain *an action* for partition, notwithstanding an apparent devise thereof to another, provided he alleges and proves that the apparent devise is void.¹¹ The allegation, in the complaint, of the invalidity of the devise, is essential to jurisdiction;¹² and the invalidity must extend to the entire will or devise.¹³ The validity of a devise may also be questioned incidentally in an action, under the statute, to determine conflicting claims to real property, and in an action of ejectment, and, also, in a proper case, in a suit *quia timet*. But the remedy of a direct action to determine the validity of the devise, which is now given by statute, as above, has always been furnished by courts of equity.¹⁴ So, too, a court of equity, where the remedy at law is not clear and adequate, will entertain an action to set aside a will and its probate, alleged to have been procured by fraudulent connivance and collusion.¹⁵

§ 61. **Establishment of wills by action.**—The only courts in this State having authority to issue letters testamentary or of administration, are Surrogates' Courts. Generally, such letters are issued pursuant to the decree of the Surrogate's Court, but there are cases where they are issued by it, pursuant to a direction contained in the judgment of another court, rendered in an action to establish the will. The cases in which such an action lies, are prescribed by the Code of Civil Procedure,¹⁶ which makes important

⁸ L. 1853, c. 238, § 1.

⁹ See *Marvin v. Marvin*, 11 Abb. (N. S.) 102; *Knox v. Jones*, 47 N. Y. 389.

¹⁰ See *Woodruff v. Cook*, 47 Barb. 304. See chapter VIII. *post*.

¹¹ Co. Civ. Proc., § 1537.

¹² *Voëssing v. Voëssing*, 12 Hun, 678.

¹³ *McKeon v. Kearney*, 57 How. Pr. 349.

¹⁴ Story's Eq. Jur., § 1445 *et seq.*;

Chapman v. Rodgers, 12 Hun. 342. And see *Bailey v. Briggs*, 56 N. Y. 414.

See chapter VI. tit. 2. *post*.

¹⁵ *De Bussierre v. Holladay*, 4 Abb. N. C. 113. See chapter VII. *post*.

¹⁶ Co. Civ. Proc., § 1861. See chapter VI. tit. 2. *post*.

and beneficial changes in the pre-existing statutes, and provides for cases which may, for the purpose of comparison with the regulations as to surrogates' jurisdiction, be conveniently arranged in three classes: (1) Wills of realty or personalty, so executed as to be admissible to probate by a surrogate, and the originals of which exist, but are without the State and inaccessible.¹⁷ In this class of cases the Surrogates' Courts have no jurisdiction. (2) Wills of like description, which have been lost or destroyed. Here the jurisdiction of the Surrogate's Court is concurrent. (3) Certain foreign wills of personalty, executed with prescribed formalities, but which could not be admitted to probate by a surrogate.¹⁸ The statute revised in the section last quoted¹⁹ made special provision for a commission to be issued out of the Court of Chancery; but this is now omitted, as chapter 9 of the present Code contains ample regulations with respect to a commission which may be issued in a proper case in any action.

§ 62. **Jurisdiction to compel accounting, etc.**—Any court of equity has jurisdiction to compel executors or administrators, who are at law trustees, to render an account of their proceedings, disclosing assets and the manner of the application thereof, and will require the due performance of their duty,²⁰ and, in general, will entertain a suit to direct and control the action of executors, administrators, and other trustees.²¹ But it does not follow that such a court is bound to exercise the jurisdiction. It may decline to do so, where the powers of the Surrogates' Courts are adequate to the settlement of the estate, and a clear case of necessity for the interposition of a court of equity is not presented.²²

¹⁷ It is not requisite, as it was under the former statute, that the will should be "in possession of a court or tribunal of justice in another country or State." See *Matter of Diez*, 56 Barb. 591; 50 N. Y. 88.

¹⁸ Compare Co. Civ. Proc., § 2611.

¹⁹ 2 R. S. 67, §§ 63a, 68a.

²⁰ *Christy v. Libby*, 2 Daly, 418; 5 Abb. Pr. (N. S.) 192; *Landers v. Staten Island R. Co.*, 53 N. Y. 450.

²¹ See *Wood v. Brown*, 34 N. Y. 337. In like manner, such a court has jurisdiction of proceedings to compel a special guardian appointed to sell the real estate of an infant, to account for and pay over moneys received by him as such guardian. (*Spelman v. Terrv*, 74 N. Y. 448.)

²² *Seymour v. Seymour*, 4 Johns. Ch. 409; *Wager v. Wager*, 89 N. Y.

161. See § 908, *post*. If no proceeding is pending in the Surrogate's Court, though it has concurrent jurisdiction of the subject-matter, in which relief may be had, the Supreme Court will entertain jurisdiction. (*Ludwig v. Bungart*, 48 App. Div. 613; 63 N. Y. Supp. 91.) But the Supreme Court has no authority to stay proceedings on an accounting in the Surrogate's Court, upon the commencement of proceedings therefor in the Supreme Court in which no injunction was demanded, no fraud is shown, and it is not apparent that the exercise of equitable powers will be necessary; and in any event the application for a stay should be made to the Surrogate's Court. (*Rutherford v. Myers*, 50 App. Div. 298; 63 N. Y. Supp. 939.)

§ 63. **Jurisdiction of Federal courts.**—Federal courts, as courts of equity, will exercise concurrent jurisdiction with the State courts of equity, in matters relating to probate, the validity and construction of wills, etc., in a case between the proper persons. But these courts cannot be said to possess the special jurisdiction of probate courts. A proceeding in a probate court is not within the designation of cases at law or in equity between parties of different States, of which Federal courts have concurrent jurisdiction with the State courts, and consequently will not be removed to the Federal court, under the Judiciary Act of Congress. But whenever a controversy in a suit between such parties, arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.²³

§ 64. **Concurrent and exclusive jurisdiction of surrogates as among themselves.**—Except in the cases before mentioned, the Surrogate's Court of the proper county has exclusive jurisdiction to take proof of wills which can be proved in this State.²⁴ It may occasionally happen, however, that more than one surrogate may be asked to exercise power to take proof of a will and grant letters, as, *e. g.*, where the deceased is not an inhabitant of the State, and dies out of it, leaving assets in several counties. In such a case the surrogate of a county in which he left assets, as will be seen in the chapter on Probate, may take proof of his will.

TITLE FIFTH.

DEPOSIT AND CUSTODY OF WILLS.

§ 64a. **Deposit of will by testator.**—It is not necessary that a will which it is desired to prove should be produced from any special custody or have been deposited by the testator in any particular

²³ Per Field, J., in *Gaines v. Fuentes*, 2 Otto, 10. Accordingly it was held, in that case, that a suit in a State court, to revoke a will and recall the probate on the ground of alleged falsity and insufficiency of the evidence on which it was granted, and the incapacity of the defendant to inherit or take by devise from the decedent, was removable to the Federal court, under the Judiciary Act of 1867. And so an action to establish a lost will, brought in a State court, is removable. (*Southworth v. Adams*, 23 Alb. L. J. 36.)

²⁴ *Burger v. Hill*, 1 Bradf. 360. See chapter VI, *post*.

place. Provision has been made by the statute, however, for the deposit, by a testator, of a will made by him and for its custody, in the possession of certain public officers. By the statute, every county clerk and surrogate, and the register of deeds in the city and county of New York (upon payment of fees), is required to receive and deposit in his office any last will or testament which any person may deliver to him for that purpose, and to give a written receipt therefor to the person depositing the same.²⁵ The fee of a county clerk or register, upon such a deposit, is six cents.²⁶

A surrogate is not entitled to any fee.²⁷ Such will must be inclosed in a sealed wrapper, so that the contents thereof cannot be read, and have indorsed thereon the name of the testator, his place of residence, and the day, month, and year when delivered; and must not, on any pretext whatever, be opened, read, or examined, until delivered to a person entitled to the same, as directed by the statute.²⁸ It is usual to indorse upon the wrapper the name of the executor designated in the will. The statute directs that a will so deposited shall be delivered only — “1. To the testator in person; or, 2. Upon his written order, duly proved by the oath of a subscribing witness; or, 3. After his death, to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or, 4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county.”²⁹

§ 65. **Opening will on death of testator.**— If such a will has been deposited with a surrogate, or been delivered to him, then upon the death of the testator the surrogate is required to publicly open and examine it, and make known its contents and file it in his office, there to remain until it has been duly proved, if capable of proof, and then to be delivered to the persons entitled to the custody thereof; or until required by the authority of some competent court to produce it in such court.³⁰ In the surrogate's office of New York county, the administration clerk is furnished with the names of persons whose wills are on deposit, in order to prevent the granting of letters of administration upon their estates. In practice, it is found that testators seldom avail themselves of the provisions

²⁵ 2 R. S. 404, § 67. For provision relating to New York city, see L. 1882, c. 410, §§ 1758–1761.

²⁶ Co. Civ. Proc., § 3304, paragraph nineteenth; id., § 3306.

²⁷ Id., § 2567.

²⁸ 2 R. S. 405, § 68.

²⁹ 2 R. S. 405, § 69.

³⁰ 2 R. S. 405, § 70.

of the statute, and wills are generally found in the possession of the executors or attorneys of the deceased, or among his own private papers.

TITLE SIXTH.

DEPOSIT OF MONEYS AND SECURITIES.

§ 66. **Payment of money into court.**—In certain proceedings, the statute requires the payment of money into the Surrogate's Court, or the deposit of a security, for the payment of money, with him. The Code provides,³¹ that in such case the same must be paid to or deposited with the county treasurer of the county, to the credit of the fund, or of the estate, or of the special proceeding; unless the statute contains special directions for another disposition thereof. Each security, so deposited with the county treasurer, must be held and disposed of by him, subject to the direction of the Surrogate's Court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by, or paid to, the county treasurer, as prescribed in this section, must be held, managed, invested, and disposed of by him, in like manner as money paid into the Supreme Court in an action pending therein.

The regulations contained in the general rules of practice, as specified in section 744 of the Code, and the provisions of title 3 of chapter 8 of the Code, apply to money paid to and securities deposited with the county treasurer, except that the Surrogate's Court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the Supreme Court by section 747 of the Code.

Where real property, or an interest in real property liable to be disposed of, is sold, in an action or special proceeding, specified in the Code, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime; and letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale,³² issued from a Surrogate's Court of the State, having jurisdiction to grant

³¹ Co. Civ. Proc., § 2537, as amended 1882. As to liability of surrogate on his bond for deposit moneys, see *ante*, § 30. The surrogate is liable not only for the amount of the principal of the deposit, but where he places the fund at interest, he is accountable for the interest received. (*Matter of Coffin*, 36 Hun, 236.)

³² These words refer to the date of the sale and not to the commencement of the action or proceeding resulting in the sale. (*White v. Poillon*, 25 Hun, 69.)

them; the surplus money must be paid into the Surrogate's Court from which the letters issued, pursuant to section 2537, and the receipt of the county treasurer is a sufficient discharge to the person paying the money.

If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus, exceeding the lien to satisfy which the property was sold, and the costs and expenses must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money.³³

³³ Co. Civ. Proc., § 2798, as amended. ings for its distribution among those
1893. This section refers to payment having claims on it. (Comey v. Clark,
prior, and not subsequent, to proceed- 23 St. Rep. 402.)

CHAPTER III.

COMMENCEMENT OF PROCEEDINGS; APPEARANCES, PLEADINGS, ETC.

TITLE FIRST.

COMMENCEMENT OF PROCEEDINGS, INCLUDING SERVICE OF PROCESS.

§ 67. **Nature of proceedings.**—All proceedings in a Surrogate's Court are special proceedings, as distinguished from actions. It is true that the essential difference between an action and a special proceeding is nowhere clearly defined;¹ but, under the present Code, there are separate and uniform rules with respect to the initial process, which, in the case of an action, is always,² and, in the case of a special proceeding, is never, a summons.

§ 68. **Commencement of special proceeding.**—It has been seen that the surrogate has power to issue citations to parties, and, in a case prescribed by law, to compel the attendance of a party.³ According to the former practice, the original process issuing from a Surrogate's Court, whereby a special proceeding was commenced, varied in different cases, being either (1) a citation, or (2) an order to show cause, or (3) a summons;⁴ while, under the present statute, it is uniformly a citation. The Code provides, that "except in a case where it is otherwise specially prescribed by law, a special proceeding in a Surrogate's Court must be commenced by the service of a citation."⁵ The foregoing exception

¹ Co. Civ. Proc., §§ 3333, 3334. And see *People v. County Judge of Rensselaer*, 13 How. Pr. 398; *People v. Colborne*, 20 id. 378; *People v. Lewis*, 28 id. 159; *Belknap v. Waters*, 11 N. Y. 477. Apparently, the only line of demarcation established by the sections cited is that an action is ordinary, while a special proceeding is not. But the distinction between "ordinary" and "extraordinary" remains undetermined.

² Co. Civ. Proc., §§ 416, 2876.

³ Co. Civ. Proc., § 2481, subd. 1.

⁴ The process of *summons* was, before the Code, designated in the statute as the proper process in two proceedings only, to wit: the compelling the return of an inventory (2 R. S. 85), and the compelling of an executor to appear and qualify (2 R. S. 70). A citation is now the proper process.

⁵ Co. Civ. Proc., § 2516. And see *Id.*, § 416.

does not, apparently, imply that there are cases in which process other than a citation may now be employed for the commencement of an original proceeding in a Surrogate's Court, but seems rather to refer to other clauses of the Code, to the effect that the presentation of a petition for the citation is a commencement of the proceeding for the purpose of giving to the court jurisdiction to do any act which may be done before actual service of the citation, *e. g.*, to direct service thereof in a particular manner,⁶ or for the purpose of applying the Statute of Limitations;⁷ and that an appearance may be a waiver of service.⁸

§ 69. Proceeding by motion, or order to show cause.—It is not always easy to distinguish an original proceeding, which can only be commenced by a citation, from other proceedings which may be initiated by an order to show cause, or a simple motion. It is held, for instance, that a proceeding to vacate a decree entered upon an accounting may be instituted by a motion or order to show cause,⁹ even where a part of the relief sought is more extended than can be granted in the proceeding.¹⁰ Although Co. Civ. Proc., § 780, for shortening the time for notice of motion, is not directly applicable to Surrogates' Courts, an order to show cause is available there to shorten time of notice.¹¹

§ 70. What is deemed commencement of proceeding.—The presentation of a petition to a Surrogate's Court, instead of the issuing of a citation pursuant to its prayer, is deemed the commencement of the special proceeding, within the meaning of the provisions of the Code, which limit the time for the commencement thereof; but only in case the citation is, within sixty days after the presentation, served personally within the State, upon the adverse party, or upon one of two or more adverse parties, who are jointly liable or otherwise united in interest; or, within the same time, the first publication thereof is made, pursuant to an order granted by the surrogate for that purpose.¹²

⁶ Co. Civ. Proc., § 2516.

⁷ Co. Civ. Proc., § 2517. And see *Id.*, § 399.

⁸ Co. Civ. Proc., §§ 424, 2528. See Commissioner Throop's note to § 2516, and *post*, § 84.

⁹ *Cluff v. Tower*, 3 Dem. 253.

¹⁰ *Matter of Halley*, N. Y. Law J., Mar. 1, 1893. See *Matter of Hamilton*, 2 Connolly, 268.

¹¹ *Matter of Filley*, 47 St. Rep. 428.

¹² Co. Civ. Proc., § 2517. And com-

pare *Id.*, § 399, which prescribes an analogous rule in respect to a civil action. As to effect of a general appearance as a waiver, see *post*, § 84. An executor is not so "united in interest" (under this section) with the residuary legatee that service of a citation, in a proceeding to revoke the probate of a will, upon him alone is sufficient, and this is so notwithstanding the extension of time of the return of the citation, the time of service thereof

§ 71. **Jurisdiction once acquired continues.**—Upon the presentation of the petition, the court acquires jurisdiction to do any act which may be done before actual service of the citation.¹³ Having once acquired it, jurisdiction is retained until the proceeding is finally disposed of by a decree, or regularly discontinued. A proceeding is not thrown out of court by the failure to adjourn a hearing to a day certain.¹⁴ The proper practice in such a case is an application or notice for another hearing, or a further examination of witnesses, as the case may be, and not the institution of a second proceeding for the same relief. For where there are two proceedings pending between the same parties for the same object, the proceeding first commenced is a bar to the second.¹⁵

§ 72. **Petition, a preliminary to citation.**—The citation is “issued upon the presentation of a petition.”¹⁶ But it is not necessary, in every case, that the petition should be in writing. To obtain a citation for some purposes, *e. g.*, to prove a will, a written petition must be presented to the surrogate, setting forth the facts, and praying for the issuing of a citation, etc.¹⁷ The former statutes were, in many instances, entirely silent upon the question of writing, and, where such was the case, a written petition was not necessary to give the surrogate jurisdiction.¹⁸ The surrogate, however, always had a right to require the application to be presented to him in writing, and verified;¹⁹ and this right is now expressly confirmed by statute, as mentioned in the next title.

§ 73. **Issuing of the citation.**—It was formerly the rule, theoretically at least, to issue the citation only upon an order of the surrogate regularly entered in the proceeding, upon an application made. In practice, however, this order was not a necessary prerequisite to the issuing of process; and if the application of a party for a citation was favorably entertained, the surrogate issued the citation at once, the order therefor being en-

not being thus extended (*Matter of Dustan*, 2 Dem. 313; citing *McKenzie v. L'Amoureux*, 11 Barb. 516; *Jones v. Felch*, 3 Bosw. 66; *Bucknam v. Brett*, 35 Barb. 598). See *Matter of Bonnett*, 9 N. Y. Supp. 459; *Fountain v. Carter*, 2 Dem. 313.

¹³ Co. Civ. Proc., § 2516.

¹⁴ Co. Civ. Proc., § 2481, subd. 8; *Gilman v. Gilman*, 1 Redf. 354, *affd.*,

38 Barb. 364; *Matter of Spreen*, 1 Civ. Proc. Rep. 375.

¹⁵ *Lewis v. Maloney*, 12 Hun. 207.

¹⁶ Co. Civ. Proc., § 2516.

¹⁷ Co. Civ. Proc., § 2614.

¹⁸ See *Smith v. Remington*, 42 Barb. 75.

¹⁹ *Foster v. Wilber*, 1 Paige, 537.

See *Bolton v. Jacks*, 6 Robt. 166.

tered afterward in a book kept for that purpose. As the citation is itself a mandate of the Surrogate's Court, a rule requiring another mandate²⁰ to be granted, as a condition of the issuing of the former, is of doubtful utility, although some surrogates insist upon an order being entered before issuing a citation.

§ 74. **Form and contents of citation.**—Except as hereinafter mentioned, the statute does not require that a citation should be in any particular form. It is subject to the general provisions of the Code, requiring writs and process to run in the name of the People of the State, to be in the English language, etc., and regulating the testing, sealing, and subscription or indorsement thereof.²¹ It must be made returnable before the surrogate from whose court it was issued, “upon a day certain, designated therein, not more than four months after the date thereof;”²² and must specify whose estate or what subject-matter is in question. The names of all the persons to be cited, as far as they can be ascertained, must be contained in the citation.”²³ The unauthorized insertion of the name of an additional party to be served, voids the citation as to such person, and service of the citation does not give the court jurisdiction over such party.²⁴ Where the name, or part of the name, of either of them cannot be ascertained, that fact must be stated in the citation.²⁵ It is issued under the seal of the court, and subscribed or witnessed by the surrogate or his clerk. The contents of the citation vary in accordance with the nature of the proceeding in which it is employed. In some cases, as in the case of a citation to attend the probate of a will, the statute requires certain particular facts to be stated in the citation, and in other cases it is silent on the subject.²⁶ For information on this head, the various proceedings must be consulted, and the forms in the appendix. But, in general, in addition to the mandatory clause, the citation need contain nothing more than the names of the parties cited, a statement of the time and place of appearance, and a general reference to the nature of the proceedings.²⁷

²⁰ See definition, Co. Civ. Proc., § 3343, subd. 2.

²¹ Co. Civ. Proc., §§ 22–24.

²² Co. Civ. Proc., § 2519.

²³ Matter of Washburn, 12 Misc. 242; 34 N. Y. Supp. 44.

²⁴ Boerum v. Betts, 1 Dem. 471.

²⁵ Co. Civ. Proc., § 2519.

²⁶ Co. Civ. Proc., § 2616.

²⁷ Where, for instance, a petition asks for the removal of a guardian and appointment of a successor, on the ground that the infant's welfare will be promoted thereby, a second citation to accomplish the latter purpose is unnecessary. Matter of Moore (18 Week. Dig. 42).

§ 75. **Citation to class, where names are unknown.**—It may often happen, however, that the name of a person entitled to be cited is unknown to the prosecuting party. To meet the requirements of such a case, the statute provides that “where persons to be cited constitute a class, the petitioner must set forth, in an affidavit, the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him; in which case, that fact must be set forth, and the surrogate must, thereupon, inquire into the matter. For the purpose of the inquiry, he may, in his discretion, issue a subpoena, requiring any person to attend before him to testify respecting the matter. If he is satisfied upon the allegations of the petitioner, or after making the inquiry, that the name of one or more of the persons to be cited cannot be ascertained with reasonable diligence, the citation may be directed to that person or those persons, by a general designation, showing his, her, or their connection with the decedent, or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended. A citation, thus directed, has the same force and effect as if it was directed to the person or persons intended, by their names; and where the person or persons so intended are duly cited, in any manner prescribed by law, the decree binds them, as if they were named therein. A petition, duly verified, is deemed an affidavit within the meaning of this section.”²⁸

§ 76. **Service of citation within the State.**—A surrogate’s citation or other mandate may be served and executed in any county of the State. The Code (§ 2520) prescribes the manner of service upon a party within the State.²⁹ The same proof is re-

²⁸ Co. Civ. Proc., § 2518. See c. IV, *post*.

²⁹ See *Wetmore v. Parker*, 52 N. Y. 450; *Kellett v. Rathbun*, 4 Paige, 102; *Board v. Board*, 4 Abb. Pr. 295; *Mead v. Miller*, 3 Dem. 577; *Matter of Carhart*, 2 id. 627; *Boerum v. Betts*, 1 id. 471; *Harrison v. Clark*, 87 N. Y. 572. By the rules of the Surrogate’s Court of New York county no mandate is deemed duly served, unless copies of the petition or other paper or papers upon which it shall be issued, and upon which relief is sought, shall be served with it, except the following: 1. Citation to attend probate. 2. Citation to revoke probate. 3. Citation on application for administration. 4. Citation for intermediate account.

5. Citation to attend judicial settlement of account. 6. Citation to temporary administrator to account. 7. Citation to principal in a bond to give new sureties in place of sureties who apply to be released. 8. Order to temporary administrator to make deposit. 9. Order to executor to appear and qualify. 10. Order requiring the executor or administrator to file inventory. 11. Why an account should not be made on surrogate’s motion (Rule III. Mar. 16. 1888).

In proceedings instituted by the public administrator of New York county a citation directed to a nonresident alien may be served upon the consul of his country (L. 1898, c. 230, § 19).

quired of service of a citation, or a subpoena, issued from a Surrogate's Court, as of service of a summons issued out of the Supreme Court. In every other case, proof of service must be made by affidavit; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by affidavit or otherwise, of the genuineness of his signature.³⁰

§ 77. **Service upon corporations, infants, and incompetents.**—Service upon an infant under the age of fourteen years, or on a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or on a corporation, is to be made in the manner prescribed for personal service of a summons in an action upon such a person, or upon a corporation.³¹ But in the case of such incompetents, the surrogate is given discretion to make an order, with or without an application therefor, requiring a copy of the citation to be delivered, in behalf of that person, to a person designated in the order, and that service of the citation shall not be deemed complete until such delivery.³² It is not to be understood, however, that such an order, and an additional service under it, dispense with the necessity of a service upon the parent, guardian, etc. (in the case of an infant), as required by sections 426, 2526, of the Code.³³

§ 78. **Substituted service.**—Where it appears, by affidavit, that proper and diligent effort has been made to serve the citation

³⁰ Co. Civ. Proc., § 2532. The jurisdiction of the surrogate is complete when service is made within the State eight or fifteen days before the return day, as the case may be. (Matter of Washburn, 12 Misc. 242; 34 N. Y. Supp. 44.) Personal service made within this State, upon a nonresident, upon whom service has been ordered to be made by publication, is void. It should be served by publication. The defect, however, is cured by appearance and no objection. (Matter of Porter, 1 Misc. 489; 22 N. Y. Supp. 1063.) See Matter of Merritt, 5 Dem. 544.

³¹ Co. Civ. Proc., § 2526. Service on an infant under fourteen, to attend probate proceeding, by serving a copy on the infant's mother alone, is defective, and is not cured by subsequent appointment of guardian *ad litem*. (Hogle v. Hogle, 49 Hun, 313.) A

mere recital in a decree upon an accounting, that certain infant legatees had been duly served with the citation, is not conclusive of such service. (Hood v. Hood, 85 N. Y. 561.)

³² Co. Civ. Proc., § 2527. By L. 1882, c. 340, whenever in any proceeding or trial it becomes necessary to determine the age of a child, the child may be produced and exhibited to the court or jury to determine its age, and the court may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age.

³³ Matter of Haug, N. Y. Law J., July 3, 1891. See Matter of Cortwright, 3 Dem. 13, to the effect that notwithstanding the order for an additional service, the citation must also be served upon a nonresident by publication, etc.

personally, within the State, upon a resident of the State, and that the person to be served cannot be found, or, if found, that he evades service so that it cannot be made, the surrogate may make an order directing service to be made as in the case of substituted service of a summons, in an action in a court of record.³⁴

§ 79. Service by publication, or without the State.—The Code provides that “the surrogate from whose court a citation is issued may make an order, directing the service thereof without the State, or by publication, in either of the following cases: (1.) Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the State; or (2.) Where the person to be served, being a resident of the State, has departed therefrom, with the intent to defraud his creditors, or to avoid the service of process; or (3.) Where the person to be served, whether an adult or an infant, is a resident of the State, but is temporarily absent therefrom; or (4.) Where the person to be served is a resident of the State, or a domestic corporation, and an attempt was made to serve a citation, issued from the same Surrogate’s Court, upon the presentation of the same petition, before the expiration of the limitation applicable to the enforcement of the claim set forth in the petition, as fixed in chapter fourth of this act; and the limitation would have expired, within sixty days next preceding the application for the order, if the time had not been extended by the attempt to serve the citation.”³⁵

§ 80. Service, where residence or person unknown.—The surrogate may also make an order, directing the service of a citation without the State, or by publication, in either of the following cases: (1.) Upon a party to whom a citation is directed, either by his full name or part of his name, where the surrogate is satisfied, by affidavit, that the residence of that party cannot, after diligent inquiry, be ascertained by the petitioner. (2.) Upon one or more unknown creditors, next of kin, legatees, heirs, devisees, or other persons, included in a class to whom a citation has been directed, designating them by a general description, as prescribed in section 2518 of the Code.³⁶

³⁴ Co. Civ. Proc., § 2521. For the provisions as to substituted service of summons in an action, see Co. Civ. Proc., §§ 436, 437.

³⁵ Co. Civ. Proc., § 2522, as amended 1881. Compare *Id.*, § 438, relating to service of a summons issuing out of a

court of record. See *Stevens v. Stevens* (3 Redf. 507), as to the power of the court before the present Code to order publication independently of statute.

³⁶ Co. Civ. Proc., § 2523. See § 75, *ante*, for the provision of § 2518, referred to. It will be observed that the

§ 81. Contents of order for publication, etc.— Where an order directing the service of a citation without the State, or by publication, is made, the party applying therefor must produce proof, by affidavit or otherwise, to the satisfaction of the surrogate, that the case is one of those specified in either section 2522 or section 2523 of the Code. The order must direct that service of the citation, upon the person named or described in the order, be made by publication of the citation in two newspapers for a specified time, which the surrogate deems reasonable, not less than once in each of six successive weeks, unless, from the petition, it appears that the estate amounts to less than \$2,000, in which case only one newspaper shall be designated;³⁷ or, at the option of the petitioner, by delivering a copy of the citation, without the State, to each person so named or described, in person; and, if the person to be served is an infant, under the age of fourteen years, also to the person with whom he is sojourning; or, if the service is made upon a corporation, to an officer thereof, specified in section 431 or 432 of the Code. It must also contain either a direction that, on or before the day of the first publication, the petitioner deposit, in a specified post-office, a copy of the citation and of the order, contained in a securely closed post-paid wrapper, directed to the person to be served, at a place specified in the order; and, if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed post-paid wrapper, directed to the person with whom such infant is sojourning; or a statement that the surrogate, being satisfied, by the affidavits upon which the order was granted, that the petitioner cannot, with reasonable diligence, ascertain a place or places where the person to be served would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.³⁸

latter provision relates exclusively to unknown *names*; but this subdivision (2) treats of unknown *persons*. The cases are entirely distinct. See *Sandford v. White*, 56 N. Y. 359; and *Co. Civ. Proc.*, § 451.

³⁷ The service is not complete until the expiration of six full weeks from the day of the first publication. (*Matter of Koch*, 12 N. Y. Supp. 94; 19 Civ. Proc. Rep. 165, following *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397.)

³⁸ *Co. Civ. Proc.*, § 2524, as amended 1899. Corresponds to section 440 of

the Code, relating to a like order in respect to publication, etc., of a summons. The surrogate is not required to make an order of publication in every case where there are nonresident parties; the statute merely permits him to do so. (*Matter of Washburn*, 12 Misc. 242; 34 N. Y. Supp. 44.) But jurisdiction over a nonresident respondent can be obtained only by voluntary appearance, or by service of a citation in the manner specified in *Co. Civ. Proc.*, § 2524. (*Saw Mill Co. v. Dock*, 3 Dem. 55.)

§ 82. **Service of citation without the State.**— Where service is made by delivering a copy of the citation without the State, pursuant to an order permitting service without the State, or by publication, it must be made, if within the United States, at least thirty days, if without the United States, at least forty days, before the return day of the citation.³⁹

§ 83. **Publication, how made.**— Where the statute, or an order of the surrogate, directs the publication of a citation, notice, or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. "The surrogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified."⁴⁰

§ 84. **Waiver of issuance and service of citation.**— Prior to 1896 there was no provision by which the issuance and service of a citation could be waived, although the service of a citation would be rendered unnecessary by the voluntary appearance of a party.⁴¹ But in that year⁴² an entirely new provision was added to section 2528, whereby "the issue and service of a citation may be waived by a party, in any proceeding, by an instrument in writing, acknowledged or proved as a deed entitled to be recorded, or by personal appearance or by his attorney, with written authorization, executed and acknowledged as a deed, and filed in the office of the surrogate."

³⁹ Co. Civ. Proc., § 2525, as amended 1882. And see *Id.*, § 444. Service thirty days before the return day is sufficient, although the order for publication was issued less than six weeks before the return day, rendering service by publication within that time impossible. Publication in the State paper is unnecessary when service is made without the State. (*Matter of Macaulay*, 94 N. Y. 574.) The return day should be fixed so as to allow at least thirty days' service before the return day, or service by publication, notwithstanding a suggestion that the infant may be brought within the surrogate's county for the purpose of having the citation served upon him. (*Matter of Merritt*, 5 Dem. 544.) It seems that a nonresident is entitled to a service of thirty days although the citation is served upon him while he is pas-

sing through the surrogate's county. (*Ib.*) See *Matter of Porter*, 1 Misc. 489.

⁴⁰ Co. Civ. Proc., § 2535, in part. The last clause of this section, to wit: that "if no newspaper is published in the county, the citation, notice, or other paper must be published in the newspaper printed at Albany, in which legal notices are required by law to be published;" may be considered as superseded, or impliedly repealed, by L. 1884, c. 133, which repealed all acts providing for "a State paper." Section 2536 was expressly repealed by L. 1900, c. 572. See L. 1893, c. 248, §§ 73, 74.

⁴¹ *Matter of Post*, 30 Misc. 551, 64 N. Y. Supp. 369. See *Matter of Gregory*, 13 Misc. 363; 35 N. Y. Supp. 105.

⁴² L. 1896, c. 570.

TITLE SECOND.

APPEARANCES, PLEADINGS, ETC.

§ 85. **Return of citation, appearances, etc.**— On or before the return day named in the citation, the original, with proof of service, should be filed with the surrogate. It is in only a limited number of cases that the petitioner will be granted the relief sought on the mere failure of the party cited to appear. Notwithstanding the nonappearance of the party cited, the surrogate may, and in some cases must, require proof, other than the petition, before granting relief. The party may appear by attorney. Following the practice of the English Ecclesiastical Court, attorneys for parties in Surrogates' Courts were formerly called *proctors*, but this is a term unknown to our law, and the name of "attorneys" is now, or should be, invariably used.

It has always been the rule that sane adult persons might appear in any court, in a civil case, and prosecute an action or plea in person.⁴³ In respect to appearances by proxy, a distinction exists between courts of record and not of record; only professional attorneys being permitted to appear in the former, while in the latter there was no such restriction. The liberal tendencies which gave birth to the Constitution of 1846, manifested themselves, in 1847, by a legislative provision that any person of good moral character, although not admitted as an attorney, might manage, prosecute, or defend a suit for any other person, provided he was specially authorized for that purpose, by the party for whom he appeared, in writing, or by personal nomination in open court.⁴⁴ But that provision was declared unconstitutional, became obsolete, and has been expressly repealed.⁴⁵

In 1870, a party was prohibited from appearing in the Surrogate's Court of New York county except in person, or by an attorney of the Supreme Court.⁴⁶ With this exception, previously to the adoption of chapter 18th of the Code of Civil Procedure, it was the general practice to allow any person to appear and act as an attorney in Surrogates' Courts,⁴⁷ those courts being then courts not of record. It is provided by section 2529 of the Code

⁴³ See 1 R. L. of 1813, p. 416, § 1; Co. Civ. Proc., § 55.

⁴⁶ L. 1870, c. 359, § 2. See *Matter of Spicer*, 1 Tuck. 80.

⁴⁴ L. 1847, c. 470, § 46.

⁴⁷ Revisers' note to draft Revised

⁴⁵ *McKoan v. Devries*, 3 Barb. 196; Statutes, L. 1880, c. 245, § 1, subd. 24.

that a surrogate's father or son shall not practice or be employed as attorney or counsel, in any case in which his partner or clerk is prohibited by law from so practicing, or being employed.⁴⁸

The mode and effect of the appearance in Surrogates' Courts, and, apparently, the status of attorneys appearing therein, have been placed on the same basis as in other courts of record by the present Code, which provides that "in a Surrogate's Court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, prosecute or defend a special proceeding, in person or by an attorney regularly admitted to practice in the courts of record, at his election; except in a proceeding to punish him for a contempt, or where he is required to appear in person, by a special provision of law, or by a special order of the surrogate. The appearance of a party, against whom a citation has been issued, has the same effect as the appearance of a defendant, in an action brought in the Supreme Court."⁴⁹

§ 86. Service of papers on attorneys.—By another provision,⁵⁰ service of papers upon attorneys appearing in these courts, is permitted in the same cases and manner, and has the same effect as in other courts of record.⁵¹ This removes the grounds of a decision, made under the former statutes,⁵² that the person appearing as attorney in a Surrogate's Court is not considered as an attorney of record upon whom notices may be served in the progress of a suit prosecuted or defended by attorney.

§ 87. Number and form of pleadings.—The pleadings in Surrogates' Courts are two in number, the petition and answer. In general they may be oral. The Code provides that the surrogate may, at any time, require a party to file a written petition or answer, containing a plain and concise statement of the facts constituting his claim, objection, or defense, and a demand of the

⁴⁸ See Co. Civ. Proc., § 50.

⁴⁹ Co. Civ. Proc., § 2528. A general appearance is not a waiver of an objection that the citation was not served within the time required by the statute. (*Pryer v. Clapp*, 1 Dem. 387; *Matter of Hurlburt*, 43 Hun. 311.) Answering the petition on its merits is equivalent to a general appearance, and a waiver of all irregularities in the service of the citation. (*Matter of Macaulay*, 27 Hun. 577, *affd.*, 94 N. Y. 574.) To the same effect see *Everts v. Everts*, 62 Barb. 577; *Board*

v. Board, 4 Abb. Pr. 295; *Boerum v. Betts*, 1 Dem. 471; *Peters v. Carr*, 2 id. 22; *Crossman v. Crossman*, id. 69; *Matter of Porter*, 1 Misc. 489. In New York county a consul may appear personally or by attorney for any non-resident citizen of his country, in proceedings instituted by the public administrator. (L. 1898, c. 230, § 19.)

⁵⁰ Co. Civ. Proc., § 2538.

⁵¹ Co. Civ. Proc., §§ 796, 802.

⁵² *Coates v. Cheever*, 1 Cow. 463, 476.

decree, order, or other relief, to which he supposes himself to be entitled. The surrogate may require the petition or answer to be verified, and a copy thereof to be served upon any other person interested. A party who fails to comply with such a requirement may be treated as a party in default.

Except where such a requirement is made, or in a case where a written petition is expressly required by the Code, a petition, or the answer thereto, may be presented orally; in which case, the substance thereof must be entered in the records of the court.⁵³ Where the statute or the surrogate requires the petition to be verified, the provisions of the Code, relating to the form of the allegations, and the form and effect of the verification of a pleading in a civil action,⁵⁴ apply, so far as they can be applied in substance, without regard to the form of the proceeding.⁵⁵ It will be observed that the rules established by the present Code, in respect to verifications of pleadings, affect also the form of the allegations in the body of the pleading verified.⁵⁶

Demurrers, as distinct forms of pleading, are unknown to the procedure of Surrogates' Courts; but the end contemplated by a demurrer, in a civil action, may be reached by a formal motion to strike out a pleading for insufficiency appearing on its face. Indeed an objection of that sort may be taken informally at any stage of the hearing, and the question of the sufficiency of the pleading will then be determined; the theory in these courts being that pleadings are addressed to the surrogate, for him to pass upon before they are pleaded. Thus where, to a petition for probate, a counter petition is filed asking for relief which the court has no power to grant, the court, on motion, will disregard it, and proceed with the probate.⁵⁷

§ 88. Remedies to be pursued separately.—Several remedies regulated by distinct provisions of the statute should be separately

⁵³ Co. Civ. Proc., § 2533. In New York county, the rule of the Surrogate's Court, in effect, abrogates oral and unverified pleadings, by providing that "all petitions and answers in this court, except as otherwise expressly prescribed by statute, shall be in writing, and contain a plain and concise statement of the facts constituting the claim, objection, or defense, and a demand of the decree, order, or other relief to which the party supposes himself to be entitled, which petition and

answer are required to be verified." Rule XIV. Mar. 16, 1888.

⁵⁴ Co. Civ. Proc., §§ 523, 526. The petition of a foreign corporation may be verified by its attorney. (Lamar's Estate, 20 Daily Reg., No. 113.) *It seems* that, under section 2533, the court may require objections to an account to be verified. (Matter of Mott, 4 Law Bull. 23 [N. Y. Surr. 1882]).

⁵⁵ Co. Civ. Proc., § 2534.

⁵⁶ Co. Civ. Proc., § 524.

⁵⁷ McClure v. Woolley, 1 Dem. 574.

pursued. Thus it is improper to proceed by one and the same petition to vacate a decree settling an executor's account,—to revoke the executor's letters,—to compel a discovery, and for an accounting;⁵⁸ and so of a petition for the revocation of letters testamentary and for the appointment of a temporary administrator.⁵⁹ But it is proper for one to pray for the payment of a legacy or distributive share and at the same time for an accounting by the representative.⁶⁰

⁵⁸ Hood v. Hood, 1 Dem. 392. Pending a proceeding for a settlement of accounts, another independent proceeding for a partial distribution and settlement will not generally be entertained. (Matter of Bruen, 3 Law Bull. 88.)

⁵⁹ Matter of Sohn, 1 Civ. Proc. Rep. 373.

⁶⁰ Matter of Macaulay, 27 Hun, 577.

CHAPTER IV.

PARTIES TO PROCEEDINGS IN SURROGATES' COURTS.

TITLE FIRST.

WHO ARE NECESSARY PARTIES.

§ 89. **In general.**— In regard to parties to special proceedings in Surrogates' Courts, it cannot be said that the general rule of courts of equity prevails — that every person whose interest is involved in the issue, or who may be affected by the decree, is a necessary party, plaintiff, or defendant. It is not every person having an interest in an estate who may institute or oppose a proceeding in these courts. It is only those persons, or that class of persons expressly designated in the statute, who may either prosecute or contest a particular proceeding. There is a further difference between the rule of courts of equity and of Surrogates' Courts, as to parties. The familiar rule that where there is a large number of persons having the same interests, one may sue on behalf of himself and others similarly situated, does not prevail in the latter courts. It is expressly provided by statute, that where a person is, or "creditor, next of kin, legatees, heirs, devisees, or other persons constituting a class" are, required to be cited for any purpose, all those persons are necessary parties to the special proceeding.¹

§ 90. **Necessary original parties.**— Parties to an original proceeding in a Surrogate's Court are (1) *the petitioner*, (2) the parties to be cited, or, as they may be called, *respondents*. Parties appearing in opposition to the probate of a will are, however, commonly called *contestants*, and parties objecting to the accounts of an executor, guardian, etc., are usually called *objectors* or *exceptors*. As suggested above, the statute must be consulted in each

¹ Co. Civ. Proc., § 2518.

case, to ascertain who may institute a proceeding by petition, and who must be made parties respondent. The only difficulty which is likely to be met with in ascertaining the proper parties to a particular proceeding, is the determining whether the party, petitioner or respondent, belongs to the *class of persons* named in the statute. Thus the statute designates, besides individuals, such as husband, wife, executor, administrator, sureties, legatees, guardian, ward, etc., classes of persons such as (1) *heirs-at-law*, (2) *next of kin*, (3) *creditors*, (4) "*persons interested in the estate or fund.*"

§ 91. **Classes of persons.**—Of course any individual belonging to either of these classes may petition, without joining the others, but, as already pointed out, each individual of the class must be made a party respondent, in a case where the statute requires *the class* to be cited. The question will then sometimes arise, whether the petitioner belongs to the class entitling him to prosecute the proceedings, or, on the other hand, whether some person not named in the citation does belong to the class, and is, therefore, a necessary party. It will be desirable in this place to briefly notice these several classes of parties, reserving further consideration until we come to the subject of each proceeding. The classes of parties mentioned in the statute are heirs-at-law, next of kin, creditors, legatees, devisees, and "persons interested in the estate or fund."

§ 92. **Heirs-at-law.**—The "heirs-at-law" and the "next of kin" of a decedent are most frequently the same persons, although of course they constitute separate and distinct classes. In legal phraseology, the word "heirs" is used to designate those relatives who succeed to the real property of an intestate; while the words "next of kin" are used to designate those, often the same, relatives who succeed to the personal property. Who those persons are, in any particular case, must be determined by an examination of the Statutes of Descents and Distributions. As a matter of fact, heirs-at-law, as such, are rarely parties to proceedings in a Surrogate's Court, that court having jurisdiction of matters relating to real estate in an incidental way only.

The class of persons so designated includes all those who would be entitled to succeed to an intestate decedent's real property under the Statute of Descent. It may be well to note here, however, that by L. 1896, c. 272, a right of inheritance is given in certain cases to *adopted children*, so that such children are necessary parties to

be cited on a petition for probate, or for letters of administration.² “*Illegitimate children*, in default of lawful issue, may inherit real³ and personal⁴ property from their mother, as if legitimate; but they cannot inherit from the ancestor of a deceased mother.⁵ The term “illegitimate,” as here used, is to receive its common-law significance, and means begotten and born out of lawful wedlock.⁶ The statute⁷ provides that no person capable of inheriting under its provisions, shall be precluded from inheritance by reason of the *alienism* of his ancestor.

This provision, however, is prospective, and has no application to cases which occurred previous to its adoption, *i. e.*, January 1, 1830.⁸ *Post-testamentary children*, unprovided for by the parent’s will, are entitled to share in the estate, and may maintain an action against the legatees or devisees to recover their shares, or may compel a distribution or partition.⁹

§ 93. **Next of kin.**—Naturally, the class denominated “the next of kin” embraces the persons who are most frequently required to be made parties to proceedings in Surrogates’ Courts. To ascertain whether a person belongs to that class, reference must be had to the Statute of Distributions, and not to the technical definition of the term “next of kin.”

It is enough to say, in this connection, that the Statute of Distributions designates, as entitled to a distributive share of unbequeathed assets, persons who are not, strictly speaking, “next of kin,” *e. g.*, children of a deceased brother or sister of a decedent who left other brothers and sisters, but no nearer relatives. But the Code declares that the term, as used in chapter 18, in reference to proceedings in Surrogates’ Courts, shall include “all those entitled under the provisions of law relating to the distribution of

² The petition should, therefore, state whether or not there is any adopted child, or issue of any deceased adopted child or children of the decedent. See discussion of effect of this act in N. Y. Daily Reg., Oct. 21, 1887.

³ L. 1896, c. 547, § 289, repealing L. 1855, c. 547. See L. 1895, c. 531.

⁴ Co. Civ. Proc., § 2732, subd. 15.

⁵ Matter of Mericlo, 63 How. Pr. 62. See Matter of Barringer, 29 Misc. 457; 61 N. Y. Supp. 1090.

⁶ Miller v. Miller, 18 Hun. 507; Bol-lerman v. Blake, 11 Wkly. Dig. 555.

⁷ 1 R. S. 754, § 22; L. 1896, c. 547, § 294.

⁸ Jackson v. Green, 7 Wend. 336; Redpath v. Rich, 3 Sandf. 81. As to meaning of term “ancestor,” see Banks

v. Walker, 3 Barb. Ch. 438; McCarthy v. Marsh, 5 N. Y. 263; People v. Irvin, 21 Wend. 128; McLean v. Swanton, 13 N. Y. 535; McCreery v. Somerville, 9 Wheat. 354; Emanuel v. Ennis, 48 N. Y. Supr. 432. Where a will relates to real property, a nonresident alien brother and sister of a deceased citizen of the United States, if among his next of kin, are entitled to citation; the latter inheriting, in case of intestacy, as if a citizen, and the former in like manner, subject to a conditional defeasance, enforceable at the instance of the State. (Kilfoy v. Powers, 3 Dem. 198.)

⁹ 2 R. S. 65, § 49, as amended L. 1869, c. 22; L. 1896, c. 547, §§ 46, 292; Co. Civ. Proc., §§ 1868, 2732, subd. 14.

personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, *other than a surviving husband or wife.*"¹⁰

The Statute of Distributions and the persons entitled thereunder to distributive shares will be more appropriately considered under the general head of Administration, chapter XVII, *post*. But it may be stated, in general, that the meaning of the term "next of kin" is not to be so far extended, by construction, as to include persons claiming, for example, to be legatees, who are not, at the same time, next of kin. Thus, the statute allowing next of kin to contest the validity of a will of personal property within one year after probate, was held, before the Code,¹¹ not to extend to persons claiming to be legatees, who were not, at the same time, next of kin.

§ 94. **Widow and husband not next of kin.**—It will be observed that the definition given by the Code excludes a surviving husband or wife. It has been long established that the words "next of kin," in their strict and primary sense, do not include the widow. Accordingly, it has been held that where a residue of personal property is directed to be divided among the testator's "next of kin," or among his "next of kin according to the statute," or where a trust was created for the benefit of those who, at the decease of a party, should be entitled to his personal estate as his next of kin, according to the Statute of Distributions, the widow takes no part.

In other words, "next of kin" does not include the widow;¹² although where there are circumstances which induce a belief that such was testator's intention, the term will be so considered.¹³ It may be said generally, that the term will receive construction according to the connection in which it is used; and, in the construction of a will, according to the intention of the testator, or, in a statute, according to the intent of the Legislature.¹⁴

¹⁰ Co. Civ. Proc., § 2514, subd. 12.

¹¹ Booth v. Kitchen, 7 Hun, 260. Otherwise now as to this particular proceeding (Co. Civ. Proc., § 2647). See c. VIII, *post*; Henry v. Henry, 4 Dem. 253; 9 Civ. Proc. Rep. 100.

¹² Murdock v. Ward, 67 N. Y. 387, distinguishing Merchants' Ins. Co. v. Hinman, 15 How. Pr. 182; 4 Abb. Pr. 313; Kniekerbacker v. Seymour, 46 Barb. 198; Dewey v. Goodenough, 56 id. 54; Luce v. Dunham, 69 N. Y. 36; Keteltas v. Keteltas, 72 id. 312; Tillman v. Davis, 95 id. 17; Matter of

Devoc, 171 id. 281; Hannin v. Osgood, 1 Redf. 409, 417; Snider v. Snider, 11 App. Div. 171; 42 N. Y. Supp. 613. See § 269, n. 24, *post*.

¹³ Murdock v. Ward, 67 N. Y. 387. The words "next of kin" in a will do not include a wife, although followed by a reference to the intestate succession laws. (Platt v. Mickle, 137 N. Y. 106; 50 St. Rep. 91; Matter of Devoc, *supra*.)

¹⁴ The words "next of kin" in 2 R. S. 114, § 9, authorizing "next of kin entitled to share in the distribu-

§ 95. **Divorced husband and wife.**—As a husband, on the dissolution of the marriage, at the suit of his wife, has no interest in her property, he is not a necessary party to a surrogate's proceeding touching the administration of her separate estate; but where the dissolution was at the suit of the husband, *his* rights and interests in her property are not impaired, and, therefore, he may be a necessary party in such a proceeding. Moreover, in the latter case, the wife, however innocent, is not entitled to a distributive share in the husband's personalty, and consequently need not be cited in a proceeding touching his will or estate.¹⁵

§ 96. **Creditors.**—Creditors constitute another class of parties mentioned in the statute, who are entitled to institute a proceeding or to be cited on an adverse proceeding.¹⁶ Whether, as a matter of fact, a party is or is not a creditor of the decedent, may be raised, it is apprehended, in answer to a citation issued on his petition; but to entitle one claiming to be a creditor to a citation, it requires only that he should state, in his verified petition, that he is such creditor or has a claim against the decedent. The court generally requires a petitioning creditor to state the general nature of his claim, and the facts upon which it is founded, especially where his claim is disputed.¹⁷ Affirmative proceedings by a creditor for the payment of debts are expressly provided for.¹⁸

tion of the estate," to sue executors and administrators to recover a distributive share, include the widow of the testator or intestate. (*Betsinger v. Chapman*, 88 N. Y. 487.) Compare *Slosson v. Lynch*, 43 Barb. 161; *Hallett v. Hare*, 5 Paige, 316; *Tillman v. Sullivan*, 63 How. Pr. 355, *affd.*, as *Tillman v. Davis*, 95 N. Y. 17. It has been held (*Dickins v. N. Y. Cent. R. Co.*, 23 N. Y. 158; *Lucas v. N. Y. Cent. R. R. Co.*, 21 Barb. 245), in an action brought by the husband as administrator, to recover for the death of his wife, that the husband was not next of kin to his wife within the act requiring compensation for causing death, etc. (L. 1847, c. 450), and could not maintain an action for his own damages; and in another case, where the party causing the death had paid to the administrator a sum certain in settlement of the action, it was held that, on a distribution of the estate, the husband was not entitled to a distributive share of that sum as one of the next of kin. (*Drake v. Gilmore*, 52 N. Y. 389.)

15 Co. Civ. Proc., §§ 1759, 1760; *Matter of Ensign*, 103 N. Y. 284.

16 *Matter of De Forest*, 86 Hun, 300; 33 N. Y. Supp. 216. As to who are creditors, see Co. Civ. Proc., § 2514, subd. 3, as amended 1900. Although a creditor of a testator may petition for the probate of his debtor's will (Co. Civ. Proc., § 2614; *Gove v. Harris*, 4 Dem. 293), he is not a proper party *respondent* in a probate proceeding, and, therefore, cannot come in, after probate, and move to open the decree admitting the will. (*Heilman v. Jones*, 5 Redf. 398.) But a judgment creditor of a devisee may contest a codicil which supersedes the will. (*Matter of Coryell*, 4 App. Div. 429; 39 N. Y. Supp. 508.)

17 *Gove v. Harris*, 4 Dem. 293; *Creamer v. Waller*, 2 id. 351. Compare *Greene v. Day*, 1 id. 45; *Wever v. Marvin*, 14 Barb. 376.

18 Co. Civ. Proc., § 2722, as amended 1895 (former § 2717). See *post*, c. XVII.

§ 97. **Assignees of creditors, legatees, etc.**— But where it is shown that a petitioner has assigned his claim or interest to a third person not a party to the proceeding, the surrogate should revoke the citation, as he has no jurisdiction to determine the validity of the assignment.¹⁹ Before the present Code, the surrogate had no power to direct the payment of a distributive share or legacy to an assignee thereof;²⁰ but now, distribution of the surplus, upon a judicial settlement of an account, may be made to the creditors, legatees, next of kin, etc., or their assigns.²¹ It does not follow from this, however, that the assignee of a legacy, for instance, may petition to compel payment thereof in a direct proceeding for that purpose;²² his remedy being by a proceeding to compel an accounting, and distribution.²³ A receiver of the property of a person entitled to a distributive share of a decedent's estate, has, therefore, a standing to petition for an accounting.²⁴

§ 98. **Persons interested in the estate.**— Among the parties who may petition for a citation in particular proceedings, the statute includes "persons interested in the estate or fund." Whether a petition discloses such an interest of the petitioner in the estate, as will entitle him to a citation, must depend upon the circumstances of each case. As a general rule, it may be stated that a claim of interest positively sworn to will entitle the party to a citation, or to leave to come in as a contestant in a pending proceeding,²⁵ though, without doubt, the surrogate may require the claim of interest to be stated with certainty; and the claim of interest may be disputed by answer, and then determined as a preliminary to the main issue.²⁶

¹⁹ *Bonfanti v. Deguerre*, 3 Bradf. 429; *Woodruff v. Woodruff*, 3 Dem. 505; *Matter of Stephens*, 64 N. Y. Supp. 990.

²⁰ *Hitchcock v. Marshall*, 2 Redf. 174 [a case of two rival claimants of the same share]. See *Worrall v. Driggs*, 1 id. 449.

²¹ *Co. Civ. Proc.*, § 2743. *It seems* that even though a beneficiary has assigned his interest, he should, nevertheless, be cited. (*Matter of Foster*, 30 Misc. 573; 63 N. Y. Supp. 1102.)

²² The provision of section 1909, giving a right of action by the transferee of a claim, refers only to civil actions or special proceedings in law courts.

²³ *Peyser v. Wendt*, 2 Dem. 221, followed in *Matter of Brewster*, 19 St. Rep. 698. See *Matter of Solomon*, 4 Redf. 509.

²⁴ *Matter of Gilligan*, 1 Connolly, 137, 18 St. Rep. 812; *Matter of Beye*, 10 Misc. 198; 31 N. Y. Supp. 200; *Monahan v. Fitzpatrick*, 16 Misc. 508; 39 N. Y. Supp. 857. See *Matter of Rainey*, 26 N. Y. Supp. 892.

²⁵ *Norton v. Lawrence*, 1 Redf. 473. Where a decree in a probate proceeding directs a temporary administrator to pay certain sums as costs, it has the effect of making him a party to the proceeding, and he may thereafter be permitted to move for a modification of such decree without first obtaining leave of the court so to do. (*Matter of Aaron*, 5 Dem. 362).

²⁶ *Matter of Comins*, 9 App. Div. 492; 41 N. Y. Supp. 323; *Matter of Hamilton*, 76 Hun. 200; 27 N. Y. Supp. 813; *Matter of Peaslee*, 73 Hun. 113; 25 N. Y. Supp. 940.

Where the expression "person interested" is used in the Code in connection with an estate or a fund, it includes "every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or *otherwise*, except as a creditor." Where a provision of the Code prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, "an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending."²⁷

This only applies to the particular proceedings designated; it does not apply, for instance, to a proceeding to revoke letters of administration.²⁸ This subject will be again mentioned in the third title of this chapter.

§ 99. Executors and administrators.—When the statute mentions any executor or administrator as competent to petition the court, it means a domestic, and not a foreign, executor or administrator. An executor or administrator appointed in another State has no right, as such, to sue in this State, without taking out letters here.²⁹ Hence an administrator appointed in California, who has not taken out letters here, has no standing in a court of this State to invoke its aid in acquiring possession of his intestate's property here.³⁰ An executor is, as such, "a person interested in

²⁷ Co. Civ. Proc., § 2514, subd. 11.

²⁸ Where in such a proceeding, brought by the intestate's widow, it appeared that she had assigned her interest in the estate, as she alleged, by the fraudulent procurement of the administrator, the petition was dismissed, — the Surrogate's Court being unable to set aside the instrument for fraud: until which is done, the petitioner was excluded from the class of persons interested in the estate. (Woodruff v. Woodruff, 3 Dem. 505.)

²⁹ Matter of Butler, 38 N. Y. 397; Petersen v. Chemical Bank, 32 id. 21; Stewart v. O'Donnell, 2 Dem. 17; Taylor v. Syme, 162 N. Y. 513; 31 Civ. Proc. Rep. 1; Flandrow v. Hammond, 13 App. Div. 325; 43 N. Y. Supp. 143. The guardian of a lunatic, appointed by a foreign court, cannot intervene in an accounting in which the ward is interested. (Weller v. Suggett, 3 Redf. 249.) But assignments of claims by foreign representatives, valid where

made, will be recognized here. (Petersen v. Chemical Bank, *supra*; Guy v. Craighead, 6 App. Div. 463; 39 N. Y. Supp. 688.) A foreign executor cannot be sued in our courts, though it is alleged he has assets in his possession here. (Ferguson v. Harrison, 27 Misc. 380; 58 N. Y. Supp. 850.) But see Smith v. Central Trust Co., 7 App. Div. 278; 40 N. Y. Supp. 152; Stone v. Demarest, 67 App. Div. 549; 73 N. Y. Supp. 903.) Where a substituted trustee was appointed by a foreign court, having jurisdiction, which gave him powers established by the Supreme Court of the foreign State interpreting its own statutes, the trustee may by virtue of that appointment sue in the courts of this State. (English v. McIntyre, 29 App. Div. 439; 51 N. Y. Supp. 697.)

³⁰ Matter of Jones, 3 Redf. 257, and cases cited. See Duffy v. Smith, 1 Dem. 202.

the estate " of a decedent, under whose will his testator was a beneficiary, so as to entitle him to petition for an accounting by the first decedent's executor.³¹

And so where a decree directs executors to convert into money certain securities and assets in their hands, and to invest the same as directed by the will, they are all interested in the performance of that duty, and where none of them have resigned or been removed, they should all be made parties in the proceeding instituted by a legatee to enforce his rights under such decree and the will.³² An allegation in the petition, that some of the executors are insolvent and have no assets of the estate in their hands, does not dispense with the necessity of making them parties.³³

Formerly, in probate proceedings, executors were deemed to represent all the devisees and legatees named in the will, and, therefore, the latter were not necessary parties to such a proceeding. In 1892, section 2615 was amended so that all persons who would take any interest in the estate, under the will, were required to be cited in a proceeding for its probate,³⁴ but by L. 1894, c. 118, the old rule, in this respect, was re-established, dispensing with a citation to devisees and legatees.

In regard to coexecutors or administrators, it has been uni-

³¹ Edwards v. Edwards, 1 Dem. 132.

³² In a proceeding to remove a trustee, all the trustees who have acted as such, and have not been discharged, are necessary parties. (Hamilton v. Faber, 33 Misc. 64; 68 N. Y. Supp. 144.)

³³ Cocks v. Haviland, 5 Dem. 11.

³⁴ See *post*, c. VI. Where the question of the construction of the will was raised in the probate proceeding, the legatees were, even before the amendment of 1892, brought into the case. See Danser v. Jeremiah, 3 Redf. 130, 146. It was also held that the executor not only represented all the interests of the legatees on probate proceedings, but they were bound by his acts, where they did not intervene in the proceedings until after the rendition of the judgment. (Marvin v. Marvin, 11 Abb. Pr. [N. S.] 97.) Where the construction of a will involves the question whether income or accretions—such as stock dividends on shares in a corporation belonging to the estate—go to the life tenant or remainderman, the life tenants are necessary parties to a proceeding awarding payment thereof to the life tenant. The principle that persons not actually parties to a suit in equity may, never-

theless, be bound by the decree on the theory of representation, should not be applied to such a case. (Riggs v. Cragg, 89 N. Y. 479; 11 Abb. N. C. 401.)

In an action brought by a substituted testamentary trustee to recover the trust fund from the executors of a deceased trustee, it is not necessary to make the *cestuis que trustent* parties, unless the action requires the determination of their rights as between themselves or as between them and the trustees. (Mount v. Mount, 25 Misc. 62; 71 N. Y. Supp. 199.) A residuary legatee cannot maintain a proceeding to establish a claim in favor of the estate where it is not shown that the debts and general legacies have been paid. (Matter of Marcellus, 165 N. Y. 70; 58 N. E. 796.) But where executors, charged with the duty of retaining and applying a part of the income of a bond and mortgage, refuse to foreclose, alleging it was without consideration, the sole residuary legatee, the annuitant consenting, may maintain an action for the foreclosure. (Mulvey v. Reilly, 31 Misc. 10; 64 N. Y. Supp. 582.)

formly held that an executor, etc., may cite his coexecutors in the Surrogate's Court, or sue them, for an accounting,³⁵ and where one of two or more coexecutors or administrators presents his accounts for settlement, his coexecutors *must* be cited.³⁶

§ 100. **Married women.**— It was formerly held that as a married woman could not act without her husband's concurrence, and as he was responsible for her acts, both husband and wife should be made parties in a matter in which the wife was interested.³⁷ Where a married woman is entitled to be cited it is no longer necessary to include her husband in the citation.³⁸

Married women are now declared capable of acting as executors, administrators, and guardians of minors, as though they were single women,³⁹ and the law permits a married woman to institute proceedings and defend her separate interests in her own name.

TITLE SECOND.

DEATH OF A PARTY AND REVIVOR OF A PROCEEDING.

§ 101. **In probate proceedings.**— Where in a proceeding for probate, one of the parties dies, the surrogate, having acquired jurisdiction of all the parties in interest, is not thereby divested of jurisdiction. If the survivors appear and litigate, without objection because of an omission to bring in the heirs and representatives of the deceased party, such omission cannot impair the validity of the proceedings as to the survivors.⁴⁰ But even where objection is made, the court may (and it is the better practice that it should, in all cases, whether objection is made or not), order the proceeding to be revived and continued.

³⁵ Wood v. Brown, 34 N. Y. 337; Smith v. Lawrence, 11 Paige, 206; Woodruff v. Woodruff, 17 Abb. Pr. 165; Buchan v. Rintoul, 70 N. Y. 1; Burt v. Burt, 41 id. 46. In Wood v. Brown (*supra*), which was an action by an executor against his co-executor to revoke the latter's appointment for his misconduct, the court held that creditors, legatees, and next of kin were not necessary parties, but delivered a *dictum* that they might be necessary in an action for final accounting.

³⁶ Co. Civ. Proc., § 2778.

³⁷ See Westervelt v. Gregg, 1 Barb. Ch. 469; Guild v. Peck, 11 Paige, 475; Woodruff v. Cox, 2 Bradf. 153; Marre v. Ginochio, id. 165.

³⁸ See Co. Civ. Proc., § 450; Bleecker v. Lynch, 1 Bradf. 458; Keeney v. Whitmarsh, 16 Barb. 141.

³⁹ L. 1867, c. 782, § 2.

⁴⁰ Brick v. Brick, 66 N. Y. 144. Where the proponent of a will, who was a beneficiary thereunder, died during the pendency of the proceeding, leaving a will, purporting to dispose of all his property, which was thereafter proved, the orderly method of continuing the probate proceeding would be an *ex parte* application by the executor of the latter will to be made a party thereto, and, upon the granting of such application, a motion, on notice, for a revivor in his name as proponent. (Matter of Govers, 5 Dem. 40.)

The proceeding for the probate of a will is a *quasi* proceeding *in rem*,⁴¹ and such a proceeding cannot, in the nature of things, abate by the death either of a proponent or a contestant. His personal representatives succeed him in the proceeding, and the right survives to, and may be prosecuted by, them. A proceeding to revoke probate stands upon a different footing, and where the interest of the petitioner ceases at his death, the proceeding cannot be revived.⁴²

§ 102. In accounting proceedings.— It was formerly the rule that in proceedings for an accounting, where a sole party petitioner or respondent died before final decision the proceeding abated, and a final decree could not be entered.⁴³ The personal representatives of the deceased executor could be called upon to account for the estate of the first decedent, but only in a new proceeding, and not by a revivor of the proceeding against the deceased executor.⁴⁴

It is now provided, however, that “on the death heretofore or hereafter of any executor, administrator, guardian, or testamentary trustee while an accounting by or against him, as such, was or is pending before a Surrogate’s Court, such court may revive said proceeding against his executor, administrator, or successor and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case where the executor or administrator of said last-mentioned decedent, acting at the time of such revival, had voluntarily petitioned for an accounting as provided for in this section.”⁴⁵

The death of the party who instituted the proceeding will not abate it. Thus where a legatee dies, his assignee is entitled to intervene and continue the proceedings.⁴⁶ The right to revive a proceeding is a valuable right, and the surrogate has no power to enter an order, of his own motion, adjudging that it has abated. Such an order being void, may be collaterally attacked whenever brought in question.⁴⁷

⁴¹ Van Alen v. Hewins, 5 Hun, 44; Bogardus v. Clark, 4 Paige, 623; Lafferty v. Lafferty, 5 Redf. 326. Law Bull. 48 (N. Y. Surr., 1882); Matter of May, 24 Misc. 456, 53 N. Y. Supp. 710.

⁴² Matter of Milliken, 32 Misc. 317.

⁴³ Pease v. Gillette, 10 Misc. 467; 32 N. Y. Supp. 102; Matter of Steeneken, 51 App. Div. 417; 64 N. Y. Supp. 660. See Matter of Koch, 33 Misc. 672; 68 N. Y. Supp. 938.

⁴⁴ Boerum v. Betts, 1 Dem. 471, and cases cited. See Matter of Scribner, 3

⁴⁵ Co. Civ. Proc., § 2606, as amended 1902.

⁴⁶ Matter of Fortune, 14 Abb. N. C. 415. See Hitchcock v. Marshall, 2 Recl. 174; Worrall v. Driggs, 1 id. 449.

⁴⁷ Matter of Armstrong, 72 App. Div. 286.

Of course, the death referred to must have occurred after the surrogate has acquired jurisdiction by service of the citation upon the party, else the proceeding cannot be revived.⁴⁸

§ 103. **In other proceedings.**—Proceedings other than those for or against probate and upon accountings stand upon a different footing. It is to be observed, moreover, that not only an *action*, but a special proceeding, does not abate by any event, if the cause of action survives; except that a special proceeding, authorized to be brought by or in the name of a public officer, or by a receiver or other trustee appointed by virtue of a statute, does not abate by the death or removal of such officer, etc., but may be continued by his successor.⁴⁹ And an executor, administrator, or a person appointed by a surrogate to sell a decedent's real estate to pay debts, is to be deemed such a trustee.⁵⁰ Section 765 of the Code, forbidding the entry of a judgment against a party (to an action) who dies before a verdict, report, or decision is actually rendered against him, is made applicable to Surrogates' Courts by section 3347, subdivision 6.⁵¹

TITLE THIRD.

INTERVENTION OF THIRD PARTIES.

§ 104. **In probate proceedings.**—It has always been the rule (now confirmed by statute), that any person interested in the estate, who, though not entitled to be cited, yet desired to intervene for the protection of his own interests, might apply to the surrogate, by petition, for leave to do so.⁵² The language of the statute authorizing intervention in probate proceedings (Co.

⁴⁸ Matter of Georgi, 35 Misc. 685; 72 N. Y. Supp. 431.

⁴⁹ Co. Civ. Proc., §§ 755, 766. See L. 1891, c. 284. Those sections do not apply to Surrogates' Courts. (Matter of Schlesinger, 36 App. Div. 77; 55 N. Y. Supp. 514; Matter of Camp, 81 Hun. 387; 30 N. Y. Supp. 884.)

⁵⁰ Co. Civ. Proc., § 1828.

⁵¹ Herbert v. Stevenson, 3 Dem. 236.

⁵² Bogardus v. Clark, 4 Paige, 623. 626, which was approved and sustained in Vanderpoel v. Van Valkenburgh, 6 N. Y. 190, 199. In Booth v. Kitchen, 7 Hun. 260, it was held that a person claiming to be legatee under a codicil afterward revoked was entitled to a hearing on the probate of the will. So, too, a judgment creditor of a devisee

may contest a codicil which supersedes the will. (Matter of Coryell, 4 App. Div. 429; 39 N. Y. Supp. 508.) See Co. Civ. Proc., § 2617; Lafferty v. Lafferty, 5 Redf. 326. A receiver in supplementary proceedings of the property of a husband, for whom no provision is made in his wife's will, is not entitled to intervene as a contestant in probate proceedings. (Matter of Brown, 47 Hun. 360.) Under L. 1893, c. 701, providing that a gift for charitable uses is not to fail by reason of the indefiniteness or uncertainty of the beneficiaries in the instrument making it, the attorney-general is entitled to intervene. (Rothschild v. Goldenberg, 58 App. Div. 499; 69 N. Y. Supp. 523.)

Civ. Proc., § 2617) is broad enough to include every interest. It has been held that *any* interest, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Thus executors under a will may oppose the probate of a later will, although the parties beneficially interested under the earlier have released their interest.⁵³ The question of the intervening party's interest in the estate will not be independently determined, even where it is disputed, before determining the main issue, but the court will try both issues together.⁵⁴

§ 105. **In other proceedings.**—Other sections of the Code provide for the bringing in of third persons, who are necessary parties in other than probate proceedings, as on an accounting (§ 2743), and on an appeal (§ 2573). So a creditor, or any person interested in the estate, although not cited (and certainly not a necessary party), is entitled to appear upon an accounting, and thus make himself a party to the proceeding.⁵⁵ There will be occasion, when we come to speak of particular proceedings, to give examples of the application of this rule. The general remark may, however, be made here, that no one who has not been formally made a party to a proceeding can make a motion therein.⁵⁶

§ 106. **Application for leave to intervene.**—A party desiring to be made a party to a pending proceeding should present a verified petition, setting forth his interest in the controversy with certainty.⁵⁷ It is not necessary, we think, that he should state

⁵³ *Matter of Greeley*, 15 Abb. (N. S.) 393. Compare *Matter of Rollwagen*, 48 How. Pr. 103; *Turhune v. Brookfield*, 1 Redf. 220; *Chittenden's Estate*, 1 Tuck. 135; *Walsh v. Ryan*, 1 Bradf. 433; *Marvin v. Marvin*, 11 Abb. Pr. (N. S.) 97; *Matter of Jones*, 1 Redf. 263; *Foster v. Foster*, 7 Paige, 48; *Public Administrator v. Watts*, 1 id. 347; *Thomson v. Thomson*, 1 Bradf. 24; *Bonfanti v. Deguerre*, 3 id. 429; *Robinson v. Robinson*, 5 Lans. 165; *Worrall v. Driggs*, 1 Redf. 449; *Gratacap v. Phye*, 1 Barb. Ch. 485; *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359; *Carpenter v. Historical Soc.*, 1 Dem. 606; *Stapler v. Hoffman*, id. 63; *Matter of Ellis*, 22 St. Rep. 77; *Merritt v. Jackson*, 2 Dem. 214. See *post*, c. VI, as to Probate Proceedings; c. XIX, as to Accounting Proceedings, and c. XXIV, as to Appeals.

⁵⁴ *Norton v. Lawrence*, 1 Redf. 473; *Henry v. Henry*, 4 Dem. 253; s. c., in part, as *Estate of Henry*, 3 How. Pr. (N. S.) 386; 9 Civ. Proc. Rep. 100. See *Jones v. Hamersley*, 4 Dem. 427; 7 St. Rep. 292, as to what questions an intervening party in probate may raise.

⁵⁵ Co. Civ. Proc., § 2728, as amended 1893 (formerly § 2731); *Schlegel v. Winckel*, 2 Dem. 232; *Reilly v. Duffy*, 4 id. 366; *Tilden v. Dows*, 2 id. 489.

⁵⁶ *Lafferty v. Lafferty*, 5 Redf. 326; *Smith v. Baylis*, 3 Dem. 567.

⁵⁷ A decree directing a temporary administrator in probate proceedings to pay certain costs has the effect of making him a party to the proceeding, and he need not obtain leave to move for a modification of the same. (*Matter of Aaron*, 5 Dem. 362.)

in his petition whether he desires to help the prosecution or the defense. He has a right to be present as a party to watch the proceedings with a view of protecting his own interests, however they may appear. The right to intervene must be availed of before final decree.⁵⁸ If, for example, a legatee fails to intervene in the proceeding in the Surrogate's Court, or on appeal from his decree, he will not be permitted, after final judgment on the probate, to appeal from a surrogate's order directing the annulment of the record, and awarding costs against an executor, and directing him to file an inventory of the estate. He has ceased to be an interested party, and is represented by the executor, and is bound by his acts.⁵⁹ A creditor does not lose his right to intervene, on an accounting, by omitting to present his claim in pursuance of a notice requiring presentation of demands.⁶⁰

§ 107. **Ordering third parties to be brought in.**— If a party to the pending proceeding desires to bring in a new party, he should apply on petition or affidavit for a citation to be issued to the proposed new party. The service of the citation, with proof thereof, is thought to be sufficient, without the entry of a formal order making him a party. So, whenever it appears, in the progress of a proceeding, that a person not cited to appear is a necessary party, the surrogate will, on his own motion, issue a citation to him for his appearance.⁶¹ This rule has been followed where, pending a reference, under the statute to determine a disputed claim against executors or administrators, it appeared that the presence of a third person was necessary to a complete determination of the controversy.⁶² So when, on the probate of a will, an alleged codicil is brought in by parties who are interested, but who were not cited, the proper course is to direct them to file an allegation propounding the codicil for proof, as a part of the pending proceeding.⁶³ So where it appeared, for the first

⁵⁸ *Matter of Dunn*, 1 Dem. 294. The right to intervene upon an accounting of an executor or trustee does not arise until the "hearing," and where a proceeding for a compulsory accounting has been discontinued by a formal consent of all the parties to it, a third person cannot thereafter intervene and bring on the matter for hearing. (*Matter of Wood*, 5 Dem. 345.) The application, after appeal, must be made to the appellate court. (*Ib.*, and *Co. Civ. Proc.*, §§ 452, 2573.)

⁵⁹ *Marvin v. Marvin*, 11 Abb. Pr. (N. S.) 97.

⁶⁰ *Greene v. Day*, 1 Dem. 45; *O'Connor v. Gifford*, 6 id. 71. See *Matter of O'Brien*, 33 Misc. 17; 67 N. Y. Supp. 1116.

⁶¹ *Matter of Odell*, 1 Misc. 390. See *Russell v. Hartt*, 87 N. Y. 19.

⁶² See *Mowry v. Peet*, 7 Abb. N. C. 196; *Munson v. Howell*, 20 How. Pr. 60.

⁶³ *Carle v. Underhill*, 3 Bradf. 101. See *Van Wert v. Benedict*, 1 id. 114.

time, upon a probate trial, that one of the next of kin was an infant, the fact not having been alleged in the petition for probate, the surrogate will appoint a special guardian, to represent the infant's interests, before a decision is rendered.⁶⁴

TITLE FOURTH.

SPECIAL GUARDIANS.

§ 108. **Special guardian for infant or incompetent.**—In Surrogates' Courts, as in others, an infant party must be represented by a guardian—his general guardian, if he has any;⁶⁵ or if he has none, or his general guardian does not appear in the proceeding, the court must appoint a special guardian for the particular proceeding to which the infant is a party. The appointment of a special guardian is not nullified by the subsequent appointment of a general guardian.⁶⁶ The omission to appoint a special guardian of an infant party who was served does not render void the surrogate's decree in the proceeding, but only voidable at the election of the infant on reaching majority.⁶⁷ Special provision is made for the protection of the interests of lunatics, idiots, and habitual drunkards, whether they appear by committee or in person.⁶⁸ The fact of there being a general guardian of an infant, or a committee of an incompetent, does not prevent the appointment of a special guardian in a proper case, as where there is any ground to suppose that the interest of the guardian or committee is adverse to that of the infant or incompetent, or where, for any other reason, the interests of the latter require the appointment of a special guardian.⁶⁹ But a general guardian who is qualified to adequately protect the interests of his ward, and who is exercising the function of his office

⁶⁴ *Matter of Feeley*, N. Y. Law J., May 13, 1890 (N. Y. Surr. Ct.).

⁶⁵ *Gunning v. Lockman*, 3 Redf. 273; 4 Abb. N. C. 173.

⁶⁶ *Matter of Monell*, 22 Civ. Proc. Rep. 377; 19 N. Y. Supp. 361.

⁶⁷ *Matter of Becker*, 28 Hun. 207; *Matter of Bowne*, 19 St. Rep. 895.

⁶⁸ Co. Civ. Proc., § 2530. See *Bloom v. Burdick*, 1 Hill. 130; *Schneider v. McFarland*, 2 N. Y. 459; *Ackley v. Dygert*, 33 Barb. 176; *Havens v. Sherman*, 42 id. 636. In *Matter of Donlon*, 66 Hun. 199; 21 N. Y. Supp. 114, the service of a citation upon an incompetent for whom no next friend or representative has been appointed, was held

sufficient cause to vacate a decree of probate.

⁶⁹ Co. Civ. Proc., §§ 2527, 2530. In *Matter of Van Beuren*, a special guardian was appointed at the request, and upon the representation of counsel, that he had no interest adverse to the person for whom such guardian was needed. It afterward appeared that he had an adverse interest, inasmuch as he represented the life tenant, and his law firm appeared for a residuary legatee and remainderman. Ransom, S., vacated the appointment. (N. Y. Law J., Jan. 19, 1891.) In *Matter of Graham*, it appearing from an examination of the will that the mother

when an occasion arises for having the ward represented in a special proceeding, is, undoubtedly, entitled to appear therein in behalf of the infant, and it would be improper to deny him this right, and to appoint a special guardian in his stead, if he is willing to act.⁷⁰

§ 109. **Application for appointment.**—On the return of a citation directed to an infant, if no one applies for the appointment of a special guardian, it is the duty of the court to appoint one on its own motion. No application need be made by the infant,⁷¹ or if made by him, no notice of such application is necessary, unless he has a general guardian; in which case notice must be given to the latter.⁷² Notice of the application need not be given to the infant where the appointment is made on the surrogate's own motion.⁷³ It is only where a person, other than the infant, or the committee of the incompetent person, applies for the appointment of a special guardian, that notice of the application must be personally served upon the infant or incompetent person, if he is within the State, and also upon the committee, if any, in like manner as a citation is required to be served.⁷⁴ The application may be made at the time of presenting the petition, and, in that case, the order to show cause may, in the surrogate's discretion, accompany the citation;⁷⁵ or, the citation itself, with-

of the infants, for whom a special guardian was appointed, upon the petition of their father, had an interest adverse to the infants, the order appointing the special guardian upon that petition was vacated. (Ransom, S., N. Y. Law J., May 29, 1891.) In *Matter of Van Wagoner* (69 Hun, 365), it was held not error for the surrogate to appoint his brother special guardian for an infant litigant.

⁷⁰ *Farmers' Loan & Trust Co. v. McKenna*, 3 Dem. 219. In *Matter of Monell* (46 St. Rep. 693; 22 Civ. Proc. Rep. 377), pending an accounting proceeding, a general guardian's letters were revoked, and the surrogate appointed a special guardian for the infant party. Held, that this appointment was not nullified or rendered of no effect by the subsequent appointment of a new general guardian. While the latter had the right to appear in the proceedings, this right did not conflict with the rights and duty of the special guardian.

⁷¹ *Matter of Ludlow*, 5 Redf. 391. Failure to give the infant notice of the application does not make the decree

void in proceedings for the sale of real property, or affect the title of a purchaser. (*Price v. Fenn*, 3 Dem. 341; 8 Civ. Proc. Rep. 206.)

⁷² *Farmers' Loan & Trust Co. v. McKenna*, 3 Dem. 219.

⁷³ And the papers need not state whether the infant resides with his parents and approves the application. (*Matter of Monell*, 46 St. Rep. 693; 19 N. Y. Supp. 361.)

⁷⁴ The appointment of a guardian *ad litem*, for an infant party in a contested probate proceeding, who is present when the appointment is made, was, however, held to be regular, without service of a notice or citation upon the infant when he did not, by himself or his guardian, object. (*Matter of Seabra*, 38 Hun, 218.)

⁷⁵ Co. Civ. Proc., § 2531. The following rules have been established in the Surrogate's Court of New York county, in respect to special guardians appointed in proceedings in that court: No special guardian to represent the interests of an infant in any proceeding in said Surrogate's Court, will be appointed on the nomination of a pro-

out any order to show cause, may contain a clause advising the infants that, in the event of their not appearing by general guardian, and failing to ask for the appointment of a special guardian, a special guardian will, upon the return of the citation, be appointed.⁷⁶

§ 110. **Appointment, when made.**—The appointment cannot be made until the citation has been served on the infant,⁷⁷ nor until the return day named in the citation.⁷⁸ The order cannot be made *nunc pro tunc*, after the decree has been made, so as to cut off the right of the infant to object to the irregularity on coming of age;⁷⁹ but it may be made, pending the hearing, before the decision is rendered.⁸⁰

§ 111. **Duties and responsibilities.**—It is for a special guardian, who is usually a lawyer,⁸¹ and aware of his duties and responsibilities as such, to take such course of action in the interest of his ward as he may deem fittest, without recourse to the court for

ponent or the accounting party or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the rights of the infant, and that he has no interest adverse to that of the infant and is not connected in business with the attorney or counsel of any party to the proceeding. Where the application for the appointment of a special guardian is made by another than the infant, or where the general guardian appears in behalf of the infant, it must appear that such applicant or general guardian has no interest adverse to that of the infant. If such applicant or general guardian is entitled to share in the distribution of the estate or fund in which the infant is interested, the nature of the interest of such applicant or general guardian must be disclosed. The application for the appointment of a special guardian, as well as the appearance filed by a general guardian of a minor, must in every instance disclose the name and residence and relationship to the infant of the person with whom the in-

fant is residing, whether or not he has a parent living, and, if a parent is living, whether or not such parent has knowledge of, and approves, such application or appearance; and such knowledge and approval must be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such application or appearance by the person with whom the infant resides must be shown in like manner. Where such application is made by an infant over the age of fourteen years, his petition must show and be accompanied by the affidavit of the parent (in case the latter has an interest adverse to that of the infant), showing, in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the guardian. (Rule X. Mar. 16, 1888.) See *Matter of Henry*, 2 How. Pr. (N. S.) 250.

⁷⁶ *Price v. Fenn*, 3 Dem. 341. See *Matter of Cutting*, 38 App. Div. 247; 56 N. Y. Supp. 945.

⁷⁷ *Potter v. Ogden*, 136 N. Y. 384; *Pinekey v. Smith*, 26 Hun. 524. But see *Price v. Fenn*, *supra*.

⁷⁸ *Matter of Leinkauf*, 4 Dem. 1.

⁷⁹ *Matter of Bowne*, 19 St. Rep. 895.

⁸⁰ *Matter of Feeley*, N. Y. Law J., May 13, 1890.

⁸¹ In *Matter of Spicer*, 1 Tuck. 80, it was held that he *must* be a lawyer.

instructions. In general, it is not proper for a surrogate to advise either the prosecution or the withdrawal of a contest in his court, but it would seem that the Supreme Court, possessing, as it does, general jurisdiction and supervisory power over the estates and persons of infants, may be asked for counsel and direction by a guardian *ad litem* as to the propriety of his further continuing to contest a probate in the Surrogate's Court.⁸²

§ 112. **Compensation of guardian.**— There was, formerly, no express provision in the statute, respecting the compensation of special guardians in Surrogates' Courts; but, as authority to appoint implied an authority to compensate such a guardian, the practice was to make him an allowance payable out of the general estate, proportioned to the character and importance of the interest involved and the services rendered. But if statutory authority were required, it would seem to be given by that section of the Code which provides, in respect to a Surrogate's Court, that "each other officer, including a referee, and each witness, is entitled to the same fees, for his services * * * as he is allowed for like services in the Supreme Court."⁸³ Since its adoption, the Code is the sole source of the authority of a Surrogate's Court to allow compensation to special guardians.⁸⁴ Hence a special guardian unsuccessfully opposing probate in behalf of an infant, was held to be an "unsuccessful contestant of the will," within the meaning of section 2558 before its amendment in 1881. As that section now stands, special guardians, appointed in a contested application for probate, or revocation of probate, are excepted from the operation of the prohibition of costs to unsuccessful contestants. Section 2561 prescribes the narrow limits within which the court may exercise its discretion as to the amount to be awarded — viz.: not exceeding seventy dollars, and ten dollars per day, in addition, for all the days less two, necessarily occupied in the trial. A special guardian who represents infants in a probate contest has no duty to discharge in reference to the estate, and his compensation should come from the infants or their estate. The costs which may be allowed by the surrogate out of the general estate are limited to those specified in Co. Civ. Proc., §§ 2558, 2561.⁸⁵

⁸² See *Matter of Chittenden*, 1 Tuck. 251.

⁸³ *Schell v. Hewitt*, 1 Dem. 249. See General Rule 50; *Matter of Matthews*, 27 Hun. 254.

⁸⁴ *Forster v. Kane*, 1 Dem. 67.

⁸⁵ *Matter of Budlong*, 100 N. Y. 203. This overrules *McCue v. O'Hara*, 5 Redf. 336. A special guardian, as counsel, is not entitled to an allowance. (*Matter of Johnston*, 6 Dem. 355.)

In proceedings other than for, or against, probate, the special guardian of an infant party, for example, in a proceeding for an accounting, will be allowed compensation, in a proper case, even where unsuccessful.⁸⁶ The rule is well settled that the surrogate has no power to compensate a special guardian for services in a proceeding which has left his court, *e. g.*, on an appeal from his decree therein.

⁸⁶ In *Matter of Trust, Ransom, S.*, said:

"The compensation of the special guardian is not to be ascertained by a comparison of his services with those of the attorneys for the accounting party, nor with the commissions allowed by law for the services of the latter. In this case objections were filed by the special guardian as the only means of procuring information which it was his plain duty to obtain. It is a mistake not uncommonly made by accounting parties and their counsel, to regard special guardians as intruders in proceedings involving the rights and interests of infants. I have heretofore expressed my views upon the rights and duties of special guardians generally, and counsel are referred to *Estates of Powers* (Surr. Dec., 1888, p. 134); *Wadsworth* (6 N. Y. Supp. 932). In this case the special guardian, in accordance with the rule of this court, has furnished for my informa-

tion, and filed the same, his sworn statement, giving in detail the character of his services and the time necessarily occupied by him in their performance. I find nothing in the written argument of counsel for the accounting party which can possibly justify me in disregarding the affidavit of the special guardian as false, and if taken as true, it fully sustains him in every particular. Although he was unsuccessful, he had reasonable grounds for his action. He discharged his duties faithfully and honestly, and should be allowed a suitable sum for his professional labor. His own estimate seems fair, and I allow him the amount he claims. The referee cannot be allowed the fee paid unless stipulation by adult parties is filed. The infants' interests, in any event, can only be charged with their proportionate share of the referee's fees, at the statutory rate." (N. Y. Law J., Jan. 26; 1892.)

CHAPTER V.

TRIAL PRACTICE, DEPOSITIONS, ETC.

TITLE FIRST.

HEARINGS BEFORE THE SURROGATE OR REFEREE.

§ 113. **In general.**—Surrogates' Courts, having once acquired jurisdiction of the parties and of the subject-matter of a proceeding, possess, in the matter of conducting trials or hearings, the ordinary common-law powers necessary to the discharge of their judicial functions. The section of the Code (§ 3347) which declares to what courts, etc., various divisions of that act apply, makes no specification in respect to the ninth chapter, entitled "Evidence." Accordingly all the provisions of that chapter, except those which expressly state otherwise or which are obviously inapplicable, govern Surrogates' Courts in common with the other courts of the State. Those provisions include the rules concerning the competency, disqualifications, and privilege of witnesses,¹ the administration of oaths and affirmations,² the issuing and enforcement of subpoenas, including *subpœnas duces tecum*,³ and the production, competency, and effect of documentary evidence.⁴

§ 114. **Decision to be filed.**—Upon a trial, the surrogate must file in his office his decision in writing, which must state, separately, the facts found and the conclusions of law. Either party *may request* a finding upon any question of fact, or a ruling upon any question of law; and an exception may be taken to such a finding or ruling, or to a refusal to find or rule accordingly.⁵

¹ Co. Civ. Proc., §§ 828-841.

² Co. Civ. Proc., §§ 842-851.

³ Co. Civ. Proc., §§ 852-869. As to surrogate's power to compel attendance of witnesses, and to punish them for contempt for nonattendance, see Co. Civ. Proc., § 2481, subds. 3, 7 (*ante*, § 52).

⁴ Co. Civ. Proc., §§ 921-962. See *post*, c. VI, as to competency of witnesses in proceedings to prove a will.

⁵ Co. Civ. Proc., § 2545, in part. This section does not apply to proceedings pending Sept. 1, 1880. (*Mills v. Hoffman*, 92 N. Y. 181.) On a motion to vacate an order denying application

The purpose of this requirement was to assimilate the practice on appeals from a surrogate's decree, in the prescribed cases, to that which regulates appeals from a judgment rendered by a court or a referee in an action, and to substitute a system which would point out specific errors, and evolve the exact questions intended to be reviewed. It is, therefore, the duty of a party appealing from a surrogate's decree to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue; and if he omits to do so, no question will be presented for review except that arising upon exceptions taken during the trial.⁶ It will be seen, therefore, that a separate statement, in a decision, of facts and conclusions of law found, is only necessary when an appeal is contemplated by either party, and then only with the view of informing the appellate court, by exceptions filed, of the errors relied on. Hence the surrogate's failure to file findings is at most an irregularity and does not affect the validity of the decree;⁷ and is not a ground of objection to his decision on appeal,⁸ nor cause for setting aside the decree for irregularity.⁹ The absence of findings, separately stated, and appropriate exceptions thereto, amounts to this only, that no question is presented for review.¹⁰ If no appeal is taken, the irregularity is waived.¹¹

§ 115. **Requests to find.**—The requirement that, when requested thereto, the surrogate in his decision shall state separately the facts found and conclusions of law is mandatory.¹² The "request" for a finding of fact or a ruling upon a question of law, which can be made to the surrogate, can only be made "upon

for an administrator's account on the ground that the order had been entered by default, the surrogate vacated the order and directed an account. Held, error to thus dispose of the merits raised by administrator's answer on a mere motion: he should have made a decision with findings of fact and conclusions of law. (*Matter of O'Brien*, 45 Hun, 284; 10 St. Rep. 414.)

⁶ *Matter of Hood*, 104 N. Y. 103; 5 St. Rep. 501; *Angevine v. Jackson*, 103 N. Y. 470; 3 St. Rep. 643; *Burger v. Burger*, 111 N. Y. 525.

⁷ *Hood v. Hood*, 5 Dem. 50; *Lewis v. Jones*, 13 Abb. Pr. 427.

⁸ *Matter of Hood*, 104 N. Y. 103. The appellate court may, if it sees fit, send the case back in order to have the irregularity cured. (*Waldo v. Waldo*, 32 Hun, 251.)

⁹ *Matter of Hesdra*, 4 Misc. 37; 23 N. Y. Supp. 846; s. c., as *Matter of Onderdonk*, 54 St. Rep. 875.

¹⁰ *Matter of Hood*, *supra*; *Matter of Kellogg*, 104 N. Y. 648; 5 St. Rep. 668; *Matter of Otis v. Hall*, 6 id. 592; *Matter of Falls*, 29 id. 759; 10 N. Y. Supp. 41; *Matter of Marsh*, 45 Hun, 107; *Matter of Potter*, 32 id. 599; *Matter of Widmayer*, 52 App. Div. 301; 65 N. Y. Supp. 83.

¹¹ *Matter of Hesdra*, *supra*.

¹² *Matter of Kaufman*, 39 St. Rep. 236; 14 N. Y. Supp. 901. In that case, the surrogate had been expressly requested to make findings of fact, which he refused to do, making a record of his refusal, to which a formal exception was taken. The General Term reversed the decree for such erroneous refusal.

the settlement of a case," on an appeal¹³ from a decree already entered.¹⁴ The surrogate should make a marginal note opposite each request to find, indicating his refusal or assent, in order to relieve the labor of the appellate court.¹⁵

§ 116. **Exceptions to surrogate's rulings.**—The present Code entirely remodels the machinery of appeals from surrogates' decrees and orders, assimilating it to that of appeals from judgments and orders in civil actions. To correspond to these changes, new rules are established with respect to the taking and filing of exceptions, the filing of a decision upon a hearing before the surrogate, and the settlement of a case on appeal. An exception may be taken to a ruling by a surrogate, upon the trial by him of an issue of fact, including a finding, or a refusal to find, upon a question of fact, in a case where such an exception may be taken to a ruling of any other court upon a trial, without a jury, of an issue of fact, as prescribed in article third of title first of chapter tenth of the Code (§ 992 *et seq.*). The provisions of that article, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to a trial before a surrogate; for which purpose the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office.¹⁶

§ 117. **Trial before referee.**—Under the Revised Statutes, before the adoption of the present Code, all issues and questions raised in a special proceeding before a surrogate were required to be determined by him, except in the single instance of an accounting by executors or administrators. But under the Code, the

¹³ Co. Civ. Proc., § 2545; Hartwell v. McMaster, 4 Redf. 389; Dickel v. Yates, 2 Dem. 229; Tilby v. Tilby, 3 id. 358; Matter of Hoyt, 5 id. 284; Matter of Dodge, 40 Hun, 443, 451; revd. on another point, 105 N. Y. 585.

¹⁴ Matter of Prout, 18 Civ. Proc. Rep. 270. This rule is applicable to actions tried in the Supreme Court, under section 2486, in cases where the surrogate is disabled from acting. (Matter of Chauncey, 32 Hun, 429.)

¹⁵ Matter of Wheeler, 28 St. Rep. 638; 8 N. Y. Supp. 385. In that case, the surrogate did not pass upon the requests to find facts and conclusions of law, in a proceeding to revoke letters of administration. The General Term said that the omission of the surrogate would justify it in sending the

case back, with instructions to him to note upon the requests his determination of each proposed finding. In Matter of Zerega (N. Y. Law J., May 15, 1893), the New York surrogate said: "The findings proposed by the attorneys for the respective parties in this proceeding by the settled practice of this court must be served, and the allowance or disallowance of each finding, and of each conclusion of law proposed, must be noted by the attorneys, and then submitted to the surrogate for settlement."

¹⁶ Co. Civ. Proc., § 2545; Hewlett v. Elmer, 103 N. Y. 156. As to when exceptions are necessary, and when and how made with reference to a review of the decision on appeal, see c. XXIV, *post*.

surrogate may in any proceeding (*other than one instituted for probate or revocation of probate of a will*), in his discretion, "appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact; to examine an account rendered; to hear and determine all questions, arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon, subject, however, to confirmation or modification by the surrogate."¹⁷ *In probate cases*, the surrogate of New York county "may, on the written consent of all the parties appearing," appoint a referee, "or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein."¹⁸ We take it that the qualification of authority applies to a referee, as well as to an assistant. The power of the court to so direct an assistant is absolute, and does not depend upon the consent of the parties;¹⁹ it is only the appointment of some other person, as referee, that requires such a consent. An assistant so appointed has authority, on the hearing before him, to pass upon the admissibility of evidence, to which objection is interposed.²⁰

§ 118. Referee's duties and powers.—A referee appointed by the surrogate "has the same power, and is entitled to the same compensation, as a referee appointed by the Supreme Court, for the trial of an issue of fact in an action;" and the provisions of the Code, applicable to a reference by the Supreme Court, apply to such a reference, "so far as they can be applied in substance, without regard to the form of the proceeding."²¹ Just what this last clause means is not clear. "How much or how little is accomplished by this very general language, it may trouble us some day to determine. It seems to open everything and settle

¹⁷ Co. Civ. Proc., § 2546, in part. of Hoes (54 App. Div. 281: 66 N. Y. Supp. 664). it was held proper to order a reference to hear and determine a disputed claim which the parties had consented should be determined by the surrogate upon the accounting.

The surrogate may amend an order of reference, *nunc pro tunc*, so as to refer the issues, and not simply to direct a report of the evidence. (Matter of May, 53 Hun. 127.) He has power under that section to direct the referee to report his opinion upon the evidence. (Matter of Ferrigan, 42 App. Div. 1: 58 N. Y. Supp. 920: *affd.*, 160 N. Y. 689.) Upon a petition to remove an executor for misconduct, the surrogate may, of his own motion, make an order of reference to take testimony. (Matter of Hale, 45 App. Div. 578: 61 N. Y. Supp. 596.) In Matter

¹⁸ Co. Civ. Proc., § 2546. In Kings county the clerk of the court may examine witnesses to a will (L. 1885, c. 367).

¹⁹ Matter of Allemann, 1 Connolly, 441.

²⁰ *Ib.*

²¹ Co. Civ. Proc., § 2546, in part.

nothing.”²² It may, however, be said, in a general way, that a surrogate’s referee, like a Supreme Court referee, is to be governed, in the course of procedure before him, by the General Rules of Practice.²³ He has, for example, the same power as a referee in an action, to permit amendments, in a proper case.²⁴ Prior to the repeal²⁵ of sections 993 and 1023 of the Code, relating to exceptions to a referee’s “refusal to make any finding whatever,” and to the submission to the referee of requests to find, those sections were applicable to a surrogate’s referee, and the fact that the referee’s determination was subject to the surrogate’s approval did not dispense with the requirement.²⁶ So, too, the referee was required to find facts and conclusions of law separately, and entirely dissociated from his opinion; failing to do so, his report would be sent back, to correct the irregularity,²⁷ or for *further findings*,²⁸ since the prohibition of referees from making additional findings, after decision rendered, did not apply to special proceedings.²⁹ As a matter of practice it is still customary for a referee to state his findings and conclusions separately, but he is not required to do so.³⁰

§ 119. **Action on referee’s report.**—The referee’s report, accompanied by the testimony taken before him, including all exhibits, must be filed within sixty days after the matter is submitted to him; otherwise, the reference may be terminated by either party.³¹ Unless the report is passed upon and confirmed, approved, modified, or rejected by the surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course and a decree to that effect may be entered by any

²² Per Fitch, J., *Matter of Clark*, 119 N. Y. 427; 29 St. Rep. 682.

²³ *Matter of Russell*, 3 Dem. 377 [Gen. Rule 30]; *Matter of Leffingwell*, 30 Hun, 528 [Gen. Rule 17].

²⁴ *Matter of Fithian*, 15 St. Rep. 734; *Matter of Frank*, 1 App. Div. 39; s. c., as *Matter of Schneider*, 36 N. Y. Supp. 972. But compare *Eldred v. Eames*, 115 N. Y. 405, which was the case of a reference of a disputed claim under the Revised Statutes.

²⁵ L. 1895, c. 946; L. 1894, c. 688.

²⁶ *Matter of Mellen*, 56 Hun, 553; 31 St. Rep. 770; *Matter of Niles*, 47 Hun, 348. And see *Matter of Hicks*, 14 St. Rep. 320; *Broughton v. Flint*, 74 N. Y. 476.

²⁷ *Matter of Sears*, N. Y. Law J., Mar. 4, 1890; *Matter of Lawrance*, 8

N. Y. Surr., MS. Dec. 433; *Matter of Havemeyer*, 25 Civ. Proc. Rep. 59.

²⁸ *Matter of Bayer*, 54 Hun, 189; 26 St. Rep. 803.

²⁹ *Matter of Bayer*, *supra*.

³⁰ *Matter of Woodward*, 69 App. Div. 286; 74 N. Y. Supp. 755. In that case the issues on a contested settlement of an executor’s account were referred, and the referee reported his decision without making separate findings, and his decision was confirmed by the surrogate. Held, that the report of the referee was authorized, and the surrogate was only required to confirm it, and not to make separate findings of fact and conclusions of law.

³¹ Co. Civ. Proc., §§ 1019, 2546; *Matter of Santos*, 31 Misc. 76; 64 N. Y. Supp. 572.

party interested in the proceedings upon two days' notice.³² The omission of the surrogate to confirm, reject, or modify a referee's report until more than ninety days have elapsed after its submission does not oust the surrogate of jurisdiction of the proceeding or deprive him of the power to make and enter a decree contrary to the recommendations of the report, and where such decree is made before any steps are actually taken to confirm the report on the ground of lapse of time, it is valid and effectual.³³ The surrogate is not required to make new findings, in rendering his decision on a referee's report. The confirmation of the referee's report is an approval of the rulings of the referee, and an appeal, upon exceptions to the report, will present the conclusion of the surrogate for review.³⁴ But it would seem that upon the coming in of the report of a referee, to whom it was referred merely to take evidence and report it with his opinion, the surrogate should make a decision with separate findings of fact and of law, notwithstanding that the referee has already done so.³⁵ It has been suggested as the better course, that the surrogate should in all cases make "a full and complete decision embodying all the findings of fact and conclusions of law, as ultimately determined by him, after he has passed upon the referee's report."³⁶ The power of the court is not limited to confirming or refusing to confirm a referee's report. The surrogate may modify the report by drawing a different legal conclusion from facts found by the referee, and the remainder of the report can stand,³⁷ or he may, for cause shown, reopen the reference, with

³² Co. Civ. Proc., § 2546, as amended 1899. See L. 1895, c. 796. The rule of the Surrogate's Court of New York county is that "when a referee's report shall be filed, together with the testimony taken before him, said report shall be confirmed as of course, unless exceptions thereto shall be filed by any party interested in the accounting or proceeding within eight days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, either party may bring on the hearing of said exceptions on eight days' notice, on any stated motion day of said Surrogate's Court." (Rule VIII, Mar. 16, 1888.)

³³ Matter of Clark, 168 N. Y. 427; 61 N. E. 769.

³⁴ Matter of Niles, 47 Hun, 348;

Matter of Flagg, N. Y. Law J., April 8, 1893; Matter of Mellen, 56 Hun, 553; Matter of Yetter, 44 App. Div. 404; 61 N. Y. Supp. 175; affd., without opinion, 162 N. Y. 615; Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755; Matter of Bettman, 65 App. Div. 229.

³⁵ Matter of Moulton, 32 St. Rep. 631; 10 N. Y. Supp. 717; Matter of O'Brien, 5 Misc. 136.

³⁶ Matter of Prout, 18 Civ. Proc. Rep. 270 [Kings Co. Surr. Ct. 1890]. Substantially the same was said by the Supreme Court (Fourth Dep., Gen. T., 1887), in Matter of Keef, 43 Hun, 98.

³⁷ Matter of May, 31 St. Rep. 50; s. c., 19 N. Y. Supp. 785. The proper practice, on amending report of referee, is to obtain an order sending it back to make specific amendments. (Matter of Smith, 17 St. Rep. 783.)

or without conditions, and direct another or further hearing.³⁸ A referee's findings of fact will not be disturbed where there is a conflict of evidence, unless the findings are clearly against the weight of evidence, or are not supported by any evidence.³⁹

§ 120. **Referee's fees.**—A surrogate has no power to direct a referee, to whom a proceeding pending in the court has been referred, to file his report in advance of receiving his fees, or to direct that any one of the parties in the proceeding shall pay the referee before the report is filed.⁴⁰ The usual practice is, in New York county at least, for referees to file their reports, together with a verified memorandum of the time spent, so that their fees may be taxed by the surrogate, and provision made in the final decree or order, entered in the proceeding for payment of such fees by such parties as may be found justly chargeable with such payment; or if any party has paid the referee, and it appears, on the termination of the proceeding, that he ought not, under the circumstances, to be charged with the expense of the reference, a direction may be made for his reimbursement, either out of the assets of the estate, or by one of the parties against whom they are chargeable.⁴¹

§ 121. **Issues triable by jury.**—The Surrogate's Court is not a tribunal adapted to the determination of disputed claims. In the only case in which, under the Revised Statutes, a surrogate had jurisdiction to try such a question, he was allowed, if in his

³⁸ An executrix not notified of a reference of her accounts,—Held entitled to have the reference opened, to enable her to sustain her account as filed. (Matter of Gorman, 49 App. Div. 637; 63 N. Y. Supp. 123.) The Surrogate's Court has power, as a condition of opening the report of a referee, to limit the party objecting as to time in the matter of examining and cross-examining the witnesses to appear before the referee. (Matter of Davenport, 37 Misc. 179; 74 N. Y. Supp. 940.)

³⁹ Matter of Odell, 1 Connolly, 94; 18 St. Rep. 997; Matter of Bradley, 17 St. Rep. 836; Matter of Plumb, 24 Misc. 249; 53 N. Y. Supp. 558.

⁴⁰ Matter of Kraus, 4 Dem. 217.

⁴¹ Matter of Hurd, 6 Misc. 171; 26 N. Y. Supp. 893; s. c. as Matter of Ellis, 56 St. Rep. 694. In Matter of Kenny (N. Y. Law J., Oct. 24, 1890), Ransom, S., decided that "the report of the referee to the effect that

the accounting party neglects and refuses to proceed is the proper method of informing the surrogate of the cause of delay; but such report is not effectual as the basis of the referee's motion to tax his fees. Proper practice by the referee in such cases is to issue his subpoena and cause the same to be served on the accounting party, and, if necessary, a subpoena *duces tecum*, and to enforce obedience by commitment for contempt. Thus the vouchers would be produced for examination, and the accounting party for personal examination; whereupon the referee should report the facts and the proceedings with dates required by settled practice, for the taxation of his fees. On such report, a decree would be proper settling the accounts and fixing all costs, payment of which could be enforced. This proceeding is referred back to the same referee, who will proceed accordingly."

opinion it could not be satisfactorily determined without a trial by jury, to award a feigned issue to be tried at the next circuit in his county.⁴² A like regulation is contained in the Code, which provides that the surrogate may, in his discretion, direct the trial by a jury, at a trial term of the Supreme Court,⁴³ or in the County Court, of any controverted question of fact, arising in *one proceeding only*, that is, a proceeding for the disposition of real property for the payment of debts, etc. The order must state, distinctly and plainly, each question of fact to be tried; and it is the only authority necessary for the trial.⁴³ With the jury trial, which the appellate court is directed to order,⁴⁴ on reversing a surrogate's decree admitting a will to probate upon a question of fact, where there is a conflict of evidence, the Surrogate's Court has nothing to do except to admit the will, if so directed by the Supreme Court.⁴⁵ The trial of issues of fact in a contested probate, before a jury, will be mentioned hereafter in connection with the probate of wills.⁴⁶

TITLE SECOND.

PROCURING DEPOSITIONS OF WITNESSES, DISCOVERY OF PAPERS, ETC.

§ 122. **Code sections applicable.**—The statutory regulations upon the topics mentioned in this title are primarily framed with reference to civil actions, and are declared to be applicable to special proceedings in Surrogates' Courts, so far as practicable.⁴⁶ Those provisions of the Code, which are so made applicable to Surrogates' Courts, relate, respectively, to depositions taken and to be used within the State,⁴⁷ depositions taken without the State for use within the State,⁴⁸ discovery of books and papers,⁴⁹ service of papers,⁵⁰ and mistakes, omissions, defects, and irregularities.⁵¹

§ 123. **Taking depositions in the State.**—The power granted, by the present Code, to Surrogates' Courts, to cause depositions to

⁴² 2 R. S. 102, § 11. And see L. 1847, c. 280, § 45.

⁴³ Co. Civ. Proc., § 2547, as amended 1895.

⁴⁴ Co. Civ. Proc., § 2588. See *Matter of Hunt*, 110 N. Y. 278; *Matter of Campbell*, 48 Hun. 417; and c. XXIV, *post*. On setting aside the verdict of a jury on the issue as to the proper execution of a will the case must be sub-

mitted to another jury. (*Matter of Booth*, 13 St. Rep. 344.)

⁴⁵ Chapter VI, *post*.

⁴⁶ Co. Civ. Proc., § 2538.

⁴⁷ Co. Civ. Proc., §§ 870-886.

⁴⁸ Co. Civ. Proc., §§ 887-913.

⁴⁹ Co. Civ. Proc., §§ 803-809.

⁵⁰ Co. Civ. Proc., §§ 796-802.

⁵¹ Co. Civ. Proc., §§ 721-730.

be taken within the State, for use in those courts, is new. It embraces the subjects more familiarly known under the titles of examinations before trial, taking testimony *de bene esse*, and perpetuating testimony, as well as taking depositions by consent. A number of questions, arising under the provisions of the Code, upon these topics, have already been adjudicated by the courts. Their consideration is more appropriate to a work upon general practice. It will be borne in mind, in general, in applying to Surrogates' Courts these and the other above-mentioned provisions, that the application is subject to the exception and qualification contained in the section above quoted, viz., "except where a contrary intent is expressed in, or plainly implied from the context of, a provision" of chapter eighteenth of the Code, and "so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form."⁵²

§ 124. **Taking depositions without the State.**—Surrogates have had authority, since 1837, on any proceeding or matter in controversy before them, to issue a commission to take the testimony of a witness in any other State or Territory of the United States, or any foreign place, when required by a party, in the same manner as by law the same might be done in any court of record.⁵³ This power is substantially preserved by section 2538 of the Code; but the provisions thereby made applicable to surrogates' proceedings contain important amendments and additions to the comparatively meagre provisions of the Revised Statutes. They abrogate numerous arbitrary and technical rules prevailing under those statutes, allow the issuing of a commission without interrogatories, and, in specified new cases, provide for an open commission, and for an order to take depositions instead of a commission, permit the interrogatories, in a proper case, to be in a foreign language, and authorize the issuing of letters rogatory.⁵⁴

⁵² Co. Civ. Proc., § 2538.

⁵³ L. 1837, c. 460, § 77 (2 R. S. 393, §§ 11–24). Section 77 was repealed by chapter 245 of the Laws of 1880, and section 2538 was adopted to vest in the court the same power. (Cadmus v. Oakley, 2 Dem. 298; Henry v. Henry, 4 id. 253; Bull v. Kendrick, id. 330, all probate cases.) The right, however, of the court to issue a commission was based in all these cases upon the general authority conferred by section 2538. It is now settled that a

Surrogate's Court has power, in its discretion, to direct the issuing of a commission to examine, before trial, a party to a proceeding pending before it. (Matter of Plumb, 135 N. Y. 661; 22 Civ. Proc. Rep. 209.) See Matter of Hodgman, 11 App. Div. 344; 42 N. Y. Supp. 1004; affd., 161 N. Y. 627.

⁵⁴ As to commissions out of chancery in the case of nonresident witnesses, see Matter of Hornby, 2 Paige, 429; Stephens v. Brooks, Clarke, 86.

§ 125. **Examination of disabled witnesses.**—Former statutes⁵⁵ made it the duty of the surrogate, upon an application to prove a will, where a material witness was disabled from attending by age, sickness, or infirmity, to proceed to the latter's residence, if in the surrogate's county, and take his testimony; and permitted the surrogate, if the witness resided in another county, to direct a like hearing before the surrogate of that county. These provisions have been preserved, in a modified form, in the present Code. The section which relates to a witness in the surrogate's county provides that "upon the application of a party to a special proceeding, and upon proof, by affidavit, to the satisfaction of the surrogate, that the testimony of a witness in his county, who is so aged, sick, or infirm, as to be unable to attend before him to be examined, is material and necessary to the applicant, the surrogate must, where the special proceeding was instituted to procure the probate or revocation of probate of a will, and, in any other case, may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor, to each other party, except a party who has failed to appear as required by the citation. The surrogate may also, in his discretion, require notice to be given to any other person interested."⁵⁶ This enactment extends the scope of the original, by including a proceeding for the revocation of probate of a will, and by permitting the surrogate to take testimony in like manner, in *any* special proceeding before him. The surrogate may appoint a referee to take and report the testimony of the witness, instead of personally attending.⁵⁷

§ 126. **Subscribing witness to will.**—The statutory provisions for the examination of an aged, sick, or infirm subscribing witness to a will, who resides in another county of this State⁵⁸ and of such as are disabled by absence from the State and otherwise will be mentioned in a subsequent chapter.⁵⁹

§ 127. **Discovery of books and papers.**—Beyond the power, conferred by the Revised Statutes, to issue a subpoena "to compel

⁵⁵ L. 1837, c. 460, §§ 12-15; L. 1841, c. 129.

⁵⁶ Co. Civ. Proc., § 2539; *Matter of McCoskry*, 5 Dem. 256; 10 Civ. Proc. Rep. 178.

⁵⁷ Co. Civ. Proc., § 2540, last sen-

tence but one. (*Matter of Gee*, 24 Civ. Proc. Rep. 211; 33 N. Y. Supp. 425.)

⁵⁸ Co. Civ. Proc., § 2540.

⁵⁹ Co. Civ. Proc., § 2619. See article second of title fourth of chapter VI, *post*.

the production of any paper material to any inquiry pending in his court," the surrogate could not, before the adoption of the eighteenth chapter of the present Code, compel the discovery of documentary evidence in aid of a special proceeding pending before him. He now has the same power as a court of record, in an action, to order a party to such a proceeding to produce and discover, or to give to the other party an inspection and copy, or permission to take a copy, of a book, document, or other paper in his possession, or under his control, relating to the merits of the special proceeding, or of the defense therein.⁶⁰ But the surrogate has no authority to require an administrator to deposit the books and papers of the estate for the inspection of a party interested in a litigation for the probate of a deceased owner's will, upon the simple statement that the administrator is hostile to the petitioner, and refuses him the same opportunity to search for letters, books, etc., which he gives to his adversary, it not appearing that any such documents favorable to his interests exist.⁶¹ He has power to order the examination of parties and others before trial,⁶² and of persons not parties, for the purpose of a motion;⁶³ also to order the taking of depositions, or to issue a commission or letters rogatory, where testimony is to be procured without the State.⁶⁴

⁶⁰ Co. Civ. Proc., § 803 *et seq.* See *Matter of Smith*, 15 St. Rep. 733. Upon a contested probate, an inspection of the will and examination of the signatures to see if they were made with the same ink and at the same time is proper. (*Matter of Boardman*, 46 St. Rep. 444.) See *Matter of Woodward*, 28 Misc. 602; 59 N. Y. Supp. 1080.

⁶¹ *Matter of Stokes*, 28 Hun. 564; affg. *Dale v. Stokes*, 5 Redf. 586. In *Taylor's Will* (10 Abb. Pr. [N. S.] 300), it was held, that the contestants might

examine the private papers of deceased, in the administrator's hands, bearing on the personal relations involved in the issues; family letters being first submitted to the court to determine their relevancy, before disclosing their contents by putting them in evidence.

⁶² Co. Civ. Proc., §§ 870, 871, 2538; *Matter of Plumb*, 135 N. Y. 661; 48 St. Rep. 569.

⁶³ Co. Civ. Proc., §§ 885, 2538. See *Reynolds v. Parkes*, 2 Dem. 399; *Camp v. Fraser*, 4 id. 212.

⁶⁴ Co. Civ. Proc., §§ 887-913, 2538.

CHAPTER VI.

THE PROBATE OF WILLS.

TITLE FIRST.

PROCEEDINGS BEFORE APPLICATION FOR PROBATE.

§ 128. **Preliminary observations.**—Upon the death of a person owning property, the ownership is immediately transferred to another; the property is not for a single instant without an owner; but the right to the possession of such property, and the power to dispose of it, do not pass in the same way. The right of ownership in the property frequently, if not usually, depends on an obscure and complicated state of facts, and, therefore, for a time, the power of disposal is held in suspense or incumbered with restrictions and conditions until those rights can be judicially ascertained. The proceedings had for this purpose, the identification and collection of the property, and its allotment and distribution according to the rights of the successors, as they are made to appear, constitute the administration of the estate. The first step in the proceedings taken in a Surrogate's Court, to obtain such a judicial determination, is to apply for the probate of the will, if any, or for letters of administration if there be no will.

§ 129. **Production of will and application for probate.**—The law prescribes no formalities with respect to the opening and reading of the will of a decedent, but this is left as a question of fair dealing among persons having diverse interests in the property disposed of by it. And the fact that the will was first opened and read by one claiming an interest in the estate casts no suspicion on his claim. But where there are other reasons to suspect fraud, a clandestine use of knowledge acquired from the will, and concealed from others equally interested, might be an important circumstance, if a controversy should arise between the parties. The proper course for those into whose hands the will falls, is to give immediate notice of its existence to the parties most nearly interested, and to the executor named therein. Where the will

has been deposited in a public office, as permitted by statute, the duty of the custodian, upon the testator's death, is expressly prescribed.¹ A surrogate has no authority to order a safe deposit company to deliver up a will, left with it by a testator, to a petitioner for probate;² though from the necessities of the case, a surrogate frequently orders the examination of the testator's papers to be made, for the purpose of discovering a will, and the deposit companies are known to invariably recognize the order.

§ 130. **Interference with the assets before probate.**—In early times, in England, it was customary for those standing nearest an intestate, and for the executors or beneficiaries named in the will of a testator, to take immediate charge of his estate, upon his death, without, in the first instance, resorting to the courts for sanction. The result was that a creditor could maintain an action against one who thus assumed to administer; and no one who should interfere with the effects could be held responsible as an executor or administrator. The law is changed in this regard. The Revised Statutes take away the remedy which creditors had against those who, without such authority, interfere with the assets, and require that the executor or administrator duly appointed shall pursue a remedy for the benefit of the creditors or others concerned. It is provided that “no person shall be liable to an action as executor of his own wrong for having received, taken or interfered with the property or effects of a deceased person.”³ This does not mean that a person wrongfully interfering is not liable to an action; but only that he is not so liable in the character of an executor or administrator. The statute further declares, that he “shall be responsible as a wrongdoer in the proper action, to the executors or general or special administrators of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts to the estate of the deceased.” Hence, if persons pretending to be executors take possession, the next of kin, or others interested, should procure an administrator to be appointed, or letters testamentary to be issued; and the executor or administrator so appointed may recover the property.⁴

Another provision of the statute declares, that “every person becoming possessed of property of a testator or intestate, without

¹ See § 64, *ante*.

² *Matter of Foos*, 2 Dem. 600.

³ 2 R. S. 449, § 17; *Mills v. Mills*,

23 St. Rep. 604.

⁴ *Muir v. Trustees, etc.*, 3 Barb. Ch. 477; *Babcock v. Booth*, 2 Hill, 181.

being thereto duly authorized as executor or administrator, or without authority from the executor or administrator, is liable to account for the full value of such property to every person entitled thereto, and shall not be allowed to retain or deduct therefrom any debt due to him."⁵ But, in connection with this provision, it should be observed that, if such a person subsequently takes out letters, the acts which were before tortious may be thereby legalized;⁶ only however in case they would have been lawful if he had been acting under the authority of letters at the time.⁷ His responsibility relates back to the date of his testator's death or to his own first act of unauthorized interference.⁸

§ 131. Executor's possession of assets before probate.—The right of one who is named an executor to take possession of the effects of his testator, without waiting for the probate of the will, is limited. It is a general principle that an executor derives his title from the will itself, and not from the letters testamentary subsequently issued to him. The latter are not the foundation, but only the authenticated evidence, of his title.⁹ Nevertheless, although a technical title to the effects vests in him at the moment of the testator's death, he cannot fully exercise his right of possession until he has been duly recognized as executor by the proper tribunal. The statute expressly provides, that no executor, although named in the will as such, shall have, before letters testamentary are granted, power to dispose of any part of the estate, except to pay funeral charges, nor to interfere with the estate, farther than is necessary for its preservation.¹⁰ Where any important interference with the assets is necessary for other purposes than the preservation of the estate, before probate can be had, application should be made for the appointment of a temporary administrator.

⁵ Co. Civ. Proc., § 2706, as amended 1893, taken from 2 R. S. 81, § 60.

See *Wever v. Marvin*, 14 Barb. 376; *Brown v. Brown*, 1 Barb. Ch. 189; *Matter of Flandrow*, 28 Hun. 279; *Humbert v. Wurster*, 22 id. 405; *Quackenbush v. Quackenbush*, 42 id. 329, 332; *Matter of Fithian*, 44 id. 457.

⁶ *Priest v. Watkins*, 2 Hill, 225; *Matter of Faulkner*, 7 id. 181.

⁷ *Bellinger v. Ford*, 21 Barb. 311.

⁸ *Matter of Farrell*, 1 Tuck. 110.

⁹ *Hartnett v. Wandell*, 60 N. Y. 349; *Van Schaack v. Saunders*, 32 Hun.

515; *Matter of Greeley*, 15 Abb. Pr. (N. S.) 393.

¹⁰ 2 R. S. 71, § 16, now incorporated in Co. Civ. Proc., § 2613 (new to the Code). The acceptance of security from a surviving partner upon his purchase of the assets of the firm pursuant to a provision of the partnership agreement, is an act for the preservation of the estate within the power of the executors of the deceased partner before letters. (*Hull v. Cartledge*, 18 App. Div. 54; 45 N. Y. Supp. 450.)

§ 132. **Necessity for probate.**—In respect to wills of real property, although the devisee takes directly under the will, and not through the executor, except where the devise is to the latter in trust, it is desirable for many reasons that wills of realty, as well as wills of personalty, should be regularly proved and recorded in the office of the proper surrogate.¹¹ The law never presumes a will in the absence of proof, nor, where the proof tends to show a will of personal property only, can it be presumed to have embraced the real property of the testator.¹² And although an ancient will may be admitted as evidence of title, without direct proof of execution or probate, it is only so when it appears to be of the age of at least thirty years,¹³ and is shown to have come from the proper custody, or where such an account of it is given as may be reasonably expected under the circumstances and as affords a presumption of its genuineness; but, in every case, a corresponding possession under the will for at least thirty years must be shown.¹⁴

A more important reason for the probate of wills of realty, is that unless the will is proved and recorded in the surrogate's office, or established by action, within four years after the testator's death, the title of a purchaser in good faith, and for a valuable consideration, from the heirs of the testator, is not defeated or impaired by virtue of a devise in the will. This limitation of four years, however, is subject to the condition that "if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the State; or if the will was concealed by one or more of the heirs of the testator," the four years do not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate.¹⁵

¹¹ See *Harrison v. Caswell*, 32 App. Div. 134; 52 N. Y. Supp. 664.

¹² *Duke of Cumberland v. Graves*, 9 Barb. 595; *Brant v. Livermore*, 10 Johns. 358.

¹³ Co. Civ. Proc., § 2632, as amended 1901. See also *Id.*, § 2631.

¹⁴ But mere efflux of time will not authorize a will of thirty years' standing to be given in evidence without proof. And a possession under it for less than thirty years is not enough. (*Staring v. Bowen*, 6 Barb. 109.) *It seems* that the thirty years are to be

computed from the testator's death. (*Id.*) A possession of less than thirty years is not enough, though more than thirty years have elapsed since the execution of the will. (*Jackson v. Blanshan*, 3 Johns. 292.) And see *Jackson v. Thompson*, 6 Cow. 178; *Jackson v. Christman*, 4 Wend. 277; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Bradstreet v. Clarke*, 12 Wend. 602, 677; *Jackson v. Luquere*, 5 Cow. 221.

¹⁵ Co. Civ. Proc., § 2628, adopting substantially 1 R. S. 749, § 3. The exception of the case of a concealment of,

§ 133. **Caveat against probate.**—Before the Revised Statutes it was the practice, when any one intended to make objection to the probate of a will or grant of administration, to file a *caveat* with the surrogate; and such a *caveat* might be filed by a mere stranger who had no interest under the will; and in such a case the surrogate was required to cause the parties and witnesses to appear before him, and hear and determine the matter in controversy, and grant such probate, letters testamentary, or of administration, as should be agreeable to law.¹⁶ The Revised Statutes, however, omitted the provisions in regard to the *caveat*, and provided that, as to wills of personal property, probate might be contested by any one of the next of kin to the testator, on allegations filed within the year.¹⁷ Subsequently, provision was made for a contest by any person having a right, upon the original application for probate of any will, on filing with the surrogate, before probate made, a request in writing that all the witnesses be examined.¹⁸ And these two methods of objecting to probate are substantially preserved by the Code of Civil Procedure.¹⁹ Objection will not be heard as to the right of the party to contest on the ground of want of interest; but the question of interest will be determined with the main question.²⁰

TITLE SECOND.

JURISDICTION OF PROBATE.

ARTICLE FIRST.

ESTABLISHMENT OF WILLS BY CIVIL ACTION.

§ 134. **Where original will cannot be obtained.**—Surrogates' Courts, and they only, have authority to issue letters testamentary and of administration. Letters testamentary or of administration, with the will annexed, are granted upon the Surrogate's

the will does not apply where the devisees or some of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir, and secreted or destroyed. It only applies to a concealment which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. (Cole v. Gourlay, 79 N. Y. 527; Fox v. Fee, 167 N. Y. 44; 60 N. E. Rep. 281.) The exception in favor of

devisees who are under age, does not apply to those who were not born until after the testator died. (Id.)

¹⁶ 1 R. L. 1813, 446; Reid v. Vanderheyden, 5 Cow. 719.

¹⁷ 2 R. S. 61, §§ 30, 31. See Co. Civ. Proc., §§ 2647, 2648.

¹⁸ L. 1837, c. 460, § 11.

¹⁹ See §§ 2617, 2618, 2647, 2648, c. VIII, *post*.

²⁰ Norton v. Lawrence, 1 Redf. 473. See *ante*, §§ 98, 104.

Court's own decree admitting the will to probate, or upon the judgment and decree of the Supreme or other superior courts of record of our own State, or of the courts of some other State or foreign country. Letters issued upon a probate decree granted by a foreign tribunal are called ancillary letters. The cases in which a will may be proved — *i. e.*, established, by an *action*, in the courts of this State,— are of three classes. The first class is of wills of real or personal property, or both, executed in such a manner, and under such circumstances, that they might, under the laws of this State, be admitted to probate in a Surrogate's Court, "but the original will is in another State or country, under such circumstances that it cannot be obtained for that purpose."²¹ A will which "has been *lost or destroyed* by accident or design, before it was duly proved and recorded within the State," may also be established by an action.²²

§ 135. Certain foreign wills of personalty.— The third class of wills which may be established by action is that of wills of personal property made by a person residing out of the State at the time of its execution or at the time of his death, and executed according to the laws of the State or country in which it was executed or in which the testator resided at the time of his death, and the case is not one where the will can be admitted to probate in a Surrogate's Court under our laws.²³

§ 136. Judgment establishing will.— If, in such an action, the validity of the will is satisfactorily shown, the court must render final judgment establishing it. But if the will was that of a resident of the State at the time of his death, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question, arising with respect to any provision, must be determined in the same or another action, or in a special proceeding, as if the will was executed within the State.²⁴ The provision prevents residents from evading the laws of the State, governing the substance of testamentary dispositions, by resorting to execution in a foreign State or

²¹ Co. Civ. Proc., § 1861, subd. 1. This section applies to wills made before, as well as to those made after, September 1, 1880. (Co. Civ. Proc., § 1867.) In his edition of the Code, Mr. Throop traces the history of this jurisdiction. An action under that section to prove and establish the will of a resident of another State which has been proved in such State is not authorized. (Clark v. Poor, 73 Hun, 143; 25 N. Y. Supp. 908.) But see Plant v. Harrison, 36 Misc. 649; 74 N. Y. Supp. 411.

²² Co. Civ. Proc., § 1861, subd. 1. See title 6 of this chapter for proceedings to prove a lost or destroyed will.

²³ Co. Civ. Proc., § 1861, subd. 2. Co. Civ. Proc., § 2611, enumerates the wills which are provable in Surrogates' Courts.

²⁴ Co. Civ. Proc., § 1862.

country. Where the parties appearing or duly served in the action include all those who would have been necessary parties to a proceeding for the probate in a Surrogate's Court, the final judgment establishing the will must direct that an exemplified copy be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or of administration with the will annexed, be issued from his court as upon a will duly proved before him.²⁵ A copy of the will so established must be incorporated into the final judgment, and the surrogate must record the same, and issue letters as directed in the judgment.²⁶

§ 137. **Action to determine validity, etc., of a devise.**— Besides the various actions in which the validity of a devise may be incidentally determined,—as in ejectment, partition, or in actions to determine conflicting claims to real property, and also in a proper case, in a suit *quia timet*,²⁷—the statute²⁸ provides for the determination of the validity, construction, and effect, under the laws of *this* State, of a devise of real property situated *within* this State, or of an interest in such property which would descend to an intestate's heirs. For that purpose the action may be brought, or rather such relief may be had, “in like manner as the validity of a deed purporting to convey lands may be determined.” It will be noticed, that it is not the validity of the *will*, but of a disposition made in a will, that may be determined. The courts of equity of this State have no inherent jurisdiction to establish a will.²⁹ It is specially provided, however, that this remedy by action cannot be availed of by one who was, before the commencement of the action, duly cited in a special proceeding in a Surrogate's Court, under section 2624, in which the question in controversy was determined by the Surrogate's Court. The judgment in such an action may perpetually enjoin any party from setting up, or from impeaching, the devise, or otherwise making any claim in contravention of the determination of the court, as justice requires.³⁰

²⁵ Co. Civ. Proc., § 1863.

²⁶ Co. Civ. Proc., § 1864.

²⁷ See *ante*, § 60.

²⁸ Co. Civ. Proc., § 1866. An heir-at-law cannot maintain an action under this section to obtain a construction of the will, for the purpose of having certain dispositions of real estate declared invalid, there being no trust of the property in question, though there is of other prop-

erty, and to obtain possession as heir-at-law of the property now held by another under the will, since a perfect remedy at law exists. (*Jones v. Richards*, 24 Misc. 625.)

²⁹ *Anderson v. Anderson*, 112 N. Y. 104; 20 St. Rep. 344. See *Smith v. Hilton*, 50 Hun. 236; 19 St. Rep. 340.

³⁰ This section and the following one (§ 1867) were intended to furnish the

§ 138. **Action to determine validity of probate.**—An entirely new remedy was created by L. 1892, c. 591,³¹ by which “the validity of the probate” of a will or codicil proved and admitted in a Surrogate’s Court of this State may be determined, at the instance of “any person interested in the will or codicil,” in an action in the Supreme Court. Probably to obviate the construction placed by the courts upon the phraseology of this section, to the effect that the remedy furnished was not available to one claiming in hostility to the will,³² the act was amended in 1897³³ so as to provide that “any person interested as heir-at-law, next of kin or otherwise, in any estate, any portion of which is disposed of, or affected, or any portion of which is attempted to be disposed of, or affected, by a will or codicil admitted to probate in this State, as provided by the Code of Civil Procedure, within two years prior to the passage of this act, or any heir-at-law or next of kin of the testator making such will, may cause the validity, or invalidity, of the probate thereof to be determined.”³⁴

The issue of the pleadings in such action is confined to the question whether the writing produced is or is not the last will and codicil of the testator, or either.³⁵ It must be tried by a jury,³⁶ and the verdict thereon is conclusive, as to real or personal prop-

only statutory rule governing the general subject-matter treated of in them. (*Horton v. Cantwell*, 108 N. Y. 255; 13 St. Rep. 615.) The section changes the prior rule laid down in *Wager v. Wager*, 89 N. Y. 161. See *Adams v. Becker*, 47 Hun, 65; 8 N. Y. Supp. 260. It was held in an action under L. 1853, c. 238, of which section 1866 is a substitute, that at least two of the witnesses (that being the number required to be examined by the surrogate on the proof of wills) must be called and examined, except in the event of death, insanity, or absence, or unless the heir has waived his right (*Chapman v. Rodgers*, 12 Hun, 342); although, in the trial of other issues, where it becomes necessary to give a will in evidence, it is not necessary to call both witnesses. (*Id.*, per Learned, P. J.)

³¹ Co. Civ. Proc., § 2653a.

³² *Lewis v. Cook*, 150 N. Y. 163; 44 N. E. 778; *Whitney v. Britton*, 16 App. Div. 457; 45 N. Y. Supp. 1150; *Wallace v. Payne*, 14 App. Div. 597; 43 N. Y. Supp. 1119 (reargument of 9 App. Div. 34). But see, *contra*, *Snow v. Hamilton*, 90 Hun, 157, and *Thomas v. Thomas*, 9 App. Div. 487,

both of which were decided prior to *Lewis v. Cook*, *supra*.

³³ L. 1897, c. 701, superseding L. 1897, c. 104. (*Reid v. Curtin*, 51 App. Div. 545; 64 N. Y. Supp. 833.)

³⁴ The remedy provided by the act applies to all wills whether of real or personal property (*Snow v. Hamilton*, *supra*); even though the testator died prior thereto. (*Lewis v. Cook*, 89 Hun, 183, reversed, on another point, 150 N. Y. 163.)

³⁵ Upon the trial, the party interested in sustaining the will has the affirmative. He must offer in evidence the will, with proof of its probate, and rest. Thereupon the burden is upon the contestant to establish its want of validity. See *Hogan v. Stone*, 68 App. Div. 60; 74 N. Y. Supp. 109; *Dobie v. Armstrong*, 160 N. Y. 584; 55 N. E. 302.

³⁶ A verdict may be directed. (*Hawke v. Hawke*, 82 Hun, 439; 31 N. Y. Supp. 968; *Katz v. Schnaier*, 87 Hun, 343; 34 N. Y. Supp. 315. A general verdict against the will cannot stand if any of the grounds alleged were insufficient to nullify the instrument. (*Buchanan v. Belsey*, 65 App. Div. 58.)

erty, unless a new trial be granted, or the judgment thereon be reversed or vacated.³⁷ The action must be commenced within two years after the will or codicil, if one of real property, has been admitted to probate, or, in case of a person's nonage, unsound mind, imprisonment, or absence from the State, within two years after such disability has been removed. If, however, the will is one of personalty, the action cannot be maintained after the expiration of one year.³⁸

ARTICLE SECOND.

PROOF OF WILLS IN SURROGATES' COURTS.

§ 139. What wills provable by surrogate.—Not every instrument executed by a decedent, as and for his last will and testament, is provable in a Surrogate's Court in this State. Independently of a restriction as to a testator's age, the statute imposes certain limitations, with respect both to the formalities of execution and attestation, and to the testator's residence and the location of his property. Thus, the will of a resident of New York, executed in France according to the French law, and not according to the law of this State, and the will of a resident of France who dies leaving no property situated, or which afterwards comes, here, are within the excluded classes. These limitations will be considered separately.

§ 140. Jurisdiction as affected by mode of execution.—The statute prescribes certain formalities for the execution of a will, which are considered in detail in a subsequent article of this chapter. But it is not in all cases essential that a will should be executed with those formalities, in order to be proved in a Surrogate's Court of this State. Certain wills of personalty, which may be termed foreign wills, may be proved in like manner, although not executed with the solemnities prescribed in the local statutes.

The Code provides that a will of real or personal property, executed as prescribed by the laws of the State, or a will of personal property, executed without the State, and within the United States, the dominion of Canada, or the kingdom of Great Britain and Ireland, as prescribed by the laws of the State or country where it is or was executed, or a will of personal property, executed by a person not a resident of the State, according to the

³⁷ One thus bound cannot object to the jurisdiction because another person who was a proper party had not been made such. (*Matter of Ruppenner*, 9 App. Div. 422; 41 N. Y. Supp. 212.)

³⁸ *Long v. Rodgers*, 79 Hun. 441; 29 N. Y. Supp. 981; *Katz v. Schnaier*, 87 Hun. 343; 34 N. Y. Supp. 315.

laws of the testator's residence, may be proved in a Surrogate's Court.³⁹

It will be noted that this provision of the statute makes a distinction between (1) wills of real property, and (2) wills of personal property. Wills of the former class, to be entitled to original probate here, must be executed and attested with the formalities prescribed by our statute. It may be presumed that "real property" refers to lands situated within this State. Wills of the latter class must be executed and attested with the formalities prescribed either (1) by the statutes of this State; or (2) by the laws of the place of execution, provided that place is a sister State, or Canada, or the kingdom of Great Britain and Ireland; or (3) by the laws of the testator's residence, in case he was a non-resident of the State. The time which determines the residence of a testator, for the purposes of the above-mentioned rules, is the time of the execution of the will, and not the death of the testator. Hence it is provided that "the right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will."⁴⁰

§ 141. Jurisdiction as affected by residence, and locus of property.—The other class of limitations upon the jurisdiction of Surrogates' Courts, to admit wills to probate, is specified by a section of the Code,⁴¹ which gives to the Surrogate's Court of each county jurisdiction, exclusive of every other Surrogate's Court, to take the proof of a will, and to grant letters thereupon, in the cases specified in the statute. These cases will be discussed when we

³⁹ Co. Civ. Proc., § 2611, as amended 1893. As to what law governs the probate of wills, see article third of title fourth of this chapter, § 177, *post*.

⁴⁰ Co. Civ. Proc., § 2611, as amended 1893; former §§ 2612, 2613 are now consolidated with § 2611, the whole of which is declared by the last clause thereof (former § 2613) to apply only "to a will executed by a person dying after the eleventh day of April, in the year 1876; and it does not invalidate a will executed before that date, which would have been valid but for the enactment of sections 1 and 2 of chapter 118 of L. 1876, except where such a will is revoked or altered by a will which those sections render valid, or

capable of being proved" in a Surrogate's Court, as prescribed. The question, therefore, whether a will of personalty made by a person dying before the date specified, is so executed as to be capable of proof in a Surrogate's Court, must be determined in view of the former rule of law, according to which such a will was deemed duly executed, if executed with the formalities prescribed by the law of the place where the testator was domiciled *at the time of his death*. (Moultrie v. Hunt, 23 N. Y. 394.) In such a case, if a Surrogate's Court has no jurisdiction, the will may be established in an action (see Co. Civ. Proc., § 1861, subd. 2, and § 1867).

⁴¹ Co. Civ. Proc., § 2476.

come to examine the question of the jurisdiction of the surrogates of the several counties of the State — how far it is exclusive or otherwise.⁴² It may, however, be useful to observe, in this place, by way of analysis, that the statute provides for two general classes of cases: 1. Wills of residents of the State. 2. Wills of nonresidents. Probate may be taken in *all* cases of wills of residents, and in some cases of wills of nonresidents. The cases where application for probate of the will of a nonresident⁴³ will be entertained may be arranged under two heads:

(a) Where there is personal property in the State.

(b) Where real property of the decedent, to which the will relates, or which a surrogate might direct to be sold, etc., for debts, etc., lies in the State.

The cases in which the statute expressly authorizes probate of the will of a nonresident, on the ground that personal property of the testator is in the State, are again divisible into four classes: 1. Where he dies within the State, leaving personal property therein.⁴⁴ 2. Where he dies within the State, leaving personal property which thereafter comes into the State. 3. Where he dies without, leaving personal property within, the State. 4. Where he dies without the State, leaving personal property which thereafter comes within the State. The general plan, then, upon which the statute may be stated to proceed, is to allow surrogates to take proof of a duly executed will, independently of the place of the testator's death, where he resided within the State, or where, residing without the State, he left real property therein, affected by the will, or subject to a surrogate's disposition, or left personal property in, or which after his death comes into, the State.

§ 142. Assets coming into State after death.— These provisions supply two cases omitted in the original, viz., where a noninhabit-

⁴² See *post*, § 143.

⁴³ See L. 1894, c. 731. That statute provides, in substance, that the will of any citizen, or, if female, whose father or husband shall have previously declared his intention to become such citizen, who shall die resident in Great Britain or any of its dependencies, which has been proven in such foreign jurisdiction and which affects property in this State, shall be admitted to probate upon production of a copy thereof and of the proofs, certified by the United States consul; but the same proceedings shall be had in the Surrogate's Court as in the case of a resi-

dent, except that the beneficiaries, only, need be cited. The purpose of that act is obscure, but we do not think it was intended to enlarge the jurisdiction of the surrogates as affected by the mode of execution of a will of real property.

⁴⁴ Jurisdiction was formerly made to depend upon the existence of "assets;" the expression above employed is "personal property," because the former term, as now defined, does not include effects exempted by law in favor of the widow, etc., but applies exclusively to personal property applicable to the payment of debts. Co. Civ. Proc., § 2514, subd. 2.

ant testator dies in any county in the State, leaving no assets in the State, but assets thereafter come within the county of his decease or any other county; and where a noninhabitant testator dies in any county in the State, leaving no assets there, but leaving assets in some other county in the State; thus superseding a ruling substantially to the effect that Surrogates' Courts may take proof of wills, either (1) where the Legislature has conferred jurisdiction; or (2), in an analogous case, where jurisdiction has not been so conferred. It is true, the defects referred to were theoretical rather than practical, since, as the smallest amount of assets is enough to sustain an application for probate, it would scarcely be possible for any one to die in a county without leaving assets enough therein for that purpose.⁴⁵ The fact that the assets were brought here irregularly, after decedent's death, upon which letters were issued here, will not deprive the surrogate of jurisdiction to decree distribution.⁴⁶ The proviso that personal property of a nonresident, coming into the State after his death, must, in order to give jurisdiction to our courts, be such as "remains unadministered," is in consonance with principles of international and interstate comity recognized as controlling under the former statutes.⁴⁷

⁴⁵ In *Kohler v. Knapp* (1 Bradf. 241), the application for probate was sustained on the ground that an old cloak belonging to the testator had afterwards come into the county of his decease. The surrogate has jurisdiction to take proof of a nonresident decedent's will where a note secured by mortgage on land situated in another State has come into this State since testator's death (*Matter of Hopper*, 5 Dem. 242); and so where decedent had an interest in a life insurance policy of a New York company (*Johnston v. Smith*, 25 Hun, 171); and where he had a claim against a resident of the surrogate's county, for money deposited with him, notwithstanding it was subsequently shown to be invalid and incapable of enforcement. (*Sullivan v. Fosdick*, 101 Hun, 174.) For other illustrations, see *Matter of Drowne*, 18 St. Rep. 981; *Booth v. Timoney*, 3

Dem. 242; *White v. Nelson*, 2 id. 416. On the other hand, funds transmitted to this State by a foreign executor to be paid over pursuant to a will are not a basis for the grant of administration here. (*Sedgwick v. Ashburner*, 1 Bradf. 105.) In *Townsend v. Pell* (3 Dem. 367), a nonresident of the State died without its limits, leaving personal property in New York county, which was taken into actual custody by a domiciliary executrix before the filing of a petition in the Surrogate's Court of that county, in pursuance whereof the will was admitted to probate here. Held, that the court had no jurisdiction. See also *Gulick v. Parsons v. Lyman*, 20 N. Y. 103; 18 How. Pr. 193.

⁴⁶ *Matter of Hughes*, 95 N. Y. 55.

⁴⁷ *Sedgwick v. Ashburner*, 1 Bradf. 105.

TITLE THIRD.

APPLICATION FOR PROBATE.

ARTICLE FIRST.

APPLICATION, WHERE MADE.

§ 143. **Exclusive jurisdiction of one surrogate.**—Assuming that the will is one of which a surrogate is authorized to take the proof, it becomes necessary to determine in which county the application should be made. In some instances the applicant is confined to one particular county, while in others the surrogates of two or more counties have concurrent jurisdiction.

The Surrogate's Court of each county has jurisdiction, exclusive of every other Surrogate's Court, to take the proof of a will, and to grant letters thereupon, in either of the following cases: 1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere. 2. Where the decedent, not being a resident of the State, died within that county, leaving personal property within the State, or leaving personal property which has, since his death, come into the State, and remains unadministered. 3. Where the decedent, not being a resident of the State, died without the State, leaving personal property within that county, and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered. 4. Where the decedent was not, at the time of his death, a resident of the State, and a petition for probate of his will, or for a grant of letters of administration, under either of the two last preceding clauses (2 and 3), has not been filed in any Surrogate's Court; but real property of the decedent, to which the will relates, or which is subject to disposition pursuant to a surrogate's decree for the payment of the decedent's debts, etc., is situated within that county, and no other.⁴⁸ It will be observed that the first of these four clauses relates to residents, while the remaining three apply to nonresidents of the State; and that, of the last-named three, the first two contemplate a jurisdiction depending upon residence, place of death, and locality of personalty, while, under the final clause, jurisdiction depends upon residence and locality of realty, and cannot, in any case, be exercised where it has been invoked under either of the two preceding clauses.

⁴⁸ Co. Civ. Proc., § 2476.

§ 143a. **Residence in county.**—The first inquiry, therefore, in this connection, is as to the testator's residence. If he was a resident of the State, then, no matter where his death occurred, probate can be had only in the county of such residence.⁴⁹ The word "resident" throughout this section replaces the word "inhabitant" in the original statute. The words "resident" and "residence" are not expressly defined in the Code, and I expressed an opinion in former editions of the present book, that the context in each case seemed to require these words to be construed as indicating the permanent residence — the home, that is, the "domicile;"⁵⁰ and that the general distinction taken by the decisions, between "residence" and "domicile," was inapplicable to the word "reside," and its derivatives, as used in the Code. It has since been determined that, while the distinction between "residence" and "domicile" still exists, "it is not necessary to seek the aid of adjudications bearing upon the much distorted questions of residence and domicile, and the difference between them for certain purposes, such as taxation and the like. A man may reside where he chooses, and although, by a *quasi* fiction of the law, he may be located in different places for public purposes, such as taxation and the like, yet his home he determines for himself; and where that is within the State, his residence — as described for the appropriation of his estate by the legal processes provided by law — is where that is situated."⁵¹ The question of

⁴⁹ *Oviedo v. Duffie*, 5 Redf. 137. The presentation of a petition for probate, alleging residence of the decedent within the county, gives exclusive jurisdiction to try the question of residence, of which the court cannot be deprived by subsequent proceedings in the Surrogate's Court of another county on an allegation of residence in the latter. (*Matter of Buckley*, 41 Hun, 106.)

⁵⁰ Such was the meaning attached to "inhabitant" in the statutes revised in the provisions under consideration. (*Isham v. Gibbons*, 1 Bradf. 69.) For the general distinction taken by the decisions, see *Frost v. Brisbin*, 19 Wend. 11; *Douglas v. Mayor, etc.*, 2 Duer, 110; *Sherwood v. Judd*, 3 Bradf. 419; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Brown v. Lynch*, 2 Bradf. 214. The authorities upon the question of domicile are collated and discussed in *Dupuy v. Wurtz*, 53 N. Y. 556. See Mr. Moak's note to the case of *Hamil-*

ton v. Dallas, L. R. 1 Ch. 257; 15 Moak, 739.

⁵¹ *Per Brady, J., Matter of Zerega*, 58 Hun, 505; 12 N. Y. Supp. 497. In that case, testator described himself in his will as a resident of Westchester county, voted and paid taxes there, although he had sold his residence there and passed his winters in New York; — Held, that, for purposes of jurisdiction of the surrogate, Westchester was the place for probate, and a motion to revoke the probate in New York county should have been granted. The proceedings having been remitted to the New York surrogate "for further action," additional testimony was taken on the question of testator's residence. The surrogate held that "though a man may have two residences, he can have but one domicile (*Douglas v. Mayor, etc.*, 2 Duer, 110; *Bell v. Pierce*, 51 N. Y. 16), and that *Zerega* (the testator) had two residences, one in Westchester and the other in New

the testator's residence in one or more counties is, therefore, one of intention, and no arbitrary rule is to be laid down in relation to it; courts must draw their conclusions of intention to fix or to change a domicile from all the circumstances of each case.⁵²

York county." On a review of the testimony (20 N. Y. Supp. 417), the surrogate adhered to his previous decision and refused to revoke the probate. The written declarations of the testator were principally relied upon by the petitioner for revocation, as to which the court said: "With written declarations the liability to a distortion of language is lessened, and if the paper is all in the handwriting of the party it is not open to suspicion. But the value of written declarations as evidence depends upon the circumstances under which they were made—whether care was taken to have the paper read to the party, if only the signature is in his handwriting, and whether his mind grasped the legal import of the words used, if the language in the paper was not his own."

In *Isham v. Gibbons* (1 Bradf. 91), Bradford, S., said: "Written declarations, even of the most solemn character, are but facts to enable the court to discover the intention of the party. It is in this light alone that they are to be received and weighed. At best, the animus of the party is only to be inferred from them. In this respect they are taken like any other facts. Declarations of any kind are not controlling, but may be, and frequently are, overcome by other and more reliable indications of the true intention." So, in the *Attorney-General v. Kent*, (1 Hurlstone & C. 12), though the judges held that jurisdiction was in the English courts, they stated that the declaration in the will that the decedent was "residing in the county of Surrey" was entitled to very little consideration. And in *Gilman v. Gilman* (52 Me. 165) it was held, though the testator described himself as "of the city and State of New York," that the recital could not weigh against facts which led it to the conclusion that his domicile continued at Waterville, in the State of Maine.

In *Hegeman v. Fox* (31 Barb. 478), referring to both oral and written declarations, the court (Judge Emott writing the opinion) says: "To the evidence of what he said at various times I attach little importance. It

comes to us impressed with the character of the particular mood of the man when he uttered it, which, no doubt, varied and was affected by the condition of his health, by his family circumstances and by other causes. It is colored more or less by the medium through which it comes, and it depends altogether upon the recollection of witnesses; nor do I consider the statement in Mr. Moore's bill in chancery, that he was an inhabitant of Florida, standing alone, as at all decisive. It was necessary for him to make such an allegation for the purpose of his suit, and he might very well have made it without fully considering its import or its extent or its consequences in other relations. Coupled, however, with his conduct, it is evidence which may disclose another motive for a wish, on his part, to acquire a residence in Florida, at or after the time when he settled near Jacksonville. * * * But the whole matter is a question of intention, and no arbitrary rule is to be laid down in relation to it. See *Mackenzie v. Mackenzie*, 3 Misc. 200; *Matter of Jones*, 19 id. 80; *Matter of Brant*, 30 id. 14.

⁵² *Dupuy v. Wurtz*, 53 N. Y. 562, and cases *supra*. In *Matter of Gould* (30 St. Rep. 949; 9 N. Y. Supp. 603), deceased, who resided in Wayne county until 1885, determined to change his residence to Monroe county and removed the principal part of his effects to that county and made an affidavit that he was a resident of that county. Held, that the surrogate of Monroe county properly assumed jurisdiction of the probate of his will. A Surrogate's Court has jurisdiction to probate the will of a decedent who died within the surrogate's county, after having been judicially declared to be insane at his former residence in another county, and whose residence was thereafter changed to the surrogate's county by the act of his committee. (*Hill v. Horton*, 4 Dem. 88.) See *Von Hoffman v. Ward*, 4 Redf. 244, as to how far a parent may change the domicile of an infant. Compare *Seiter v. Straub*, 1 Dem. 264.

§ 144. **Nonresident's property in county.**— If the testator was domiciled in any other State, the nature and *locus* of his property are to be considered. His estate may consist of (a) only personal effects within, or which, after his death, come into the State, or (b) only real property, in the State, described in the fourth clause of section 2476, or (c) both real and personal property. We will consider each of these hypotheses.

(a) In this case, the place of the testator's death is to be noted. If he died within the State, the application can be made only in the county where he died; while, if he died without the State, it can be made only in the county where the property was left or has come.⁵³

(b) Here, the application for probate must be made in the county where the real property is situated, independently of the place of the testator's death.

(c) In such a case, by the terms of the statute, if a petition for probate, or for letters of administration, has been filed under either the second or third clauses of the section, no surrogate can gain jurisdiction under the fourth. But there seems to be a *casus omissus* in the statute, in failing to prohibit the invoking of jurisdiction based upon the locality of personal property of a non-resident, after a petition has been filed under the fourth clause of the statute.

§ 145. **Nature and locality of personal property.**— The general definition of "personal property" makes the term include money, goods and chattels, things in action, and evidences of debt.⁵⁴ As used in respect to surrogate's proceedings, the expression "personal property" signifies every kind of property which survives a decedent, other than real property as defined in reference to the same subject, and includes a right of action conferred by special statutory provision upon an executor or administrator.⁵⁵ The question, what are "assets," will be considered in a subsequent chapter. That term having been expunged from the statutory provision now under discussion, does not call for further notice here.

⁵³ We assume here that there is only one such county. The case where property is left in, or comes into, two or more counties is subsequently discussed.

⁵⁴ Co. Civ. Proc., § 3343, subd. 7. Subd. 7 of § 3343, defining the term "personal property" was repealed by L. 1892, c. 677, by which another definition was given (§ 4). A "debt" in-

cludes every claim or demand upon which a money judgment could be recovered in an action. (Co. Civ. Proc., § 2514, subd. 3.) See Despard v. Churchill, 53 N. Y. 192.

⁵⁵ Co. Civ. Proc., § 2514, subd. 13. The corresponding definitions of real property are given in the next paragraph.

In respect to the subject of locality, tangible personal property presents no difficulties. Where personal property left by a decedent consists of a debt owing by a resident of this State, its locality is established by the Code which declares that "for the purpose of conferring jurisdiction upon a Surrogate's Court, a debt, owing to a decedent by a resident of the State, is regarded as personal property situated within the county where the debtor or either of two or more joint debtors reside; and a debt, owing to him by a domestic corporation, is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor is a resident or a nonresident of the State, or a foreign or a domestic government, State, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property, at the place where the bond, note, or other instrument is, either within or without the State."⁵⁶

§ 146. Nature and locality of real property.—Real property is, in general, coextensive in meaning with lands, tenements, and hereditaments.⁵⁷ As used in respect to surrogates' proceedings, the expression includes every estate, interest and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are by law declared to be assets.⁵⁸ As regards the locality of real property, it was held under the former statute,⁵⁹ giving the surrogate jurisdiction where "any real estate devised by the testator" is situated in his county, that jurisdiction depended not upon the decedent's ownership of such property, but upon his actual or apparent devise thereof.⁶⁰ But such a question cannot arise under the present Code, which, in this instance, adopts the language of the Revised Statutes.⁶¹

The provision giving the surrogate jurisdiction to grant probate of the will of a nonresident by reason of real property being

⁵⁶ Co. Civ. Proc., § 2478; substantially enacting what was formerly the rule. See *Kohler v. Knapp*, 1 Bradf. 241; *Ferris v. Van Vechten*, 73 N. Y. 113; *Beers v. Shannon*, id. 292; *Matter of Hopper*, 5 Dem. 242.

⁵⁷ L. 1892, c. 677, § 3, which re-

pealed subd. 6 of Co. Civ. Proc., § 3343.

⁵⁸ Co. Civ. Proc., § 2514, subd. 13.

⁵⁹ L. 1837, c. 460, § 1, subd. 5.

⁶⁰ *Vreeland v. McClelland*, 1 Bradf. 393.

⁶¹ 2 R. S. 220, § 1, subd. 1.

situated in his county, is important, chiefly with reference to giving effect to the devises and powers of sale relating to real property within the State, contained in a will, in a case where, so far as personal property is concerned, there is no jurisdiction to take probate here;⁶² and also in that class of cases where, by reason of there being insufficient assets, creditors must resort to the real property for the satisfaction of debts.⁶³ It removes doubts and obscurities which existed under the original enactments of which it is a revision, but appears, as has been already intimated, still to leave open a question which may give rise to a conflict of jurisdiction.

§ 147. **Concurrent jurisdiction of two or more surrogates.**— It is manifest that where jurisdiction depends on the existence of property in a county of the State, two or more surrogates might have equal claim to jurisdiction. The Code provides for such a contingency, by establishing the rule that where personal property of a nonresident testator dying without the State, is within, or after his death comes into, two or more counties, under such circumstances as to confer jurisdiction to take the probate; or real property of any nonresident testator is situated in two or more counties, under the like circumstances, the Surrogates' Courts of those counties have concurrent jurisdiction, exclusive of every other Surrogate's Court, to take the proof of the will and grant letters thereupon; but where a petition for probate, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.⁶⁴

ARTICLE SECOND.

APPLICATION FOR PROBATE, HOW AND BY WHOM MADE.

§ 148. **In general.**— The person who, it might be supposed, would naturally take steps to have a will proved, is the executor, if any, named therein. It is competent, however, for either "a person designated in a will as executor, devisee, or legatee, or any other person interested in the estate, or a creditor of the decedent, or any party to an action brought or about to be brought, and interested in the subject thereof, in which action the decedent,

⁶² See *Young v. Brush*, 28 N. Y. 667; ⁶³ See *Hollister v. Hollister*, 10 How. Thorn v. Sheil, 15 Abb. Pr. (N. S.) 81. Pr. 532.

⁶⁴ Co. Civ. Proc., § 2477.

if living, would be a proper party,"⁶⁵ to present to the Surrogate's Court having jurisdiction a petition for the probate of the will. Under the definition,⁶⁶ given in the Code, of a "person interested," this enumeration includes, besides the persons specifically designated, a husband or wife, and those coming within the description of heirs and next of kin. Doubtless, under the language of the present, as under that of the former statute, the rule obtains, that any interest, or the bare possibility of interest, is sufficient to entitle one to be a party to the proceeding.⁶⁷ A person interested may make the application by a duly authorized agent; it is not necessary that he should apply personally.⁶⁸ Formerly, where a married woman propounded a will, her husband was usually required to join with her; but now, married women are capable of receiving letters as though they were single women,⁶⁹ and it is expressly declared that a married woman prosecutes or defends a special proceeding as if she were single.⁷⁰

The term "creditor" includes every person having a claim or demand against the testator, upon which a judgment for, or a direction for the payment of, money could be recovered in an action, and also any person having a claim for expense of administration or for funeral expenses.⁷¹

§ 149. Presence of the will.— It is not only the right, but the duty of one who finds a will which he is interested to prove, to propound it for probate.⁷² The proponent need not, even where the will is not lost or destroyed,⁷³ have the document in his possession, or produce it as a condition of obtaining a citation. Its production can be compelled, at the proper time, by a subpoena *duces tecum*.⁷⁴ If the instrument is inaccessible, that is, in another State or country under such circumstances that it cannot be obtained here, it may nevertheless be proved.⁷⁵ If lost or de-

⁶⁵ Co. Civ. Proc., § 2614, as amended 1897. No act of an executor, offering a will for probate, can deprive persons interested in the estate of the right to have it admitted. (Paxton v. Patterson, 26 Abb. N. C. 389; s. c., *sub nom.* Paxton v. Brogan, 35 St. Rep. 479; 12 N. Y. Supp. 563.)

⁶⁶ Co. Civ. Proc., § 2514, subd. 11.

⁶⁷ Matter of Greeley, 15 Abb. (N. S.) 393; Boynton v. Laddy, 20 St. Rep. 148. See other cases, *ante*, § 98.

⁶⁸ Russell v. Hartt, 87 N. Y. 19.

⁶⁹ L. 1867, c. 782, § 2.

⁷⁰ Co. Civ. Proc., § 450.

⁷¹ Co. Civ. Proc., § 2514, subd. 3, as amended 1900 (L. 1900, c. 120).

⁷² Matter of Griswold, 15 Abb. Pr. 299. And see Thorn v. Sheil, 15 Abb. Pr. (N. S.) 81.

⁷³ See Co. Civ. Proc., § 2621.

⁷⁴ Co. Civ. Proc., § 2481, subd. 3.

⁷⁵ Matter of Delaplaine, 5 Dem. 398; 19 Abb. N. C. 36. And this is so, even where there were no subscribing witnesses, if the will has been executed in conformity with the laws of decedent's residence. (Ib.) As the statute (L. 1837, c. 460, § 1) stood before the present Code, Surrogates' Courts were authorized to take proof of the last wills of all deceased persons, where the testator, being a noninhabitant, died out of the State, leaving assets in the

stroyed, it may be proved either by action, or by a special proceeding in the Surrogate's Court. If it has been already proved before a foreign tribunal, it may be recorded here upon a duly exemplified copy of the will, etc.

§ 150. Foreign wills.—The statute makes no distinction, in respect to the right to apply for probate, between a domestic and a foreign will. In the case of the latter, the application is usually made by the foreign representative, in person or by his attorney in fact. The right of a foreign consul to intervene in any such proceeding on behalf of a member of his nation not within the country, has been generally recognized. The jurisdictional facts existing, the court here is not bound to postpone the probate of a foreign will, until the instrument has been submitted to the proper judicial tribunal of the decedent's domicile.⁷⁶

§ 151. Application by written petition.—The formalities of the application for proof of a will, so far as they are prescribed by statute, are very simple. The application is by petition. Whatever may have been the former practice,⁷⁷ the statute now recognizes the general rule,⁷⁸ that the petition for probate must be in writing and duly verified.⁷⁹ The requisite form of the allegations and mode of verification are the same as in case of a verified pleading in a civil action.⁸⁰ The affidavit of verification may be taken before any officer authorized to administer oaths and affidavits generally.⁸¹ Where the property is small, and the parties are few, it has been not unusual for them to go before the surrogate together, produce the will, and state the facts, in answer to inquiries addressed to them; and in such case, if no objection appeared, the surrogate would proceed at once to take proof of the will, the citation sometimes being dispensed with, on the ground of a personal appearance of all parties in interest.⁸²

county, etc., and provision was made for the taking of testimony by commissioners in foreign countries. Original probate was, therefore, granted on wills, the originals of which were not produced. Thus, a will disposing of real and personal property in this State was executed in Scotland, according to the laws of that country, and also according to the laws of this State. The evidence of the subscribing witnesses was taken in Scotland, by commissioners appointed by the surrogate here, and a copy of the will annexed to the commission was certified

by the commissioners as correct. Held, that the surrogate had jurisdiction to admit the will to probate without production of the original. (*Russell v. Hartt*, 87 N. Y. 19.)

⁷⁶ *Booth v. Timoney*, 3 Dem. 416.

⁷⁷ See *Smith v. Remington*, 42 Barb.

⁷⁵ : *Wright v. Fleming*, 19 Hun, 370.

⁷⁸ See *Foster v. Wilber*, 1 Paige, 537.

⁷⁹ Co. Civ. Proc., § 2614.

⁸⁰ See Co. Civ. Proc., §§ 523–526 and 2534.

⁸¹ Co. Civ. Proc., § 842.

⁸² See *Everts v. Everts*, 62 Barb. 577; *Bailey v. Stewart*, 2 Redf. 212.

Under the present Code it is believed that the provision for a verified written petition for probate is compulsory; for although its language is that the proponent "*may* present" such a petition, the permissive form of the expression appears to be, owing to the main purpose of the section, to confer upon the persons specified the right to apply for probate; and no other method of invoking the jurisdiction of the court is prescribed. And such, indeed, has been the general and orderly course of practice. On the other hand, if the petition shows that there are no persons entitled, under the statute, to be cited, or if the parties interested have waived issue and service,⁸³ a prayer for a citation and the citation itself are needless formalities; so that the ruling above cited may be expected to be held still applicable, notwithstanding the mandatory language of the Code, viz., that, "upon the presentation of such a petition, the surrogate must issue a citation accordingly."

§ 152. **Contents of the petition.**— The requirements of the Code, as to the contents of the petition, are briefly that it describe the will, set forth the facts upon which the jurisdiction of the court to grant probate thereof depends, and pray that the will may be proved, and that the persons specified in the statute as entitled to citation may be cited to attend the probate thereof.⁸⁴ Under the head of a description of the will, the petition should show whether it is oral or nuncupative; and whether it relates to real or personal property, or both. It is usual, if the will relates to real estate, though this is not essential, to state facts showing the competency of the testator to hold and convey land — as that he was of full age, also that he was a citizen of the United States, etc. As to the jurisdictional facts, the allegations will naturally vary for different cases. Where the will is executed "as prescribed by the laws of the State,"⁸⁵ and the testator "was at the time of his death a resident of" the surrogate's county, an averment of such residence, and of the time and place of his death, is all that is required. In other cases, the existence and locality of personal or real property must be shown; and a statement of the place of execution of the will may be material.⁸⁶

The petition should also set forth the name and residence of every person who is entitled to be cited on the probate, *e. g.*,

⁸³ See § 84, *ante*. Prior to the service of a citation. (Matter of Gregamendment of § 2528 (L. 1896, c. 570) ory, 13 Misc. 363; 35 N. Y. Supp. 105.)
⁸⁴ Co. Civ. Proc., § 2614.
⁸⁵ See Co. Civ. Proc., § 2611.
⁸⁶ See Co. Civ. Proc., § 2611.

each of the heirs, or each of the next of kin⁸⁷ (including adopted children),⁸⁸ or both, according to whether the will is sought to be proved as one of real or personal property, or both, and the husband or the wife of the testator, unless the name or part of the name, or residence of one or more of them cannot, after diligent inquiry, be ascertained by the petitioner, in which case that fact must be alleged.⁸⁹ If any of those persons are infants, that fact, and the name, age, and residence of each infant should be stated. The petition closes with a prayer for probate and for a citation, as prescribed in the statute. It is customary for surrogates to have printed forms of petitions, and it is suggested that these be used by the practitioner whenever available.

It is obvious, that in order to make a probate decree conclusive, great care is to be observed that all persons who may possibly have an interest should be cited.⁹⁰

§ 153. Will in foreign language.—Where the will is written in a foreign language, it may be offered for probate in that language, with or without a translation thereof annexed; but, before decree, it is the duty of the court to translate it into English, to ascertain its meaning, and to see that the proper parties have been cited. The translation is to be treated as a part of the decree admitting the will to probate, and is unassailable collaterally like the rest of the decree.⁹¹

§ 154. Duplicate and mutual wills.—Where a will is executed in duplicate, although each duplicate may be said to be a part of the will, in the sense that it is not a separate will, yet from the nature of the case, each duplicate is a complete will in itself, since each is an original. On the probate of a will executed in duplicate, the petition should describe the will as so executed, and the part kept by the testator must be produced or accounted for, as in case it cannot be found, a presumption arises that the testator has destroyed it with the intention of revoking his will.⁹² A conjoint or

⁸⁷ The question as to who are the heirs-at-law and next of kin of a deceased person is to be determined by the Statute of Descents and the Statute of Distributions. See §§ 92, 93, *ante*; and see Co. Civ. Proc., § 2514, subd. 12.

⁸⁸ *Matter of Gregory*, 13 Misc. 363; 35 N. Y. Supp. 105.

⁸⁹ Co. Civ. Proc., §§ 2518, 2523.

⁹⁰ In *Matter of Dates* (35 St. Rep. 338; 12 N. Y. Supp. 205), an infant grandchild of the testator was not

cited to appear at the probate of his will and codicil, the latter of which, giving a life estate only to testator's children, was rejected. Held, that the interests of the grandchild were not concluded by the decision.

⁹¹ *Caulfield v. Sullivan*, 85 N. Y. 153.

⁹² *Williams on Exrs.* 158. Either of two duplicate wills may be proved without the other. (*Crossman v. Crossman*, 95 N. Y. 145.) Upon a petition for probate of a will executed in duplicate, one of the two originals being

mutual will is valid, and may be proved on the death of either party.⁹³

§ 154a. **Supplemental petition; intervention of parties.**—In case the name of any person entitled to be cited has been omitted in the original petition, a supplemental petition may be filed at any time on discovering the omission, and a new citation issued to bring him into court; the parties already cited need not again be served with the citation.⁹⁴ The statute provides that “any person, although not cited, who is named as a devisee or legatee, in the will propounded, or as executor, trustee, devisee, or legatee, in any other paper, purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election, support or oppose the application. A person so appearing becomes a party to the special proceeding.” But this provision is declared not to affect the right or interest of such person, unless he becomes a party.⁹⁵ In order, therefore, to conclude a third party, it is well, though not necessary, to enter a formal order, making him a party to the pending proceeding. The trial of issues raised by parties opposing the

shown to have been destroyed by the maker, *animo revocandi*, and there being no proof that the other was in her possession at any time after its execution, though it did not appear but that it was still intact: held, that a decree might be entered denying the application. (*Asinari v. Bangs*, 3 Dem. 385.) And see *Biggs v. Angus*, *id.* 93. The nonpresentment of both duplicates is not a ground revoking the probate of the will, where both are subsequently produced. At most the probate was irregular. (*Matter of Crossman*, 3 Civ. Proc. Rep. 65, *affd.*, 30 Hun, 385; 95 N. Y. 145.)

⁹³ *Matter of Raupp*, 10 Misc. 300; 31 N. Y. Supp. 680. A mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as the separate will of whichever dies first. (*Matter of Diez*, 50 N. Y. 88; *Ex p. Day*, 1 Bradf. 476, and cases cited.) And see *Ex p. McCormick*, 2 Bradf. 169. As to effect of wills made by father and son with reference to each other, and of a release by the father to the executors of the son, in a peculiar case, see *Wood v. Vandenburg*, 6 Paige, 277. In order to make a mutual will, it must be made under an agreement that the survivor shall be enti-

tled to the other's property. (*Driscoller v. Van Den Henden*, 49 Super. Ct. [J. & S.] 508.) Two parties may agree between themselves to execute mutual and reciprocal wills, which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations, of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. (*Edson v. Parsons*, 155 N. Y. 555; 50 N. E. 265; *Everdell v. Hill*, 27 Misc. 285; 58 N. Y. Supp. 447.) See *Martin v. Hillen*, 142 N. Y. 140; 58 St. Rep. 617; *Herrick v. Snyder*, 27 Misc. 462; 59 N. Y. Supp. 229.

⁹⁴ See *ante*, § 107. *Merritt v. Jackson*, 2 Dem. 214; *Matter of Crumb*, 6 *id.* 478; *Matter of Ellis*, 22 St. Rep. 77; *Matter of Odell*, 1 Misc. 390.

⁹⁵ Co. Civ. Proc., § 2617. See *Lafferty v. Lafferty*, 5 Redf. 326. To intervene in probate proceedings, as a beneficiary under a former will, such will must either have been in existence when decedent died, or must have been lost or destroyed without decedent's procurement. (*Hamersley v. Lockman*, 2 Dem. 524.)

probate of a will, can only be had in an independent proceeding. It cannot be had, for instance, upon an application by the temporary administrator of decedent's estate for leave to discharge certain items of alleged indebtedness.⁹⁶

§ 155. **Consolidating proceedings.**— Where two instruments are propounded by different parties, the several applications for probate will be consolidated and tried together as one proceeding.⁹⁷ So, where an alleged codicil is produced by persons intervening for their interest, but who were not cited.⁹⁸

§ 156. **Withdrawal of petition for probate.**— When once a will has been produced in court — and the parties cited — the proponents may not withdraw it from the files, nor by such means procure its probate.⁹⁹ Although no act of an executor propounding a will for probate can deprive a person interested under it of the right to have the will admitted, on due proof,¹ it does not follow that in a proper case the court will not grant leave to withdraw a petition for probate, on objections filed.² If all the parties cited, being of full age, should ask that the proceeding be dismissed, no one appearing in support of the will, it would be the duty of the surrogate to dismiss the proceeding. The same result would be produced if all the parties cited should formally admit that the will was not legally executed, or that the testator was incompetent. But so long as any person cited is before the surrogate in support of the will, he has no right, upon the motion of any other party, arbitrarily to arrest or dismiss the proceeding.³ It follows that after the petition for the probate of a will is filed with the surrogate, and the proper parties cited can become actors, any of them can contest and produce witnesses in opposition to probate, and any can offer witnesses in support of the will and cross-examine those called in opposition.⁴

ARTICLE THIRD.

THE CITATION AND ITS SERVICE.

§ 157. **Classes of persons to be cited.**— We have already, in the chapter on Parties, treated generally of parties to special proceedings in Surrogates' Courts, but it will be proper to refer, in

⁹⁶ *Mason v. Williams*, 3 Dem. 285.

¹ *Paxton v. Patterson*, 26 Abb. N. C.

⁹⁷ *Van Wert v. Benedict*, 1 Bradf. 114.

389; 12 N. Y. Supp. 562.

² *Heermans v. Hill*, 2 Hun, 409; 4

⁹⁸ *Carle v. Underhill*, 3 Bradf. 101.

Sup. Ct. (T. & C.) 602.

⁹⁹ *Hoyt v. Jackson*, 2 Dem. 443; *Raven v. Norton*, id. 110.

³ *Matter of Lasak*, 131 N. Y. 624; 43 St. Rep. 101.

⁴ *Matter of Lasak*, *supra*.

this place, to the rules relating especially to a proceeding for probate.⁵ The relatives of a testator who are entitled to be cited to attend the probate of his will are: "1. If the will relates exclusively to real property, the husband, or wife, if any, and all the heirs of the testator. 2. If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator. 3. If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator."⁶ The first subdivision looks to the protection of the husband's possible estate by the curtesy.⁷ A widow's dower cannot, of course, be impaired by her husband's will.

§ 158. Public administrator and attorney-general.—Where the surrogate is unable to ascertain, to his satisfaction, whether the decedent left surviving him any person who would be entitled to the property affected by the will, if the decedent had died intestate, the citation must be directed, where the will relates to real property, to the attorney-general; where it relates to personal property, to the public administrator, who would have been entitled to administration if the decedent had died intestate.⁸

§ 159. Service of citation.—The rule governing the manner and proof of its service and the general requisites, as to form and contents of a citation, are detailed on a previous page.⁹ In addition to the requirements common to all citations, viz., that the names of all the persons to be cited, so far as they can be ascertained, must be contained therein, etc., the Code provides that the citation to attend *the probate of a will* must set forth the name of the decedent, and that of the person by whom the will is propounded; and must state whether the will relates, or purports to relate, exclusively to real property, or personal property, or to both; and where the will propounded was nuncupative, the fact must be

⁵ Upon an application for probate of memoranda of names of legatees referred to in a will previously probated, the same parties should be cited as if the question had risen at the time of the probate of the will. (*Dyer v. Erring*, 2 Dem. 160.)

⁶ Co. Civ. Proc., § 2615, as amended 1894, substantially restoring the provisions of the statute as it existed prior to L. 1892, c. 627, which required a citation to all persons interested in the will, as legatees, devisees, etc. The in-

terests of those persons are now protected by section 2617, as amended 1894, requiring notice of the hearing of objections to probate to be served on them. See § 162, *post*. See also L. 1894, c. 731, and §§ 92, 93, *ante*.

⁷ See *Hatfield v. Sweden*, 54 N. Y. 280.

⁸ Co. Civ. Proc., § 2616, adopting the rule laid down in *Gombault v. Public Administrator*, 4 Bradf. 226.

⁹ See *ante*, § 73 *et seq*.

stated in the citation.¹⁰ Personal service of the citation is made by delivering a copy. It is not necessary to exhibit the original.¹¹ On or before the return day, the original, with proof of due service, should be left in the surrogate's office. It is no objection that the service was made by an executor or legatee named in the will.¹² If any of the parties cited are infants, or otherwise incapable, the surrogate will appoint a guardian *ad litem* for the protection of their interests. This is necessary, whether there is a contest over the will or not. The steps necessary for such appointment are stated in the chapter on Parties.

TITLE FOURTH.

PROOF OF WILLS.

ARTICLE FIRST.

UNCONTESTED AND CONTESTED PROBATE.

§ 160. **Uncontested probate.**— The court having acquired jurisdiction of the parties, the further steps to be taken toward the proof of the will are governed by the fact whether or not the probate is contested. In case no *caveat* has been filed against the probate, and there is no demand on the part of any of the parties in interest for an oral examination of the subscribing witnesses, the practice, in an ordinary case of a written will, is to take the affidavit of each subscribing witness, sworn to before the surrogate or one of his clerks, to the effect that the witness was acquainted with the decedent in his lifetime; that he was present as a witness and the decedent subscribed the paper propounded and now shown witness, dated, etc., purporting to be the last will and testament of, etc.; that, at the time of making such subscription, the decedent declared the said instrument to be his last will and testament, and requested the deponent to sign his name as a witness thereto, which deponent thereupon did; that the decedent was a citizen of the United States, of full age, of sound mind and memory, in all respects competent to devise real estate, and not

¹⁰ Co. Civ. Proc., § 2616. See, as to proof of service, Co. Civ. Proc., § 2532, *ante*.

for infant parties, Id., § 2530, § 108, § 76, *ante*; as to appearance as a substitute for service, Id., § 2528, § 84, *ante*; as to a supplemental citation, Id., § 2481, subd. 2, § 107, *ante*; as to appointment of special guardian

¹¹ The surrogate's rules in New York county do not require a copy of the petition to be served with the citation (Rule III). See *ante*, § 76, note.

¹² Co. Civ. Proc., § 2520; Wetmore v. Parker, 52 N. Y. 450.

under restraint; and that the deponent saw the other witnesses (naming them) sign their names as witnesses, in the presence, and at the request, of the decedent. The affidavits being duly verified and filed, together with the will, letters forthwith issue to the executors named, or, in case of their renunciation, to the persons next entitled. An oral examination of the witnesses is had only in case it is required by some party in interest. However taken, "the proofs must be reduced to writing."¹³ There would seem to be no legal objection to such deposition being sworn to before one of the clerks of the office authorized to administer oaths, as is usually done, although the language of the statute is explicit, that the surrogate must "cause the witnesses to be examined *before him*."¹⁴ The *acting* upon the proofs taken whether by affidavit or otherwise,—that is, the admission of the will to probate,—is of course a judicial function which cannot be delegated.¹⁵ As regards the form of the examination, the language, that two, at least, of the witnesses must be "produced and examined, if so many are within the State, and competent and able to *testify*," would seem to imply that the examination should be oral in all cases. A party in interest desiring an oral examination of the subscribing witness, may demand it without filing a formal answer to the petition for probate.

§ 161. Contested probate.—If, upon the return day of the citation, any person desires to contest the validity of the will, he must present his grounds of objection in writing. No particular form is prescribed by statute for the presentation of such objections, and the courts have permitted the most general and indefinite allegations to be presented as a basis of contest, resulting too frequently in a confused and disorderly trial, with accumulations of irrelevant and redundant testimony. It is, in every case, the better practice for the contestant to formulate his grounds of objection on the principles of pleading in civil actions. If, in the course of the trial, it should appear that he has not covered every ground of objection, he may have leave to amend his answer in that regard. There is no doubt, we think, that the surrogate may require definiteness and certainty, in the allegations filed by the contestant, so as to settle the precise issues to be presented for

¹³ Co. Civ. Proc., § 2618.

¹⁴ Co. Civ. Proc., § 2618. Under L. 1887, c. 701, the surrogate of New York county may appoint an assistant to take testimony in the case of a probate contest, and such assistant has

power to rule upon the admissibility of evidence. (Matter of Allemann, 1 Connoly, 441; 22 St. Rep. 885.)

¹⁵ Roderigas v. East Riv. Sav. Inst., 76 N. Y. 316.

trial. He is, indeed, expressly authorized at any time, at the commencement or in the course of a proceeding, to "require a party to file a written petition or answer containing a plain and concise statement of the facts constituting his claim, objection or defense, and a demand of the decree, order or other relief, to which he supposes himself to be entitled,"¹⁶ and there can be no doubt that he has a discretion to control the introduction of evidence in conformity thereto.

§ 162. Notice of hearing of objections.—In order that the rights of persons named in the will, upon whom a copy of the citation is not required to be served, may be protected, the statute provides that "in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given, in such manner as the surrogate shall direct, to all persons in being, who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding."¹⁷

§ 163. Hearing and determination of allegations against probate.—Not every person who fancies himself possessed of an interest in the estate, can be heard to oppose the probate of a will by which such estate is passed; nor can a proponent, by naming a person in the petition, give that person a status as contestant, where such relation does not exist.¹⁸ Thus, persons whose sole rights are those of legatees and devisees under a will properly rejected on probate have no standing to object to the probate of a prior will.¹⁹ The question of the contestant's interest may, and ought to be, determined before testimony is taken as to the factum of the will.²⁰ A statement of the various questions which are likely to confront the surrogate, and the principles upon which they should be determined, are treated of in other parts of this work, but in this

¹⁶ Co. Civ. Proc., § 2533. It is not necessary that copies be served upon the proponents or their attorneys. The filing operates as a *caveat*. Where a contestant files his objections after witnesses are examined, their examination is not thereby invalidated, nor can the proponent be compelled to recall them. (*Downey v. Downey*, 16 Hun, 482.)

¹⁷ Co. Civ. Proc., § 2617, as amended 1894. The decree in the proceeding does not affect the right or interest of any such person unless he is so noti-

fied. (Ib.) This clause must, of course, be taken to refer to a decree adverse to the interest of such person. See *Cook v. White*, 43 App. Div. 388; 60 N. Y. Supp. 153.

¹⁸ *Matter of Hamilton*, 76 Hun, 200; 27 N. Y. Supp. 813.

¹⁹ *Matter of Gaines*, 84 Hun, 520; 32 N. Y. Supp. 398. But a judgment creditor of a devisee under a will may contest a codicil which supersedes the will. (*Matter of Coryell*, 4 App. Div. 429; 39 N. Y. Supp. 508.)

²⁰ *Matter of Hamilton*, *supra*.

connection, we should point out the statutory requirement, that "the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will and the validity of its execution," before admitting it to probate.²¹ This duty is to be discharged, irrespectively of the form or character of the objections filed; so that, in view of the nature of the proceeding and the peculiar functions of the court, strict rules as to forms of pleading and relevancy of evidence are inapplicable. So far at least as regards matters relating to the probate of testaments and the administration of the estates of deceased persons, the surrogate proceeds in conformity with prescription and established usage, except as modified from time to time by statutory regulations, and in a case where the statute prescribes no particular method of proceeding, he follows the practice of the English ecclesiastical courts in testamentary matters.²²

§ 164. Jury trials in probate cases.—The Code provides for the trial of issues of fact by a jury in probate cases. *First.* Where on appeal from a Surrogate's Court, its decree, admitting a will to probate or revoking the probate, is reversed or modified upon a question of fact, the appellate court must direct a trial by jury of the material questions of fact arising upon the issues between the parties.²³ The order must state the questions of fact to be tried, and must direct the trial to take place either at a Trial Term

²¹ Co. Civ. Proc., § 2622. See *Matter of Boardman*, 20 N. Y. Supp. 60. In *Matter of Follett* (N. Y. Law J., April 27, 1891) no allegations were filed against the will, but the circumstances attending its execution were "such as make it necessary for the surrogate, of his own motion, to investigate the facts." (Ransom, S.) See *Matter of Way*, 6 Misc. 484; 27 N. Y. Supp. 235.

Where the surrogate is satisfied that testator had not mental capacity to make a will, and that the instrument offered for probate was obtained by fraud and undue influence, he has the right and it is his duty to wholly refuse probate, even though the contestant is only an heir-at-law. He is not obliged in such case to admit it as a will of personal property only, because the next of kin do not contest. (*Matter of Bartholick*, 141 N. Y. 166; 56 St. Rep. 684.)

²² *Campbell v. Logan*, 2 Bradf. 90; *Pew v. Hastings*, 1 Barb. Ch. 452.

²³ Co. Civ. Proc., § 2588, as amended by L. 1895, c. 946. *Valentine v. Valen-*

tine, 3 St. Rep. 154; *Matter of Hannah*, 11 id. 807. Where a surrogate's decree refusing probate is reversed, and the issues tried by jury, the trial court can only certify the verdict to the surrogate, but cannot order a judgment for the proponent awarding him costs. (*Matter of Campbell*, 48 Hun. 417.) A verdict of a jury upon a question of fact is to be certified by the clerk of the court in which the trial took place, and sent directly to the Surrogate's Court. (*Matter of Hatten*, 22 Abb. N. C. 66.) After a verdict by a jury, a motion for a new trial should be made at Special and not, as formerly, at the Appellate Court. (*Matter of Clark*, 40 Hun. 233.) But the Special Term has no authority to enter a judgment upon the verdict. (*Matter of Laudy*, 35 App. Div. 542; 55 N. Y. Supp. 98.) Entry of final judgment should not be stayed because a motion for a new trial has been made on the minutes of the judge who presided at the trial. (*Matter of Moss*, 24 Civ. Pro. 438; 34 N. Y. Supp. 798.)

of the Supreme Court, or in the County Court of the county of the surrogate. *Second.* The surrogate of New York county is authorized, in his discretion, to transfer by order any proceeding for the probate of a will, pending before him, to the Supreme Court for trial by a jury.²⁴ The issues must be tried by a jury, and the verdict can be reviewed only by a motion for a new trial upon the minutes of the judge, made within ten days after the verdict is rendered.²⁵ The surrogate has no jurisdiction to entertain an application for a new trial, after the trial of such issues.²⁶

ARTICLE SECOND.

MEANS OF PROOF; COMPETENCY AND QUALIFICATION OF WITNESSES.

§ 165. **Subscribing witnesses to be examined.**— Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State and competent and able to testify. Probate cannot be granted unless both witnesses are produced or their absence satisfactorily explained.²⁷ Any party, who contests the probate of a will, may, by a notice filed with the surrogate at any time before the proofs are closed, require the examination of *all* the subscribing witnesses to a written will, *or of any other witness*, whose testimony the surrogate is satisfied may be material; in which case, all such witnesses, who are within the State, and competent and able to testify, must be so examined.²⁸ It is sufficient if both testify, no matter by which party called and examined.²⁹ No

²⁴ Co. Civ. Proc., § 2547, as amended 1895. The power of the surrogate to recall probate proceedings from the Court of Common Pleas was doubted in *Matter of Delaplaine*, 6 Dem. 269.

²⁵ The Constitution of 1869, art. 6, § 27, provides that the Legislature may confer upon courts of record in any county having a population exceeding 40,000, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases. See Const. 1894, art. 6, § 15.

²⁶ *Matter of Patterson*, 63 Hun, 529; 44 St. Rep. 842.

²⁷ *Graber v. Haaz*, 2 Dem. 216. Where a will was admitted in South Carolina and but one witness appeared, and there was no proof either as to the absence of the other witnesses or as to their handwriting, nor did the attestation clause state that any wit-

ness signed at the request of the testator, held, that the will was not executed or proven according to the laws of this State. (*Lockwood v. Lockwood*, 21 St. Rep. 93.)

²⁸ Co. Civ. Proc., § 2618. This section relates to proceedings upon a return of citation issued upon the presentation of a will for probate, and has no application to a proceeding to revoke the probate of a will on the ground that it had been procured by fraud. (*Hoyt v. Hoyt*, 9 St. Rep. 731.)

It is not necessary to obtain the evidence of a subscribing witness who is absent from the State to authorize probate of the will, unless such evidence is asked for by one of the parties. (*Matter of Clark*, 75 Hun, 471; 27 N. Y. Supp. 681.)

²⁹ *Matter of Stewart*, 36 St. Rep. 56; 13 N. Y. Supp. 219.

order is necessary to require the production of the subscribing witnesses, but the examination of other persons is an essential prerequisite to probate only when the surrogate is satisfied that their testimony may be material, in which case the witnesses must be brought before him and examined, unless they are absent from the State or incompetent or unable to testify.³⁰ The surrogate has power to compel attendance of a witness other than a subscribing witness, whether present at the execution of the will or not. And when produced, it is the duty of the surrogate to examine such witnesses even though the contestants be not present.³¹ The refusal of the surrogate to require the proponent to produce such witness in a proper case, is sufficient ground for reversing the probate on appeal.³²

§ 166. Dead, disabled, and absent witnesses.—A subscribing or other witness may have died, or be subject to any of several disabilities or inabilities, as age, sickness, infirmity, lunacy, absence from the State, etc., and provision is made for such cases. The death, absence from the State, lunacy, or other incompetency of any witness, required to be examined upon the probate, or proof that such witness cannot after due diligence be found within the State or elsewhere, must be shown by affidavit or other competent evidence, to the satisfaction of the surrogate, before dispensing with his testimony.³³ Mere absence from the State of a subscribing witness does not dispense with his examination if demanded. His examination may be taken by commission, in case he cannot after due diligence be found in the State.³⁴

§ 167. Subscribing witness in another county.—A subscribing witness who is in another county, and who, the surrogate has good reason to believe, cannot attend before him, within a reasonable time, to which the hearing may be adjourned, may be examined before the surrogate of the county in which he is.³⁵ It will be observed, that where the disabled witness is not in the surrogate's county, the statute declares that the surrogate "may make" the order for examination, while the examination of wit-

³⁰ Matter of McGovern, 5 Dem. 424. The surrogate will not pass upon the question of the materiality of witnesses in a case which had been moved for trial in another court. (Ib.)

³¹ Matter of Baird, 41 Hun. 89; 2 St. Rep. 353. The contestants may thus demand the examination of a witness against whose testimony they might object as incompetent by reason

of interest, for the demand is a waiver of the objection. (Ib.) See Matter of Hoyt, 67 How. Pr. 57; s. c., *sub nom.* Hoyt v. Jackson, 2 Dem. 443.

³² Matter of Baird, *supra*.

³³ Co. Civ. Proc., § 2619, as amended 1882.

³⁴ Co. Civ. Proc., § 2620.

³⁵ Co. Civ. Proc., § 2540.

nesses under section 2539, in case of the probate or revocation of probate of a will, is imperative. In either instance, the *residence* of the witness is no longer material. It should be further noticed that, under section 2540, the witness to be examined in another county is a *subscribing witness*; also that the inability of such witness is not that of age, sickness, etc., but that he cannot attend the trial within a reasonable time.

§ 168. Aged, sick, and infirm witnesses.—Where a subscribing or other witness, whose testimony is required upon the probate, is within the State and able to testify, but disabled from attending, by age, sickness, or infirmity, the statute requires that the surrogate, if the witness is within his county, proceed to the place where he is, and there, as in open court, take his examination; or, if he is without the surrogate's county, the court may cause him to be examined before the surrogate of the county where he is.³⁶ In either case, the testimony of the witness, so taken, must be taken in the manner prescribed by law and produced before the surrogate as part of the proofs.³⁷

§ 169. Probate on proof of handwriting, etc.—If all the subscribing witnesses are, or if a subscribing witness whose testimony is required is, dead or incompetent, by reason of lunacy or otherwise, to testify or unable to testify, or if such a subscribing witness is absent from the State, or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action.³⁸ It is even held that where there is proof that a subscribing witness is being induced to absent himself from the trial, by contestant's counsel, his handwriting may be proved.³⁹ A will signed by testator's mark is not proved by the testimony of a single subscribing witness proving the handwriting of the deceased subscribing witness, but who did

³⁶ Co. Civ. Proc., §§ 2539, 2540. As to the details of procedure in such a case, see § 125, *ante*.

³⁷ Co. Civ. Proc., § 2619. See Co. Civ. Proc., § 2538.

³⁸ Co. Civ. Proc., § 2620. See Masters' Estate, 1 Civ. Proc. Rep. 459; Matter of Hesdra, 17 St. Rep. 612; Matter of Oliver, 13 Misc. 466; 34 N. Y. Supp. 706. By the statute (2 R. S.

139, §§ 9, 12), of which this section is a partial adoption, it was only in case a witness "resided" out of the State that proof of handwriting was allowed; and it was held, that mere absence on a journey did not authorize such proof. (Stow v. Stow, 1 Redf. 305.)

³⁹ Matter of Dates, 35 St. Rep. 338; 12 N. Y. Supp. 205.

not see the mark made.⁴⁰ Where testator signed by making his mark, and the subscribing witnesses are dead, the testimony of a third person, who was present, that testator made his mark, is sufficient proof of his handwriting.⁴¹ A case may occur where proof of testator's handwriting can be dispensed with, as where, for example, the signatures of both of the deceased witnesses were proved, and the will, which was in the handwriting of one of them, a lawyer, was found among the testator's private papers.⁴²

Photographs of a will cannot be received in evidence, though where the genuineness of the instrument is disputed, the court may permit photographic copies to be made.⁴³ The court may grant leave to a contestant to subject the will to chemical tests for the purpose of disclosing the nature and composition of the ink, and the process or processes to which it has been subjected.⁴⁴

§ 170. **Interested parties as witnesses.**— Previously to the removal, by the Code of Procedure, of the disqualification of parties and interested persons to testify as witnesses, it was held that, as the probate of a will was, as to persons interested, *lis inter partes*, none of the parties were competent witnesses, except so far as the statute authorized their examination touching the circumstances of the execution, delivery, and custody of the instrument.⁴⁵ The act referred to, while, in general, abrogating the disqualification, contained a restriction as to the case of personal transactions or communications between the proposed witness and a person, at the time of the examination, deceased, etc., where the witness

⁴⁰ *Matter of Porter*, 1 Misc. 262; 22 N. Y. Supp. 1062. But otherwise where the making of the mark was seen. (*Matter of Wilson*, 76 Hun, 1; 27 N. Y. Supp. 957.)

⁴¹ *Matter of Smith*, 39 St. Rep. 698; 15 N. Y. Supp. 425. It is not necessary to produce two witnesses, who saw the testator make his mark. (*Matter of Kane*, 2 Connoly, 249; *Matter of Hyland*, 27 N. Y. Supp. 961; 58 St. Rep. 798.)

⁴² *Matter of O'Hara*, 2 Law Bull. 83; citing *Rider v. Legg*, 51 Barb. 260. In *Matter of Dreyer* (N. Y. Law J., Feb. 27, 1892), the will was made in 1867. Neither of the witnesses were produced, the testator's son and daughter (proponents) proved his signature; in their younger days, they knew the two witnesses, but were unable to prove the signature of either, and did not know where either could be found. Probate

was denied, "although," said Ransom, S., "I am morally convinced that the paper was properly executed."

⁴³ *Taylor's Will*, 10 Abb. Pr. (N. S.) 300; *Cornwell v. Wooley*, 1 Abb. Ct. App. Dec. 441; 43 How. Pr. 475; *Lawrence v. Norton*, 45 Barb. 448; 30 How. Pr. 232; *Tarrant v. Ware*, 25 N. Y. 425, note; *Merchant's Estate*, 1 Tuck. 151; *Johnson v. Hicks*, 1 Lans. 150.

⁴⁴ *Matter of Monroe*, 1 Connoly, 496; *Matter of Boardman*, 46 St. Rep. 444. For the rules governing proof of a disputed signature, by declarations of the decedent, by experts in handwriting, and as to the use of photographic copies of signature, see *Taylor's Will*, *supra*. *Johnson v. Hicks*, 1 Lans. 150; *Waterman v. Whitney*, 11 N. Y. 157; *Jackson v. Betts*, 6 Cow. 377; *Matter of Williams*, 2 Connoly, 579; *affd.*, 46 St. Rep. 791; 19 N. Y. Supp. 778.

⁴⁵ *Brush v. Holland*, 3 Bradf. 240.

was offered against the personal representative or successors in interest of the deceased.⁴⁶ The provision of the present Code is very broad, including among the protected persons not only the executor, administrator, or survivor of a deceased person, but also a person deriving his title or interest from, through, or under a deceased person, by assignment or otherwise;⁴⁷ and has been held to apply to proceedings in a Surrogate's Court upon an application for probate.⁴⁸ The husband or wife of a party or person interested is, in general, no longer incompetent;⁴⁹ and there can be no question that a person named as executor in a will is competent to testify as to its execution.⁵⁰

§ 171. Qualification of witnesses as to execution of will.—It is expressly provided that “a person is not disqualified or excused from testifying *respecting the execution of a will*, by a provision therein, whether it is beneficial to him or otherwise.”⁵¹ In view

⁴⁶ Code of Procedure, § 399.

⁴⁷ Co. Civ. Proc., § 829. The words of this section, *any person deriving his title or interest from*, through or under a deceased person, concerning a personal transaction or communication between the witness and the deceased person, should be construed as being equivalent to “any person *claiming to derive*,” etc., and so to include the contestant of a will, upon the hearing of a special proceeding for its probate. (*Cadmus v. Oakley*, 3 Dem. 324.) Hence, a person named as legatee is not competent to testify in his own behalf or interest (*i. e.*, in general, in support of the application for probate), concerning a personal transaction or communication between himself and the decedent. Section 2544 of the Code, declaring that “a person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether it is beneficial to him or otherwise,” conveys no intimation that a person within its description is not, in like manner as others, subject to the limitations contained in the former section. (*Ib.*) As to waiver of objection, see *Matter of Beach*, 1 Misc. 27.

⁴⁸ *Schoonmaker v. Wolford*, 20 Hun. 166; *Lane v. Lane*, 95 N. Y. 494. See *Matter of Snelling*, 136 N. Y. 515; *Matter of Palmateer*, 78 Hun. 43; 28 N. Y. Supp. 1062.

⁴⁹ Co. Civ. Proc., § 828; *Talbot v. Talbot*, 23 N. Y. 17. But see *Johnson*

v. Cochrane, 91 Hun. 165; *affd.*, 159 N. Y. 555.

⁵⁰ See Co. Civ. Proc., § 2544; *Burritt v. Silliman*, 13 N. Y. 93; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Rugg v. Rugg*, 21 Hun. 383; *affd.*, 83 N. Y. 592; *Schoonmaker v. Wolford*, 20 Hun. 166; *Levy's Estate*, 1 Tuck. 87; *McDonough v. Loughlin*, 20 Barb. 238; *Matter of Folts*, 71 Hun. 492; 24 N. Y. Supp. 1052. Even where the executor is the proponent of the alleged will, he is, in his capacity of executor, a party *without interest*, and, therefore, not included in the prohibition of that section, because it is impossible that he should be examined “in his own behalf or interest;” besides, contestants, against whom he would testify, are not persons deriving their “title or interest from, through or under” the deceased, by assignment or otherwise. (*Whelpley v. Loder*, 1 Dem. 368.) A person named executor is not made incompetent by a bequest to him of a sum of money, as a compensation for his services as executor, over and above his commission. (*Pruyn v. Brinkerhoff*, 57 Barb. 176.) *s. p.*, *Matter of Wilson*, 103 N. Y. 374; *Matter of Huestis*, 23 Week. Dig. 224; *Matter of Gagan*, 47 St. Rep. 444; 21 N. Y. Supp. 350.

⁵¹ Co. Civ. Proc., § 2544; replacing 2 R. S. 57, § 6, and *id.* 65, § 50, in part. See *Hopkins v. Lane*, 6 Dem. 12, as to right to waive the statute provision. A similar English statute has been

of the context, this provision might be thought applicable only to probate proceedings, or proceedings to revoke probate; but we think testimony respecting the execution of the will is admissible in any judicial proceeding, though offered by a person having a beneficial interest under the will. Although a subscribing witness to whom "any beneficial devise, legacy, or appointment of any real or personal estate is made" by the will, is competent and compellable to testify, respecting the execution of the will, where it cannot be proved without his testimony, he cannot take under the will, if he testifies.⁵² Where, however, the will can be proved without the testimony of the witness — as where such witness is a nonresident of the State, and the testimony of the other subscribing witness can be obtained — a legacy to him is not avoided; and this notwithstanding the legatee-witness was examined, though unnecessarily.⁵³ The statute means, therefore, the case of a witness who is *necessarily* called on to prove the will; so that, though examined as such on the probate, if his examination was not necessary, and the will was sufficiently proved, under the statute, by the testimony of the other witness, his interest under the will is not affected.⁵⁴

held to entitle an executor, who is also a legatee, to be a witness to support the will. (Munday v. Slaughter, 2 Curteis, 72.) See Children's Aid Soc. v. Loveridge, 70 N. Y. 387; McDonough v. Loughlin, 20 Barb. 238 (disapproving Burritt v. Silliman, 16 id. 198); Matter of Levy, 1 Tuck. 87; Cadmus v. Oakley, 3 Dem. 324; *ante*, § 98, n. 28.
⁵² Morse v. Tilden, 35 Misc. 560; 72 N. Y. Supp. 30.

⁵³ 2 R. S. 65, §§ 50, 51; Caw v. Robertson, 5 N. Y. 125; Reeve v. Crosby, 3 Redf. 74; Cornell v. Wooley, 3 Keyes, 378. The discharge or the release of a debt in a will is, by 2 R. S. 84, § 14, a specific legacy to the debtor of the debt released, and when an attesting witness is, by the will, discharged from a debt due the estate, and there is legal necessity of his becoming a witness, it operates as a discharge of the legacy. (Matter of Tonnele, 5 N. Y. Leg. Obs. 254.) A devise of real estate in trust to make partition and for various special purposes, or a gift of personal estate in trust, is not forfeited by the devisee or legatee becoming a subscribing witness. (Pruyn v. Brinkerhoff, 57 Barb. 176.) An attesting witness having hired personal property from the executor, is not, therefore, an inter-

ested witness. (Seguine v. Seguine, 2 Barb. 385.) Under 2 R. S. 65, § 50, providing that any subscribing witness to a will wherein any beneficial devise is made to such witness, whose testimony is necessary to prove the will, shall not be entitled to the legacy, does not apply where the legatees under a will are subscribing witnesses to a codicil, and the will alone is proved, and the codicil does not benefit them, and is not necessary to the proof of the will. (Matter of Johnson's Will, 37 Misc. 334; 75 N. Y. Supp. 489.)

⁵⁴ Matter of Beck, 26 Misc. 179; *affd.*, 6 App. Div. 211; Matter of Owen, 48 App. Div. 507; 62 N. Y. Supp. 919. A bequest to a necessary witness cannot be validated on the ground that, as the surrogate may believe one of two witnesses and not the other, a will may be proved without two witnesses in fact. (Matter of Brown, 31 Hun. 166.) The fact that one of two legatees is disqualified to take, by being a necessary witness, does not affect the validity of the legacy to the other. (Matter of Orser, 4 Civ. Proc. Rep. 129.) A necessary subscribing witness to a will is precluded from taking more than his share of the personality that would have been his had the will not been established.

§ 172. **Qualification as to other issues.**—Where the testimony of the interested witness is directed to some other issue than that of the execution of the will, *e. g.*, to the issue of the testator's mental capacity, it is incompetent. Thus in a probate proceeding, one who is interested in opposition to the probate, *e. g.*, an heir-at-law,⁵⁵ or one who is interested in favor of it, *e. g.*, a legatee,⁵⁶ is incompetent to testify *in his own behalf* as to personal transactions had with the deceased, on the issue of the testator's mental capacity.⁵⁷ But not so where the witness is called by the contestant, for in such case he testifies *against* interest.⁵⁸ So one claiming to be decedent's widow is incompetent to testify as to her marriage in a proceeding instituted by her to revoke letters of administration granted to another.⁵⁹ The interest which will disqualify a witness must be present, certain and vested, as distinguished from a remote, uncertain or contingent interest. The true test is that the witness will gain or lose by the direct legal operation of the decree, or that the record will be legal evidence for or against him in some other action. Hence the possible right of dower of the wife of a son of a deceased owner of real property in such of the property as the son might inherit, if decedent is adjudged intestate, is not such an interest as to disqualify her from testifying against the executor, on the probate of decedent's will, to a personal transaction or communication with decedent on the issue of the validity of the will.⁶⁰

(Ib.) The admission of testimony of one of the beneficiaries under a will who was present at its execution, proof of which was sufficiently made by the subscribing witnesses,—Held immaterial. (Matter of Bernsee, 71 Hun, 27; 24 N. Y. Supp. 504; *affd.*, 141 N. Y. 389.)

⁵⁵ Schoonmaker v. Wolford, 20 Hun, 166; Snyder v. Sherman, 23 *id.* 139; *affd.*, 88 N. Y. 656.

⁵⁶ Matter of Burke, 5 Redf. 369; Cadmus v. Oakley, 3 Dem. 324; Lane v. Lane, 95 N. Y. 494; Matter of Stewart, 1 Connolly, 413; Matter of Bedlow, 22 N. Y. Supp. 290. Where testimony as to a transaction between the testator and a legatee has been given by the contestant, the legatee may testify in rebuttal, though interested in the event. (Matter of Crane, 68 App. Div. 355; 74 N. Y. Supp. 88.)

⁵⁷ As to the competency and weight of the opinions of nonprofessional witnesses, as to mental capacity of testa-

tors, see subd. 4 of art. 3 of this chapter, *post*.

⁵⁸ Matter of Potter, 161 N. Y. 84; 55 N. E. Rep. 387; Matter of Woodward, 167 N. Y. 28; Matter of Hedges, 57 App. Div. 48; 67 N. Y. Supp. 1028.

⁵⁹ Angevine v. Angevine, 48 Barb. 417.

⁶⁰ Scherrer v. Kaufman, 1 Dem. 39. But see Johnson v. Cochrane, 91 Hun, 165; 36 N. Y. Supp. 283; *affd.*, 159 N. Y. 555. The mother of a beneficiary is not an interested person. (Matter of Bedlow, 22 N. Y. Supp. 290.) Testimony of the executor, as to transactions and communications with decedent, and what he did, as tending to show an *implied* agreement to pay for his services, is incompetent. (Burnett v. Noble, 5 Redf. 69.) See Smith v. Christopher, 6 Sup. Ct. (T. & C.) 288; and Abbot's Trial Evidence, p. 62 *et seq.* And so, also, a surety upon an executor's bond is so far interested in the event of the ac-

§ 173. **Releasing interest.**— It would seem that after a cause before the surrogate has advanced to the examination of witnesses, a party litigant will not be allowed, in general, to renounce contestation, assign his interest, and become a witness.⁶¹ But the common-law rule which permitted a person having a pecuniary interest in the result of an action to assign or release such interest, and thus become competent to testify, is not changed by any statute, it would seem, unless it be by the provision of section 829 of the Code of Civil Procedure, which forbids an assignor to testify in certain cases in favor of the assignee. If a legatee releases his interest to the *executor*, his relatives will take the legacy, but they can hardly be regarded as his assignees, and he is a competent witness.⁶²

counting of his principal, that he is incompetent to testify as a witness on behalf of the executor, to a personal transaction or communication between him and the deceased. (*Milner v. Montgomery*, 78 N. Y. 282.) But in an action by an administrator to set aside an assignment of a mortgage made by his intestate, the next of kin, though interested in the event of the action, and claiming rights through the plaintiff, are not incompetent to testify in his behalf, as to the conduct and actions of the intestate, and as to personal transactions of his with which they had no connection, and also as to communications made by him to others in their presence. (*Holcomb v. Holcomb*, 20 Hun. 156.) The fact that a witness upon a contested application for administration by one alleged to be the husband of a decedent, is a second cousin of decedent, and entitled to participate in the estate as one of the next of kin, in the event of the decease of all the first cousins of the latter, who are numerous, does not interest the witness in the event so as to prevent his testifying to a conversation with the deceased. The exclusion depends upon a present fixed interest, not one remote and contingent and amounting to a mere possibility. (*Matter of Hanley*, 44 Hun. 559.) The prohibition does not apply when the deceased person is other than the one whose estate is in controversy in the proceeding. (*Matter of De Baun*, 1 Connolly, 203.)

⁶¹ *Sherwood v. Judd*, 3 Bradf. 267.

⁶² *Whelpley v. Loder*, 1 Dem. 368; *Meehan v. Rourke*, 2 Bradf. 385; *Reeve v. Crosby*, 3 Redf. 74; *Coffin v. Coffin*, 23 N. Y. 9; *Matter of Wilson*, 7 Eastern Rep. 736; *Matter of Fitzgerald*, 33 Misc. 325; 68 N. Y. Supp. 632. Upon the hearing of a contested probate one named as a legatee was called to testify to personal transactions with the testator. Upon his competency being questioned, a release of his legacy to the temporary administrator of the estate was produced. Objection being raised that the release did not discharge the legacy, and that if it did, it became in effect an assignment to the residuary legatee which would prevent the assignor from testifying in her behalf, held, that the paper was receivable in evidence and the witness competent. (*Stebbins v. Hart*, 4 Dem. 501, 506, n.)

But a release by a son of a testatrix, of all his right, title and interest in her estate, in consideration of land conveyed to him by her in her lifetime, if effectual, would not make him a competent witness as to personal transactions with his mother in an action to have probate of her will set aside, brought by another son, who would derive part of his title and interest by virtue of the release. (*Bennett v. Bennett*, 50 App. Div. 127; 63 N. Y. Supp. 387.) A release of the interest of a proposed witness in the estate in question which names no releasee and is not shown to have been delivered to any one is insufficient to qualify him to testify as to a personal transaction with the decedent. (*Matter of Torkington*, 79 Hun. 128; 61 St. Rep. 426.)

§ 174. **Privileged communications.**—The competency of clergymen, attorneys, and physicians, to testify concerning confessions and other confidential communications or information, is regulated by express provisions of the statute. The privilege of communication to a physician or surgeon,⁶³ and between attorney and client,⁶⁴ and of confessions to a clergyman or other minister of any religion,⁶⁵ is that of the person confessing, the patient, or the client, and not of the witness. The Code expressly declares that the sections forbidding disclosures in the cases specified, apply to every examination of a person as a witness, unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient, or the client.⁶⁶ The chief application of these rules to proceedings for the probate of a will, is where the person confessing, the patient, or the client, was the testator, and the opinion was formerly advanced that, although the privilege cannot be said to die with the person, yet where, from his death, there is no one to claim it, the assertion of the privilege is of necessity excluded, except so far as may depend upon the discretion of the court.⁶⁷ But it has been held, that

⁶³ Co. Civ. Proc., § 834.

⁶⁴ Co. Civ. Proc., § 835. The prohibition applies to instructions given, by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with the attorney for the purpose of enabling him to carry out the instructions. (Matter of Coleman, 111 N. Y. 220.) A question put to the attorney who drew the will as to who instructed him to draw it (such instructions not being given in the hearing or presence of any other person than the testator and witness) was held to be incompetent in Matter of McCarthy, 48 St. Rep. 315. See Matter of Bedlow, 22 N. Y. Supp. 290. But where the attorney, at the request of the testator, read the will aloud in the presence of the witnesses, he is not prohibited from testifying, as such reading is an express waiver of secrecy. (Matter of Barnes, 70 App. Div. 523; 75 N. Y. Supp. 373.) The attorney who drew the will or advised the testator upon it, and afterward accepted a retainer to contest its probate, cannot claim a privilege from testifying as a witness at the instance of the proponents. (Sheridan v. Houghton, 6 Abb. N. C. 234; 16 Hun, 628.) See Blackburn v. Crawford, 3 Wall. 175; Allen v. Public Adm'r, 1 Bradf. 221;

Sanford v. Sanford, 61 Barb. 293; Brand v. Brand, 39 How. Pr. 193; Graham v. People, 63 Barb. 468; Rogers v. Lyon, 64 id. 373; Carnes v. Platt, 15 Abb. Pr. (N. S.) 337; Britton v. Lorenz, 45 N. Y. 51; Taylor's Will, 10 Abb. Pr. (N. S.) 300; Matter of Chapman, 27 Hun. 573; Matter of Sears, 33 Misc. 141; 68 N. Y. Supp. 363.

⁶⁵ Co. Civ. Proc., § 833. See People v. Gates, 13 Wend. 311.

⁶⁶ Co. Civ. Proc., § 836.

⁶⁷ Allen v. Public Adm'r, 1 Bradf. 221. But see Renihan v. Dennin, 103 N. Y. 573. It is not easy to discover any good reason why courts should volunteer to stop the mouth of a witness, and be "compelled to grope in the dark when there is testimony of intelligent witnesses within their reach to enable them to ascertain where the truth lies on the issues that they have to decide, the disclosure of which will not be a stain upon the memory of the dead man, which is the property of his family and kindred." (Per Ransom, S., in Matter of Coop. N. Y. Law J., May 13, 1891.) The difficulty is now remedied by the amendment of 1892, *infra*. Even before such legislation, the General Term of the Fifth Department held that all instructions by counsel and all acts of a testator in

the right to exclude the prohibited testimony survives to the representatives, *in the premises*, of a deceased person.⁶⁸

§ 175. **Qualification of physician.**—A large number of decisions on the subject of the qualification of a physician to testify from knowledge acquired while attending a patient have been superseded (or else made statutory law) by the amendment of section 836, adopted in 1892.⁶⁹ It was formerly established that a physician who had attended the deceased in a professional capacity, was not a competent witness to testify, from knowledge acquired while attending him, as to his mental capacity,⁷⁰ although he might testify to any knowledge obtained from personal acquaintance with the decedent *before* his professional relations with him commenced, and *after* they ceased.⁷¹ By the amendment referred to, the disqualification of a physician or surgeon to testify, etc., is limited to the disclosure of "confidential communications, and such facts as would tend to disgrace the memory of the patient:" with this exception, he may "disclose any information as to the mental or physical condition" of his deceased patient, which he acquired in attending him, *only, however*, when "the personal representatives of the deceased patient, or, if the validity of the last will and testament of such deceased patient is in question, the executor, or executors, named in said will, or the surviving husband, widow, or an heir-at-law, or any of the next of kin of said deceased, or any other party in interest," shall expressly waive the statutory disqualification upon the trial or examination.⁷²

the presence of witnesses connected with the making and execution of a will, which will tend to uphold and support the instrument, may be proved by the person who assisted in its preparation at the time, though he was acting as testator's legal adviser. (Matter of McCarthy, 28 St. Rep. 342.)

⁶⁸ *Staunton v. Parker*, 19 Hun. 55. This case is criticised in *Pearsall v. Elmer* (5 Redf. 181), where, upon a contested application for the probate of a codicil, an attorney was asked by contestants to state a conversation had between him and decedent, relating to the preparation by him, for decedent, of a codicil not executed, subsequently to the execution of the instrument propounded. Held privileged, but otherwise, *it seems*, as to conversation, etc., relating to the paper presented for probate.

⁶⁹ L. 1892, c. 514.

⁷⁰ *Matter of Coleman*, 111 N. Y. 220.

⁷¹ *Fisher v. Fisher*, 129 N. Y. 654. See, generally, on this subject, *Johnson v. Johnson*, 14 Wend. 637; *Kendall v. Grey*, 2 Hilt. 300; *People v. Stout*, 3 Park. Cr. 670; *Westover v. Etna Ins. Co.*, 99 N. Y. 56; *Grattan v. Metrop. Life Ins. Co.*, 80 id. 281; *Renihan v. Dennin*, 38 Hun. 270; 103 N. Y. 573; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Dilleber v. Home L. Ins. Co.*, 69 id. 256; *Matter of Loewenstine*, 2 Misc. 323; 21 N. Y. Supp. 493.

⁷² "The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may, prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor." (Co. Civ. Proc., § 836, as amended 1899.) See *Holden*

§ 176. **Qualification of attorney who is subscribing witness.**—A testator, in requesting a person to sign as a subscribing witness to his will, is presumed to know the obligations assumed by the witness in respect to the proof of the will; among other things, the duty to testify as to the circumstances attending its execution, including the mental condition of the testator at that time, as evidenced by his action, conduct and conversation. The act of the testator, therefore, in requesting his attorney, who drew his will, to become a witness to it, is clearly indicative of an intention to waive the statutory prohibition, and so leave the witness free to perform the duties of the office assigned him.⁷³ This rule is now made statutory by the amendment above referred to, which declares, in effect, that “an attorney, on the probate of a will,” is not disqualified “from becoming a witness as to its preparation and execution, in case such attorney is one of the subscribing witnesses thereto.”⁷⁴

ARTICLE THIRD.

WHAT LAW GOVERNS PROBATE.

§ 177. **Law at time of testator's death.**—The formalities requisite to the due execution of a will are governed by the law existing at the *time of the testator's death*, unless otherwise provided by the law; for a will is ambulatory while the testator lives, and it takes effect only on his death. Hence, a statute affecting wills, which is enacted after a will is made, but before a testator's death, must, unless there be a saving clause as to such wills, take effect thereon.⁷⁵ But it is usual for the Legislature, in changing the

v. Metropolitan Life Ins. Co., 165 N. Y. 13. It is not necessary that all the persons mentioned should unite in such waiver. (Matter of Murphy, 85 Hun, 575; 33 N. Y. Supp. 198.) The calling of the physician as a witness by the personal representative and asking him questions calculated to elicit such evidence is a sufficient waiver. (Holcomb v. Harris, 166 N. Y. 257; Pringle v. Burroughs, 70 App. Div. 12; 74 N. Y. Supp. 1055.)

⁷³ Matter of Coleman, 111 N. Y. 220; Matter of Gagan, 47 St. Rep. 444; *affd.*, 49 *id.* 366; 21 N. Y. Supp. 350. The waiver extends to all communications and transactions, between the testator and the attorney, having reference to the paper under consideration. (Matter of Lamb, 21 Civ. Proc. Rep. 324; 18 N. Y. Supp. 173.) The fact of the at-

torney being a subscribing witness is *prima facie* evidence of such waiver, and the burden is thrown upon the contestants to show by affirmative proof that the legal inference is not warranted. A statute which seeks to limit the extent to which witnesses, whose relation to the case may raise a doubt of their competency to testify, must be strictly construed. (Matter of Halsey, N. Y. Law J., May 13, 1890.)

⁷⁴ Co. Civ. Proc., § 836, as amended 1892; Matter of Gagan, 47 St. Rep. 444; *affd.*, 49 *id.* 366.

⁷⁵ Root v. Stuyvesant, 18 Wend. 257; Bishop v. Bishop, 4 Hill, 138; Double-day v. Newton, 27 Barb. 431; De Peyster v. Clendinning, 8 Paige, 295; *affd.*, on other points *sub nom.* Bulkley v. De Peyster, 26 Wend. 21.

formalities prescribed for the due execution of wills, to except instruments previously executed, but not yet made effective by death. Such provision was made in the Revised Statutes.⁷⁶ But by adding a codicil after a new statute has been passed, the testator republishes his will, and subjects it, in some degree, at least, to the effect of the new statute.⁷⁷ In respect to the *mode of proof*, the case is governed by the law in force when the will is propounded for probate.⁷⁸ But the topic under consideration involves, also, questions concerning the *lex loci*.

§ 178. Law of place as to wills of real property.—In respect to wills of real property, situated within the State, the formalities of execution must of course be those prescribed by our own law;⁷⁹ but where the real property is situated in another State, the formalities prescribed by the laws of that State must be complied with.

§ 179. Wills of personal property.—In respect to wills of personal property, the rule in this State formerly was that the formalities of execution and attestation must be those prescribed by the law of the place where the testator was domiciled *at the time of his death*, for the reason, as was argued, that, as a will is wholly inoperative until the testator's death, and as the law of the domicile applies to the person and the personal property, the will, wherever made, and notwithstanding any changes of domicile, must be sustained, if at all, in respect to its formalities of execution, by the law which was applicable to his person and his personal property at that time.⁸⁰ But this doctrine is now changed in this State, and a will of personal property executed in any other State or Territory of the United States, the dominion of Canada, or the kingdom of Great Britain and Ireland, if executed as prescribed by the laws of the State or country where it was executed, or a will of personal property executed, by a nonresident of the State, according to the laws of the testator's residence may be proved here,⁸¹ and this right to probate, as well as the validity of

⁷⁶ *Lawrence v. Hebbard*, 1 Bradf. 252; *Price v. Brown*, id. 291.

⁷⁷ *Salmon v. Stuyvesant*, 16 Wend. 320; *Root v. Stuyvesant*, 18 id. 257, 315.

⁷⁸ Co. Civ. Proc., § 2482; *Jauncey v. Thorne*, 2 Barb. Ch. 40.

⁷⁹ See *Vogel v. Lehlritter*, 139 N. Y. 223; 54 St. Rep. 595; *Matter of Law*, 56 App. Div. 454; 67 N. Y. Supp. 857; *Koppel v. Holm*, 23 Misc. 557, 52 N. Y. Supp. 830.

⁸⁰ *Moultrie v. Hunt*, 23 N. Y. 394; *Dupuy v. Wurtz*, 53 N. Y. 556. Real and personal property, though given by the same clause of a will, and upon the same trust, are severable, and the validity of one does not depend upon that of the other. (*Knox v. Jones*, 47 N. Y. 389.)

⁸¹ *Matter of Gaines*, 84 Hun. 520; 32 N. Y. Supp. 398; *affd.*, 154 N. Y. 747; *Matter of Cruger*, 36 Misc. 477; 73 N. Y. Supp. 812.

the execution of the will or its construction, is not affected by a change of the testator's residence made after its execution and publication.⁸² The law of the domicile governs the formalities of execution of a will of personal property,⁸³ the question of testamentary capacity,⁸⁴ the right of the persons to dispose of the estate,⁸⁵ and the construction of the instrument;⁸⁶ but the validity of bequests, unless expressly prohibited by the law of the testator's domicile, depends upon the law of the domicile of the legatee.⁸⁷ Questions of evidence, however, are determined by the *lex fori* or law of the jurisdiction in whose courts they are raised.⁸⁸ On the other hand, a nonresident's will, though not executed in conformity with the laws of his foreign domicile, where executed, may nevertheless be admitted to probate here, where there are assets, provided it was executed with the formalities required by our own statute.⁸⁹

⁸² Co. Civ. Proc., § 2611, as amended 1893. See *Booth v. Timoney*, 3 Dem. 416; *Matter of Booth*, 127 N. Y. 109, and *ante*, § 140.

⁸³ The courts of this State have jurisdiction to determine whether the will of a resident of another State was properly admitted to probate in such State, and will restrain the distributees from receiving their shares on the ground of fraud and collusion in procuring such probate. (*Davis v. Cornue*, 151 N. Y. 172.)

⁸⁴ *Davison's Estate*, 1 Tuck. 479.

⁸⁵ *Schultz v. Dambmann*, 3 Bradf. 379; *Wood v. Wood*, 5 Paige, 596; *Hope v. Brewer*, 136 N. Y. 126. A leasehold estate for years in lands situated in this State, owned by a resident of another State, will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governed the person of its owner. (*Despard v. Churchill*, 53 N. Y. 192.)

⁸⁶ *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Knox v. Jones*, 47 id. 389; *Caulfield v. Sullivan*, 85 id. 153; *Damert v. Osborn*, 140 id. 30, motion for reargument denied in 141 id. 564; 60 St. Rep. 337, which see: *N. Y. Life, etc., Co. v. Viele*, 161 N. Y. 11; 55 N. E. 311; *Matter of Cleveland*, 28 Misc. 369; 59 N. Y. Supp. 985; *Wright*

v. Mercein, 34 Misc. 414; 69 N. Y. Supp. 936; *Mackenzie v. Mackenzie*, 3 Misc. 200; 23 N. Y. Supp. 270. Compare *Mills v. Fogal*, 4 Edw. 559; *Isham v. Gibbons*, 1 Bradf. 69; *Matter of Roberts*, 8 Paige, 446; 1 Redf. on Wills, 393. See Co. Civ. Proc., § 2694. The rule of law in another State in reference to construing a will, is *prima facie* the same as that of New York. (*Putnam v. Lincoln Safe Deposit Co.*, 34 Misc. 333; 66 App. Div. 136; *Congregational Society v. Hale*, 29 App. Div. 396; 51 N. Y. Supp. 704.) A married woman, separated from her husband, but not divorced, has no separate domicile, and her will must be construed according to the law of the husband's domicile. (*Jones v. Jones*, 8 Misc. 660; 60 St. Rep. 429.) But a will executed in New Jersey by an unmarried woman who afterward marries and removes to and dies in this State is governed by the law of this State and cannot be admitted to probate, as it is revoked by the subsequent marriage. (*Matter of Coburn*, 9 Misc. 437; 30 N. Y. Supp. 383.)

⁸⁷ *Congregational, etc., Society v. Hale*, 29 App. Div. 396; 51 N. Y. Supp. 704; *Matter of Lang*, 9 Misc. 521; 30 N. Y. Supp. 388.

⁸⁸ *Wharton, Conflict of L.*, § 574.

⁸⁹ *Matter of McMulkin*, 5 Dem. 295.

ARTICLE FOURTH.

FACTS MATERIAL TO THE QUESTION OF PROBATE.

SUBDIVISION 1.

PRELIMINARY CONSIDERATIONS.

§ 180. **The issues in probate cases.**—The subject-matter of a contest in a probate proceeding may be confined exclusively to the *factum* of the will, or it may include also the *exposition* of the will, that is, its construction and effect, if it be found to be a valid will for any purpose. The distinction between these two subjects of jurisdiction is important. The one question is as to the genuineness and valid execution of the paper, involving the testamentary capacity of the testator, his freedom from restraint, and all questions of fraud and mistake in the testamentary act, including in some measure the legality of the testamentary dispositions. The other question is as to the meaning of the language of the will and its effect as a disposition of property. The distinction is important because, as to the *factum* of the will, parol or extrinsic evidence is admissible to impeach or to sustain the will, while, on the question of construction, such evidence is only admissible within certain strict rules and limitations.⁹⁰ Previous to the adoption of chapter 18 of the Code of Civil Procedure, Surrogates' Courts (with the single exception of that of New York county⁹¹) had no jurisdiction to pass upon any question other than the fact of the due execution and attestation, and the "validity" of the will; and this "validity" was interpreted to mean the validity of its execution as the act of a capable testator, free from restraint, etc. The court had no authority, in a proceeding for probate, to pass upon the question, whether any provision of the will was in contravention of a statutory limitation of testamentary power, or whether a devisee or legatee was legally competent to take under the will, or like questions involving the legality and construction of dispositive clauses in a will.⁹² The

⁹⁰ *Matter of Keleman*, 126 N. Y. 73.

⁹¹ L. 1870, c. 359, § 11. That statute conferred on the surrogate the same power and jurisdiction as the Supreme Court had, in determining the construction, validity, or legal effect of wills of real or personal property — much broader than those conferred by the present statute.

⁹² See *McLaughlin's Estate*, 1 Tuck. 79; *Matter of Gilman*, 38 Barb. 364; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Matter of Forman*, 54 Barb. 274; *Bevan v. Cooper*, 72 N. Y. 317; *Waters v. Cullen*, 2 Bradf. 354; *Hillis v. Hillis*, 16 Hun, 76.

inquiry of the court was limited to the single question of the valid execution of the paper as the last will of a free and competent testator. And probate could not be resisted on the ground that the testator had no power to dispose of the property referred to, or that his proposed disposition was illegal. The law is now otherwise; and in the same proceeding by which the genuineness of the will and the validity of its execution are determined, the court may, if so required by any party in interest, pass upon "the validity, construction, or effect of any disposition of personal property, contained in the will of a resident of the State, executed within the State," unless the will is rejected for failure of proof of the statutory requisites.⁹³ The present chapter is devoted to a consideration of the rules and practice governing the determination of questions arising upon the *factum* of the will.

§ 181. **Factum of the will.**—By this phrase is not meant merely the formal execution and attestation of the instrument. It is true that the formal execution and publication of the testamentary paper is the best, and, in most cases, the only evidence of the testator's intention to make a will, but the questions, whether the testator intended to make the particular will offered for probate; whether his instructions to the draftsman were comprehended; whether those instructions were correctly put in writing; whether, when the will was read, he understood its contents; whether they conformed to his real wish; whether, in fact, *this* particular instrument is his will — are all elements of the *factum* of the will, and are to be determined by a considerate examination of all the facts and circumstances attending the transaction. For the *factum* of a will, as was said by Sir John Nicoll,⁹⁴ "means not barely the signing of it, and the formal publication or delivery, but proof, in the language of the *condidit*, that he well knew and understood the contents thereof, and did give, will, dispose, and do, in all things as in the said will contained." It may be said generally, then, that questions of error or mistakes or variances, as well as of fraud and incapacity, when they relate to the *factum* of the will, are to be determined by the surrogate whenever they are raised in a proceeding for the probate of the instrument.

§ 182. **Testamentary character of the paper propounded.**— But it is proper to observe, in the first place, that the instrument must

⁹³ Co. Civ. Proc., § 2624. The exercise of this jurisdiction is the subject of the next following chapter.

⁹⁴ Zacharias v. Collis, 3 Phillim. 179. And see Burger v. Hill, 1 Bradf. 363; Fisher v. Clark, 1 Paige, 176; Colton v. Ross, 2 id. 398.

be testamentary in its character — that is, it must have been intended by the testator as a last disposition of his property and estate.⁹⁵ No technical language or form is essential, as in a deed, to give effect to a testator's intention, and before the requisites, as to execution and publication of wills, were prescribed by the Revised Statutes, almost any form of instrument and memorandum might operate as a testamentary disposition of personal property. Only wills of real property were required to be executed and attested with certain formalities, although wills of personal property, like wills of real property, were required to be in writing, with some limited exceptions. A will of real property could be proved in the Supreme Court or the Common Pleas of the county only. The Surrogates' Courts had jurisdiction to grant probate of a will of personalty only, and, in one case at least,⁹⁶ such a court was upheld in granting probate on a testamentary paper, unsigned by the testator, and unattested by witnesses. But it is not so now. Thus, a memorandum annexed to bonds, directing that, after the holder's death, they be canceled or not enforced, except by way of set-off, not being executed as a will, has no validity as such.⁹⁷ But a paper expressing a wish to give certain sums, and that neither "executors nor heirs will object to carrying out this my will," is testamentary in its character. The *character* of the instrument depends on its substance, not on its form or any declaration of the testator.⁹⁸ A paper need not contain a statement that it is a will to make it one. Thus, an instrument duly executed by the deceased, which simply nominates certain persons as executors, and authorizes them to sell real estate,

⁹⁵ If it is shown that the paper, though perfectly executed and attested, was made, not *animo testandi* but in jest, only to exhibit the brevity of expression of which a will was capable, it is not the will of the testator. (*Nicholas v. Nicholas*, 2 Phillim. 180.) And, to the same effect, see *Trevelyan v. Trevelyan*, 4 id. 153. If two persons, intending to make their wills, each, by mistake, executes the document prepared for the other (*Re Hunt*, L. R. 3 P. & D. 250); or if the document was intended only as a contrivance to effect some collateral object, *e. g.*, to be shown to another person to induce him to comply with the testator's wish (*Lister v. Smith*, 3 Sw. & Tr. 282); in neither case is there *animus testandi*.

⁹⁶ *Watts v. Public Adm'r*, 4 Wend. 168. So a letter contemplating the writer's death, and requesting the re-

cipient to put others in possession of his property, was held a valid will. (*Morrell v. Dickey*, 1 Johns. Ch. 153.) And a Scottish deed of disposition and settlement was held a will, and provable. (*Matter of Easton*, 6 Paige, 183.)

⁹⁷ *Brinckerhoff v. Brinckerhoff*, 2 N. Y. Leg. Obs. 424.

⁹⁸ *Carle v. Underhill*, 3 Bradf. 101. An instrument conveying land, which is not intended to take effect until after the death of the person executing it, is properly construed to be a will, and not a deed, where there is nothing in the language of the instrument and in the circumstances under which it was executed to indicate that it was intended as anything else than a will, and hence such instrument is subject to revocation by the person executing it at any time during his life. (*Perry v. Perry*, 21 N. Y. Supp. 133.)

is a will;⁹⁹ so, too, one which merely directs payment of funeral expenses and legacies.¹

§ 183. Conditional will.—Where the paper propounded is clearly made dependent upon a condition precedent in its very terms, performance of the condition must be shown before the paper can be upheld as a will. If it clearly appears, on its face, that the paper was not intended to remain an operative will, except on the happening of a certain event, or other contingency, then the surrogate will inquire, before granting probate, whether that contingency has arisen. If the condition is of partial application, however, and does not express that the entire instrument is to take effect or fail upon a particular event, probate will be granted, and the effect of the condition upon particular legacies be left to future consideration.² We have already mentioned conjoint or *mutual wills* which are provable on the death of either party.³

§ 184. Circumstances of execution, delivery, and custody of will.—Besides the formalities requisite for the due execution, publication, and attestation of the paper propounded, the surrogate may inquire, if he desire to do so, into the circumstances of the delivery and possession of the will, and for that purpose may, in his discretion, require proof of the circumstances attending the execution, the delivery, and the possession thereof, or other circumstances, to be made by the person who received the will from the testator, if he can be produced, as also by the person presenting it for probate.⁴ The court is not confined, therefore, to the particular issues raised by the objections of the contestant. While the surrogate may, in his discretion, require the examination of the person who has had possession of the will since its execution, he cannot compel the examination of the lawyer who drew the will.⁵

But extrinsic evidence of this, or of any sort, is only competent

⁹⁹ Barber v. Barber, 17 Hun. 72.

¹ Matter of Buchan, 16 Misc. 204; 38 N. Y. Supp. 1124.

² *Ex p.* Lindsay, 2 Bradf. 204; Thompson v. Connor, 3 id. 366. For the case of a codicil adjudged to have been executed conditionally, to be made effectual only by its being attached to the will at a subsequent period, which never was done, and it did not at the time express testator's wish, see Matter of Buckwell, N. Y. Law J., Mar. 18, 1891 (N. Y. Surr. Ct.).

³ See § 154, *ante*.

⁴ Co. Civ. Proc., § 2622. Evidence of the circumstances surrounding testator, at the time of the execution of a will, where its terms are doubtful, is admissible to show intent, but occurrences long thereafter may not be proved for the purpose. (Morris v. Sickly, 133 N. Y. 456; 45 St. Rep. 735.)

⁵ Taylor's Will, 10 Abb. Pr. (N. S.) 300.

on the trial of an issue as to the *factum* of the will. Where no question of the validity of the will itself is raised, and the only issue is as to "the construction, validity, and effect" of its dispositions of property, extrinsic parol evidence of the circumstances under which the will was executed is incompetent. Even if by such extrinsic evidence a trust *ex maleficio* could be established, a Surrogate's Court has no jurisdiction to determine such an issue.⁶

§ 185. Order of proof.—If the allegations of the petition as to the death of the testator, his residence in the county, or the existence of property there, or as to any other jurisdictional fact, are put in issue by an answer, or, even in a case not contested, where these facts are imperfectly alleged, the proponent, in the due order of proof, is bound, first, to establish these facts by proof. The next step is to prove the requisite formalities attending the execution, publication, and attestation of the will, and then to show that the testator was, at the time, of proper age and mental soundness, and was not unduly influenced in the testamentary act. Accordingly, it has been held that where the probate is contested in respect to the genuineness of the paper, the testamentary capacity of the decedent, and the freedom of the act, the contestant's evidence as to the genuineness of the paper should first be received, and that relating to capacity and undue influence successively afterward.⁷

§ 186. Decedent's death and identity.— "The existence of the jurisdictional facts prescribed by the statute"⁸ is essential to the validity of the surrogate's decree in this, as in every other, proceeding. *The fact of the death* of the person whose will is sought to be proved is, of course, of the first importance, as a test of jurisdiction. Where the testator's death is controverted, or is not stated in the petition for probate, on positive personal knowledge, the burden of proving it is upon the proponent.⁹ If the fact can only be imperfectly proved, circumstances must be shown sufficient to raise a legal presumption of death. It is necessarily impossible to give any standard by which to measure the sufficiency of circumstantial evidence of death; mere information and belief, founded on nothing, is of course not proof in any legal sense.¹⁰

⁶ *Matter of Keleman*, 126 N. Y. 73. To the same effect, *Matter of Walker*, 136 id. 20. See c. VII, *post*.

⁷ *Taylor's Will*, 10 Abb. Pr. (N. S.) 300.

⁸ Co. Civ. Proc., § 2474.

⁹ *Prout v. McNab*, 6 Dem. 152.

¹⁰ *Roderigas v. East River Savings Bank*, 76 N. Y. 316. See *Matter of Morgan*, 30 Misc. 578, where the facts and circumstances were reviewed and held sufficient to establish the death of the testator in a hotel fire.

It is not necessary, speaking generally, that any specific period of time should elapse to create the presumption of death, but it may arise whenever the facts of the case will warrant.¹¹ The

¹¹ In *Matter of Nolting* (43 Hun, 456), it appeared that the alleged decedent had left his home under the depression following an attack of delirium tremens, declaring his intention to commit suicide, and had gone toward the river; that thereafter he had not been heard from for more than ten years, although previously he had communicated regularly with his relatives. Held, that, from his silent absence during ten years, the law would raise a presumption of his death, which, coupled with the facts and circumstances produced to the surrogate, was sufficient to justify the issuing of letters of administration, and that the surrogate erred in refusing to do so.

As to presumption of death arising from prolonged absence, see *Keller v. Stueck*, 4 Redf. 294; *Machini v. Zanoni*, 5 id. 492; *Matter of Sullivan*, 51 Hun, 378; *Stouvenel v. Stephens*, 2 Daly, 319; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Gerry v. Post*, 13 How. Pr. 118; *Merritt v. Thompson*, 1 Hilt. 550; *King v. Paddock*, 18 Johns. 141; *McCartee v. Camel*, 1 Barb. Ch. 455; *Eagle v. Emmet*, 4 Bradf. 117; 3 Abb. Pr. 218; *Moehring v. Mitchell*, 1 Barb. Ch. 264; *Clarke v. Cummings*, 5 Barb. 339, 354; *Matter of Ackerman*, 2 Redf. 521; *Matter of Ridgeway*, id. 226; *Matter of Tobin*, 15 St. Rep. 749; *Matter of Shipman*, 22 id. 362; *Allen v. Ketcham*, 24 id. 251; *Ferry v. Sampson*, 17 id. 428; *Karstens v. Karstens*, 20 Misc. 247; 45 N. Y. Supp. 966; *affd.*, 9 App. Div. 229; *Czech v. Bean*, 35 Misc. 729; 72 N. Y. Supp. 402; *Matter of Taylor*, 49 St. Rep. 644.

If the party whose death is in question went to sea, and nothing has been heard of the vessel in which he sailed, or of those who accompanied him, the presumption, after a sufficient length of time has elapsed, will be that the vessel was lost, and all on board perished; especially where the family and friends of the missing man have made every effort and exhausted apparently every source of information to ascertain news of him and the vessel. (*Matter of Stewart*, 1 Connoly, 86; 18 St. Rep. 978.) In *Matter of Norton* (N. Y. Law J., June 12, 1891), there was no positive proof

of the time or place of testator's death; "but," said Ransom, S., "I am satisfied from the proofs that, months since, he was lost at sea. On November 24, 1890, a little steamer, named for the testator, departed from New London, Conn., for Toulon, France, having on board himself, his wife and niece, and a crew of seven men. Nothing was heard of its movements thereafter, except a dubious statement transmitted by cable, that an Algerian traveler in Toulon stated that it had been seen in Gibraltar in the latter part of December. Subsequent inquiry failed to discover who the traveler was or what was the source of his knowledge. The vessel was less than sixty feet long, and had been thoroughly tested as a sailing vessel, but when laden with the additional weight of boilers and engines, and the necessary coal for the voyage, it was so low in the water that the deck was only from twenty to twenty-two inches above the water line. Within three days after its departure, heavy gales beginning on the southeast coast of the United States, moved in a northeasterly course, increasing in violence until they became hurricanes. The time of the departure of the vessel, the speed at which it moved, and the course taken, would have carried it into the track of the gales. In this case, many months having elapsed since the departure of the vessel, and after extraordinary efforts made, no intelligence having been received of its existence or the existence of any of those on board, I hold that the testator's death is proven, and a decree of probate of the will may be presented. In *Matter of Alexander* (N. Y. Law J., Jan. 7, 1893), it appeared that testator took his departure on the brig of which he was the master in August, 1892, for Martinique, and neither he nor the crew had been heard of since. A brig answering the description of his vessel was seen to sink off the Bermudas a few days afterward, and about the time it should have reached the locality. Different articles of cargo were found floating in the vicinity which were identified as of the same character and marks of merchandise shipped by the owners of the

statute declares that "a person upon whose life an estate in *real property* depends, who remains without the United States, or absents himself in the State or elsewhere for seven years together, is presumed to be dead, in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time."¹² The presumption of death, arising from long, unexplained absence, may be rebutted by proof of the person's character and habits, and the manner of his disappearance, making it improbable that he would have communicated with his friends.¹³

Similar to the question of testator's death is that of his *identity*: as where the persons called in by him to witness his will were strangers. In such a case, his identity must be shown, and this may be done by proving that the signature to the paper offered for probate is in his handwriting.¹⁴

§ 187. Burden of proof generally.— The proof of a will must be in accordance with the rules of evidence which prevail in all judicial investigations.¹⁵ The party propounding the will has the affirmative, and the burden of proof rests on him to show to the satisfaction of the court that the instrument was duly executed by a testator of sound mind and lawful age, etc.¹⁶ The subject

brig from this city on the voyage. The hydrographic reports and the newspaper reports showed that about the time the vessel sunk violent gales prevailed in the vicinity. An insurance company paid the owners for the loss of the cargo. A decree of probate was granted. A presumption of the death of an emigrant from a foreign country to the United States, who came here in 1851, and has not been heard from since at his former home, does not arise, in the absence of evidence of inquiry for him in this country. (*Matter of White*, 31 Misc. 484; 65 N. Y. Supp. 567.)

¹² Co. (Civ. Proc.), § 841, as amended 1891. The section also specifies what length of time, in failing to claim proceeds of land deposited for unknown heirs, in partition sales, shall work a presumption of death.

¹³ In *Matter of Miller* (N. Y. Law J., Mar. 18, 1890), on a question of distribution of an estate in remainder, the death of an infant remainderman was sought to be inferred from her absence and failure to communicate with her relatives for more than seven years. "From the facts as to the character

and habits of the alleged decedent and the manner of her disappearance, it is extremely improbable that she would have been desirous to communicate with her relatives. On the streets of a large city, without money, without friends, with no moral training and no education, and with the vicious propensities which are hereafter described, it requires no suggestion on my part to imagine the fate that overtook her." The court refused to entertain the presumption of death. *Keller v. Stuck* (4 Redf. 294) was the case of two children who, when very young and twelve years before testator's death, were removed to a western State to acquire a residence there. Held, that the fact of their not having been heard from since then, raised no presumption of their death, prior to that of testator.

¹⁴ *Mowry v. Silber*, 2 Bradf. 133.

¹⁵ *Peebles v. Case*, 2 Bradf. 226.

¹⁶ *Delafield v. Parish*, 25 N. Y. 9, 97; *Matter of Kellum*, 52 id. 517; *Rollwagen v. Rollwagen*, 63 id. 504; *Kingsley v. Blanchard*, 66 Barb. 317; *Dickie v. Van Vleck*, 5 Redf. 284; *Logg v. Meyer*, id. 628; *Miller v. White*, id. 320; *Cooper v. Benedict*, 3 Dem.

of presumptions and burden of proof as to the mental capacity of a testator, is more in order for a subsequent page.¹⁷ As to proving the due execution and attestation of the will, it is sufficient to say, in this place, generally, that if the attestation clause is full, the signature genuine, the circumstances corroborative of due execution, and no evidence is given disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution, or what took place at the time.¹⁸ Where the testimony leaves the matter in such a state of doubt and uncertainty that the mind of the court is not brought to the belief of the actual execution of the will, although it is not convinced to the contrary, a decree admitting it to probate will be reversed.¹⁹ In general, the burden of proof remains with the proponent to the end of the trial, and if, upon consideration of all the evidence on both sides, the court is not satisfied that the paper propounded contains the last will of the deceased, it must refuse probate. Indeed, if there is a reasonable doubt whether one or more of the directions of the statute have not been omitted, the probate must be refused, although it may appear probable that the paper expresses the testator's intentions.²⁰ Where it is alleged as a ground of contest, that a subsequent will was executed by the testator, the burden is on the contestant to show the due execution of the subsequent will, in order to establish a revocation of the one propounded.²¹ Even where the will has once been admitted to probate, and allegations against its validity or the competency of its proofs are filed, the burden of proving anew is upon the parties resisting the allegations.²²

136; *Matter of McMulkin*, 6 id. 347; *Matter of Elmer*, 88 Hun. 290; 34 N. Y. Supp. 406; *Matter of Hitchler*, 25 Misc. 365; 55 N. Y. Supp. 640. The subject of the burden of proof in probate cases, and of the effect of *Delafield v. Parish*, are discussed in the *Albany Law Journal* of July 16, 1881.

¹⁷ See §§ 206, 212, 217, *post*.

¹⁸ *Matter of Kellum*, 52 N. Y. 517; *Orser v. Orser*, 24 id. 51; *Brown v. Clark*, 77 id. 369. As to effect of the attestation clause as evidence of execution and publication, see *post*, § 203.

¹⁹ *Howland v. Taylor*, 53 N. Y. 627; *Knapp v. Reilly*, 3 Dem. 427. A mere doubt as to the validity of the will, will not justify the appellate court in reversing a decree of the surrogate ad-

mitting it to probate. (*Delafield v. Parish*, 25 N. Y. 35.) A grave doubt, such as will justify reversal, is not formed by the fact that the sustaining witnesses contradict each other, as to the facts attending the execution, where the evidence of each witness taken separately shows the due execution of the will. (*Matter of Lyddy*, 24 St. Rep. 607.)

²⁰ *Theological Seminary of Auburn v. Calhoun*, 25 N. Y. 422, note; *Howland v. Taylor*, 53 N. Y. 627. And see *Irwin v. Irwin*, 1 Redf. 495; *Crispell v. Du Bois*, 4 Barb. 393; and *Burritt v. Silliman*, 16 id. 198.

²¹ *Mairs v. Freeman*, 3 Redf. 181.

²² *Collier v. Idley*, 1 Bradf. 94. Compare *Shaw v. Shaw*, 1 Dem. 21.

§ 188. **Weight of evidence.**—No unvarying rule as to the amount of evidence necessary to establish the execution of a will can be laid down, which is to control in every case, as the circumstances of each case must differ from any other. It is the duty of the court to ascertain, from the facts and circumstances, whether the instrument offered is established with reasonable certainty.²³ The instrument propounded for probate must stand or fall on the testimony adduced before the surrogate in the proceeding for its proof. The fact that the instrument propounded has been already proved in the Supreme Court, as a will of realty, is not a material fact in a proceeding for its proof as a will of personalty in the Surrogate's Court.²⁴ The proponent is not required to produce all the witnesses, except in certain cases already pointed out;²⁵ and even in those cases it is not essential that each witness should be able to testify that all the formalities required by law were complied with.

SUBDIVISION 2.

EXECUTION, PUBLICATION, AND ATTESTATION OF WILL.

§ 189. **Formalities of execution.**—To entitle a testamentary paper to be admitted to probate, certain facts in reference to its mode of execution, publication, and attestation, are required by the statute to be shown.²⁶ The provision of the Statute of Wills, just cited, has been the subject of very frequent adjudications, and its construction, as now settled, may be best stated in the following language, slightly modified from that of the section, as it stands on the statute book: Every will, except nuncupative wills (made in the cases prescribed in another section), must be executed before the testator's death,²⁷ and completely attested in the following manner:

§ 190. **Subscription of will.**—*It must be subscribed by the testator at the end of the will; that is, the testator must sign his name or make his mark below the body of the writing. His signing his*

²³ Rider v. Legg, 51 Barb. 260; Nexsen v. Nexsen, 3 Abb. Ct. App. Dec. 360; 2 Keyes, 229.

²⁴ Isham v. Gibbons, 1 Bradf. 69. And see Collier v. Idley, id. 94. And conversely, a will once proved as a will of personalty, may afterward, on the discovery of real property, be proved anew as a will of real estate. (Smith's Estate, 1 Tuck. 108.)

²⁵ See § 165, *ante*.

²⁶ 2 R. S. 63, § 40. For the requisites

of execution of a will under the English statute, and in this State, before 1830, see Watts v. Public Administrator, 4 Wend. 168; Jauncey v. Thorne, 2 Barb. Ch. 40; Price v. Brown, 1 Bradf. 291. For the history and construction of our statutes regulating the execution and attestation of wills, see Haysradt v. Kingman, 22 N. Y. 372.

²⁷ The formalities must be fully completed before the death of the testator. If he dies in the act, and, though after

name *in* the body of the writing is not a subscription within the meaning of the statute.²⁸ The "end of the will," in the statute, means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion,—*e. g.*, a clause revoking former wills, and a portion only of a clause naming an executor,—following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will.²⁹ Where a will, after the signature of the decedent and the witnesses, contains a clause appointing an executor, the validity of the instrument depends upon the question whether such clause was written before or after execution. If written before execution the signature is not at the end of the will, and the instrument is invalid.³⁰

his subscription, before the witnesses have signed, the will is not valid. (*Vernam v. Spencer*, 3 Bradf. 16; *Matter of Fish*, 88 Hun. 56; 34 N. Y. Supp. 536; *affd.*, 153 N. Y. 579.) In *Knapp v. Reilly* (3 Dem. 427), the testator began to sign his name Patrick, and after writing "Pat—" became too weak to go on, and desisted, though not as having completed all he set out to write. Held, no signature, what was written not being intended as a complete signature.

²⁸ At common law, if a person wrote his name in the body of a will or contract with intent to execute it in that manner, the signature so written was as valid as though signed at the end of the instrument. See *Matter of Booth*, 127 N. Y. 109.

²⁹ *Sisters of Charity v. Kelly*, 67 N. Y. 409. In this case, K. presented to two persons a paper, which he stated he had drawn as his will, and requested them to witness it. The last clause of the instrument was as follows: "I make, constitute and appoint Edward McCarthy to be executor (J. Kelly) of this, my last will and testament, hereby revoking all former wills by me made." There was no evidence that the testator wrote the name "J. Kelly" save his statement as to drawing the will. After the two witnesses had signed, K. wrote his name, in the attestation clause, so that it read: "Subscribed by John Kelly," etc. There was no other signature. Held, probate was properly refused; that the signature in the attestation clause was not a due execution, as it was written after the witnesses had signed their names; that

the writing of the name "J. Kelly" in the last clause of the will, if written by the testator, was not a valid subscription: first, because he did not present that name to the witnesses for their attestation, and the subsequent signing precluded the idea that he wrote it or adopted it for his signature to the paper as a will; second, because the place where the name appears was not the end of the will. See also *Matter of O'Neil*, 91 N. Y. 516; *Jackson v. Jackson*, 39 id. 153; *Matter of Donner*, 37 Misc. 57; 74 N. Y. Supp. 828; *Matter of Conway*, 124 N. Y. 455; *Matter of Blair*, 84 Hun. 581; *affd.*, 152 N. Y. 645; *Matter of Whitney*, 153 id. 259; *Matter of Andrews*, 162 id. 1. But see *Matter of Noon*, 31 Misc. 420, where the paper propounded for probate was entirely in the handwriting of the testatrix, who had left a blank space in the attestation clause so that it read, "Subscribed by—, the testatrix," etc., where she signed it with the intention of executing the will in the presence of the witnesses who thereupon signed as such at her request. Held, a sufficient subscription within the statute. (*Distinguishing Sisters of Charity v. Kelly, supra.*) The validity of the will is not affected because at the time it was executed the separate sheets were not fastened together. (*Matter of Snell*, 32 Misc. 611; 67 N. Y. Supp. 581; *Matter of Fitzgerald*, 33 Misc. 325; 68 N. Y. Supp. 632.)

³⁰ *Matter of Jacobson*, 6 Dem. 298. See *Matter of Gedney*, 17 Misc. 500; 41 N. Y. Supp. 205.

The subscription must be made immediately below where the body of the will terminates, and without any considerable intervening space. A moderate blank space, however, left between the last line of the will and the subscription is not fatal.³¹ But where, after the usual subscription of the testator, the appointment of executors was under-written and signed by the witnesses only, and then a direction to the executors was under-written and signed by the witnesses only, and then a further direction to the executors was under-written and signed by the testator only — the will was not duly executed.³²

A *substantial compliance* with the direction of the statute is, however, all that is necessary,³³ as where the testator's seal was affixed in the usual place for signature above the witnesses' attestation clause, but his subscription was written in proximity to the signatures of the witnesses below that clause;³⁴ or where, after

³¹ *Matter of Gilman*, 38 Barb. 364; *Hitchcock v. Thompson*, 6 Hun. 279; revg. *Heady's Will*, 15 Abb. Pr. (N. S.) 211. Compare *Dennett v. Taylor*, 5 Redf. 561; *Matter of Collins*, id. 20. The existence of unruled blank spaces between the body of the will, written on the first page of a folded sheet, being a printed form, and the lower part of the third page, where the executor's clause and attestation clause, partly in print, were,—Held not to require the rejection of the will. (*Matter of Murphy*, 48 App. Div. 211; 62 N. Y. Supp. 785. See *contra*, *McCord v. Lounsbury*, 5 Dem. 68.)

³² *McGuire v. Kerr*, 2 Bradf. 244. See *Matter of Sanderson*, 9 Misc. 574. In *Matter of Conway* (124 N. Y. 455; 36 St. Rep. 486), the will was written upon a blank form consisting of a single half sheet, one side of which commenced with the usual printed formula and ended with the testimonium and attestation clauses. The blank space intended for the disposing portion of the will was entirely written upon, and at the end, in parentheses and underlined, were the words "carried to back of will." Upon the back of will, just below the space left for the indorsement in parentheses, and underlined, was the word "continued." Then followed bequests of personal property to the testator's sons and daughters which filled up the whole of instrument from the space of indorsement to within one inch of the bottom, and below it all appeared the words "signa-

ture on face of will." Held, not a subscription at the end of will.

³³ *Matter of Voorhis*, 125 N. Y. 765; more fully, 36 St. Rep. 173; *Matter of Williams*, 2 Connolly, 579; 15 N. Y. Supp. 828; *affd.*, 19 id. 778; 46 St. Rep. 791; *Matter of Carey*, 14 Misc. 486; 36 N. Y. Supp. 817.

³⁴ *Cohen's Estate*, 1 Tuck. 286; *Taylor v. Wardlaw*, 3 Dem. 48. Where the signature of a testatrix, placed in a blank space in the attestation clause, was intended as her subscription and so understood by the witnesses, it is sufficient. (*Matter of Acker*, 5 Dem. 19; *Matter of Noon*, 31 Misc. 420.) But in *Matter of Plaisted* (N. Y. Law J., March 24, 1892), the decedent executed her will in due form, and, subsequently, in extreme illness, sent for a friend and directed him to take memoranda in respect of a codicil. He did so, she wrote her name thereto, "Eva." She then signed her name two-thirds down on a blank page of legal-cap, leaving space for an attestation clause, and requested the gentleman to whom she had dictated the memoranda, and a lady, to sign their names below the space for the attestation clause. In accordance with her request, the memoranda and the blank for the codicil were sent to her attorney at Superior, Wisconsin, with a request that he write in the codicil in accordance with the memoranda, and to put in an attestation clause over the signature of the witnesses, probably under the supposition that the document would be valid.

due execution and attestation of a complete will, the testator added other directions without attestation, but which were such as might be rejected without impairing the will.³⁵ So where the subscription and attestation of the will were sufficient, but a copy of another instrument, not testamentary in character, was annexed to the will and incorporated into it by express reference in the will, it was held that the validity of the will was not affected, although the annexed instrument was not subscribed.³⁶ A subscription after the attestation clause meets the requirement of the statute. By so signing, the testator makes that clause a part of the will.³⁷ It must not be understood, however, that a will is entitled to probate simply because the testator intended to conform to the statute. It is the intention of the Legislature, not that of the testator, which controls.³⁸

§ 191. Subscription by mark.—The testator may make his mark, or a subscribing witness may do so for him, if he cannot write,³⁹ or he may sign by the hand of a third person. Such signature must be made by the testator's direction, and in his presence, and the person whose hand makes the signature must attest the will as a witness. An imperfect or indistinct subscription of the testator's name may be regarded as his mark, and thus constitute a compliance with the requirements of the statute.⁴⁰ When the signature of the testator is by mark, it is no objection that the testator's name, and the words "his mark," were written by a witness after he made his mark, and that no proof was given of distinct direction to him by the testator. It is enough if the declaration and the signature were made on the same occasion, and

The attorney did as requested, and wrote a letter of instructions to have the paper executed. She died before receiving it. Probate was denied.

³⁵ Conboy v. Jennings, 1 Sup. Ct. (T. & C.) 622. This case is distinguished in *Dennett v. Taylor*, 5 Redf. 561. See also *Brady v. McCrosson*, 5 Redf. 431; *Matter of Collins*, id. 20; *McMillen v. McMillen*, 13 Wkly. Dig. 350, and cases cited or referred to in next succeeding note.

³⁶ *Tonnele v. Hall*, 4 N. Y. 140; *Thompson v. Quimby*, 2 Bradf. 449. Compare *Matter of O'Neil*, 91 N. Y. 516; *Dennett v. Taylor*, 5 Redf. 561; *Matter of Nies*, 13 St. Rep. 756. As to effect of annexing unsigned testamentary papers to an otherwise properly executed will, see *Matter of Fults*, 42 App. Div. 593; 59 N. Y. Supp. 756.

³⁷ *Younger v. Duffie*, 94 N. Y. 535; *Matter of Laudy*, 78 Hun. 479; 148 N. Y. 403; *Matter of Gamage*, N. Y. Law J., Dec. 20, 1892.

³⁸ *Matter of Andrews*, 162 N. Y. 1; 30 Civ. Proc. Rep. 377. See *Matter of Hitchler*, 25 Misc. 365.

³⁹ *Butler v. Benson*, 1 Barb. 526; *Morris v. Kniffin*, 37 Barb. 336; *Dack v. Dack*, 19 Hun. 630; *Simpson's Will*, 2 Redf. 29. In the last case, it was held that a will so subscribed might be proved when only one subscribing witness could be examined, thus overruling *Matter of Walsh*, 1 Tuck. 132. As to proof of such testator's "handwriting," see § 202, *post*.

⁴⁰ *Hartwell v. McMaster*, 4 Redf. 389.

as one transaction. Indeed, signing by mark would be sufficient, without any such written memorandum.⁴¹

§ 192. **Signature by another person.**—So, too, the testator's hand being weak, or he being illiterate, a third person may guide his hand in the making of his subscription.⁴² Indeed, it may be stated, as a general proposition, that any of the acts required of the testator by the statute may be done by another person in his presence, with his assent and approval.⁴³ Where, however, the evidence leaves in doubt whether the subscription was made by the decedent alone, or with the aid of another, and there is nothing to show that he requested or desired any other person to subscribe it for him, or to aid him in doing so himself, probate is properly refused.⁴⁴ A seal is not sufficient to attest a will, nor is it necessary.⁴⁵

§ 193. **Witnesses of subscription.**—*The will must be subscribed by the testator in the presence of each of at least two witnesses, or must be acknowledged by him to have been subscribed, to each of such attesting witnesses or to such of them as were not present at the making of the subscription.*⁴⁶ Subscribing witnesses to a

⁴¹ Jackson v. Jackson, 39 N. Y. 153; Robins v. Coryell, 27 Barb. 556. And see Chaffee v. Baptist Missionary Convention, 10 Paige, 85; Hollenbeck v. Van Valkenburgh, 5 How. Pr. 281.

⁴² Campbell v. Logan, 2 Bradf. 90; Van Hanswyck v. Wiese, 44 Barb. 494.

In Matter of Kearney (69 App. Div. 481; 74 N. Y. Supp. 1045), the testator's physician and an attorney, witnesses to his will, testified that at testator's request the attorney assisted him in signing the will, he being very weak. The attorney took testator's hand in his own, and, without touching the pen, guided testator in writing his signature. An expert testified, on comparison with two of testator's normal signatures, that he failed to see "a particle of his handwriting in the signature," and that testator had no superintendence, mental or physical, in the act. Held, that the signature was that of testator; the extent of requested assistance, so long as it is assistance, and not control, not invalidating it.

⁴³ Robins v. Coryell, 27 Barb. 557; Gilbert v. Knox, 52 N. Y. 125; Peck v. Cary, 27 id. 9; Meehan v. Rourke, 2 Bradf. 385.

⁴⁴ Rollwagen v. Rollwagen, 3 Hun, 121; affd., 63 N. Y. 504.

⁴⁵ Matter of Diez, 50 N. Y. 88.

⁴⁶ Matter of Laudy, 148 N. Y. 403; Lyon v. Smith, 11 Barb. 124; Carroll v. Norton, 3 Bradf. 291; Tonnele v. Hall, 5 N. Y. Leg. Obs. 254; Spaulding v. Gibbons, 5 Redf. 316; Matter of De Haas, 9 App. Div. 561; 41 N. Y. Supp. 696. In Baker v. Woodbridge (66 Barb. 261), it appeared that neither of the subscribing witnesses saw the testatrix sign, and to neither of them did she acknowledge that she had signed it, and neither of them saw her name upon it. One of the witnesses testified that S., who drew the will and called him to witness it, said to him in the presence of the testatrix, holding out to him a paper so folded that he did not see the signature, "That is Mrs. Bell's will," and requested him to sign his name. The testatrix said nothing and did nothing so far as he remembered. The other witness testified that S. had desired him to come and witness Mrs. Bell's will; that when he went into the room a paper was handed to him and he signed it; that nothing was said in Mrs. Bell's presence about its being a will. S., who drew the will, did not remember that he was present when it was executed. Held, that the will was not properly executed and published.

There is no exception in the statutory requirement as to the execution of

will are required for the purpose of attesting and identifying the signature of the testator; and in order to do this, it is essential that they should see the testator subscribe his name, or that, with the signature visible to them, he should acknowledge it to be his.⁴⁷ Hence, it is not enough if he presents the will already subscribed by him to the witness, and acknowledges that he has executed it as such will, declaring it to be his will and requesting him to sign, where at the same time the witness does not see the signature.⁴⁸ It is a sufficient acknowledgment of his signature, if, the paper and signature being before the witnesses in plain sight, the testator addresses them in words which are calculated and intended by him to give them to understand that the signature is his, and it is so understood by them, although there is no formal acknowledgment by the testator to the witnesses that the signature is his.⁴⁹ Signing the will in the presence of one witness, subsequently acknowledging his signature to a second, and later still to a third, is sufficient.⁵⁰ But, though he declare the instrument to be his will, and request the witnesses to sign, this does not dispense with the acknowledgment of his signature where the signature was not made in the witnesses' presence.⁵¹ The acknowledgment of the signature, and the publication of the will, by acknowledgment, may constitute one and the same act.⁵² It is a fatal objection if one of the witnesses neither saw the testator subscribe, nor heard

wills in favor of holographic instruments. (*Matter of Turell*, 166 N. Y. 330; 59 N. E. 910.)

⁴⁷ *Matter of Mackey*, 110 N. Y. 611; *Matter of Laudy*, 148 id. 403.

⁴⁸ *Lewis v. Lewis*, 11 N. Y. 221; *Matter of Mackey*, 110 id. 611; *Matter of Laudy*, 148 id. 403; *Mitchell v. Mitchell*, 16 Hun. 97; *affd.*, 77 N. Y. 596; *Matter of Purdy*, 46 App. Div. 33; 61 N. Y. Supp. 430. This, in effect, overrules *Baskin v. Baskin*, 36 N. Y. 416; *Willis v. Mott*, id. 486; *Rudden v. McDonald*, 1 Bradf. 352. See *Vernam v. Spencer*, 3 id. 16; *Darling v. Arthur*, 22 Hun. 84.

⁴⁹ *Matter of Austin*, 45 Hun. 1; *Matter of Laudy*, 161 N. Y. 429; *Matter of Lang*, 9 Misc. 521; 30 N. Y. Supp. 388; *Matter of Stockwell*, 17 Misc. 108; 40 N. Y. Supp. 734.

⁵⁰ *Hovsrad v. Kingman*, 22 N. Y. 372; *followed*, *Matter of Potter*, 33 St. Rep. 936.

⁵¹ *Mitchell v. Mitchell*, 16 Hun. 97; *affd.*, 77 N. Y. 596, where it appeared

that deceased came into a store where two persons were, produced a paper and said: "I have a paper that I want you to sign." One of the persons took the paper and saw the signature of the deceased. The deceased then said: "This is my will, I want you to witness it." Both persons thereupon signed the paper as witnesses under the attestation clause. The deceased then took the paper and said: "I declare this to be my last will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. Held, no sufficient signing of the will by the deceased in the presence of the witnesses, nor a sufficient acknowledgment to them that he had done so.

⁵² *Baskin v. Baskin*, 36 N. Y. 416; *Matter of Phillips*, 98 id. 267; *Matter of Hunt*, 42 Hun. 434; *Kinne v. Kinne*, No. 1, 2 Sup. Ct. (T. & C.) 391.

him acknowledge his signature.⁵³ Where, at the time he exhibited the instrument and told the witnesses it was his will, it was so folded that they could see no part of the writing, except the attestation clause, and they did not see the signature, it was held there was no proper acknowledgment of his signature.⁵⁴ The intent of the requirement that a testator's subscription should be "made in the presence of each of the attesting witnesses," or, etc., is not simply that the testator and witnesses should be within the same inclosure, but that the latter should either actually see the former write his name, or have their attention directed to the act of signing while the same is taking place.⁵⁵

§ 194. *Publication.*—*The testator, at the time of making such subscription, or at the time of acknowledging the same, or both*

⁵³ Rutherford v. Rutherford, 1 Den. 33; Lewis v. Lewis, 11 N. Y. 220; Matter of Higgins, 94 id. 554; Jones v. Jones, 42 Hun, 563; Rumsey v. Goldsmith, 3 Dem. 494; Matter of Abercrombie, 24 App. Div. 407; 48 N. Y. Supp. 414; Matter of McDougall, 87 Hun, 349; 34 N. Y. Supp. 302; Matter of Nevins, 4 Misc. 22; 24 N. Y. Supp. 838; Matter of Purdy, 46 App. Div. 33; 61 N. Y. Supp. 430. See Matter of Rustin, 45 Hun, 1.

⁵⁴ Lewis v. Lewis, *supra*; Matter of Mackay, 110 N. Y. 611; disapproving a *dictum* in Willis v. Mott, 36 id. 486, 491, that testator was not required to exhibit his signature. In Matter of Losee (13 Misc. 298; 34 N. Y. Supp. 1120), the will was signed by the testatrix in the presence of two witnesses, one of whom was unable to see to write, and at her request the other witness signed the name of both. It appeared that the first-named witness was unable to see testatrix's signature or to distinguish whether there was ink on the pen with which she wrote, and on the hearing could not distinguish the writing on the paper produced or identify it. Held, that there was no valid execution of the instrument, as there was but one attesting witness. A statement that it is a will, or that "I have made my will; I want you to sign it," made upon exhibition of an apparently blank paper, is not an acknowledgment of a subscription thereto. (Matter of Eakins, 13 Misc. 557; 35 N. Y. Supp. 489.)

⁵⁵ Gardiner v. Raines, 3 Dem. 98. In Spaulding v. Gibbons (5 Redf. 316),

one witness testified that testator signed in the presence of both witnesses, before they affixed their signatures, and declared the paper to be his last will. The other witness did not remember whether he saw testator sign or not, but the evidence showed that he was, at the time, either in the same room or in an adjoining room, in such a position that he could see the signing after his attention was drawn to what was going on. Held, that testator must be considered to have signed in the presence of each subscribing witness.

In Matter of Look (26 St. Rep. 745; 7 N. Y. Supp. 298) testatrix signed her will in the presence of one witness, and, in the presence of both, declared it to be her will, and they signed as witnesses, at her request. One of them testified that she did not see the signature of the testatrix which was within the field of her vision as she signed as witness. Held, a sufficient acknowledgment of the subscription to comply with the statute. The statutory formalities being observed, the valid execution of the will does not depend upon the correctness of the vision or the degree of attention of the witness any more than upon the retentiveness of his memory. See, a peculiar case, Matter of Van Houten, 15 Misc. 196, where it was said that proof that the witnesses saw the pen moving over the paper and heard it make a scratching noise was sufficient to show that the signature was made in their presence: it is not necessary that they should see the mark it made or its actual contact with the paper.

—if subscribed in the presence of one and acknowledged after subscription to the other — must declare in the presence of each witness that the instrument is his will. The object of this provision is to secure the testator against fraud and imposition, and the knowledge that the instrument which the witnesses are called upon to attest is a will, must be communicated to them by the testator at the time of his subscription or acknowledgment; and knowledge derived from any other source, or at any other time, of the same fact, cannot stand as a substitute for the declaration of the testator. The declaration or publication of the will must be made out substantially the same as the subscription or the acknowledgment thereof.⁵⁶ Where the witnesses had been sent for to witness the testator's will, and went for that purpose, but had no other information that they were witnessing his will, the publication was held insufficient.⁵⁷ The testator must in some manner communicate to the attesting witnesses, at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his will, and intends to give it effect as such. Producing the will already subscribed, but folded, so as to conceal the subscription, and acknowledging it as a "free will and deed," are not enough.⁵⁸

⁵⁶ *Scribner v. Crane*, 2 Paige, 147; *Gilbert v. Knox*, 52 N. Y. 125, and cases *infra*. "When the testator produces a paper to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. It is enough that he verifies the subscription as authentic, without reference to the form in which the acknowledgment is made." (Per Porter, J., in *Baskin v. Baskin*, 36 N. Y. 416.) In that case, after the testator had signed his will, in the presence of one of the attesting witnesses, the other witness was called in and asked by the testator to sign it. The witness saw that the testator's signature was already attached; and the testator, with the will in his hand, in the presence of both witnesses, declared it to be his last will and testament, and the second witness then subscribed the attestation clause, which stated that the will was signed and published in the presence of the attesting witnesses. Held, a good publication. See *Matter of Carey*, 24 App. Div. 531; 49 N. Y. Supp. 32.

Testator, after reading the will and signing it in the presence of the witnesses, handed it to one of them with the request that he read the attestation clause and sign it; direct request was made to the other, who had drawn the will. Held, a sufficient publication and request to both witnesses. (*Matter of Woolsey*, 17 Misc. 547; 41 N. Y. Supp. 263.)

⁵⁷ *Bagley v. Blackman*, 2 Lans. 41; *Matter of Chandler*, N. Y. Law J., May 22, 1891. In *Matter of Dickson* (N. Y. Law J., Jan. 16, 1892), the will was in testator's handwriting, and had a declaratory clause at the beginning, stating it to be his will. He called his nephew and niece into his presence, produced the paper, substantially acknowledged his signature at the end of it, and requested them to sign as witnesses. He did not inform them that it was a will, but from the circumstances occurring about that time, they inferred that it was. Probate was denied.

⁵⁸ *Lewis v. Lewis*, 11 N. Y. 220; *Rutherford v. Rutherford*, 1 Den. 33; *Walsh v. Laffan*, 2 Dem. 498; *Porteus*

§ 195. **The declaration must be unequivocal.**—Accordingly, when the decedent, in response to questions, stated that she did not know as she could say that it was her last will,—that it was the last she had made then, the proof of publication was held defective.⁵⁹ It is not essential that the publication, any more than the other facts involved in the execution, should be made by express words of the testator;⁶⁰ or on the same occasion, or when both witnesses are present.⁶¹ A substantial compliance with the statute is sufficient.⁶² It may be incorporated with the request to the witnesses to attest;⁶³ and both may be made by means of questions put to the testator and his affirmative response;⁶⁴ and such response may even be made by nodding the head.⁶⁵ Where

v. Holm, 4 id. 14. In *Larabee v. Ballard* (1 Dem. 496), it appeared that, after the scrivener had completed the draft, decedent requested him to sign decedent's name thereto "*per W. K.*" which he did. While engaged in drafting the instrument, the decedent asked him whether he could witness it without calling any one else, whereto the scrivener assented. Afterward, decedent went into a store and asked B., who was there, to witness an alteration in his will. Decedent and B. then went into the office where the scrivener was, with the instrument. B. thereupon asked decedent if he acknowledged that to be his work, to which decedent assented. Held, not a sufficient declaration by testator of the character of the instrument. In *Matter of Turrell* (28 Misc. 106), the will was referred to as a "document," although the witnesses surmised that they were witnessing a will. Held, insufficient. In *Matter of Oldham* (N. Y. Law J., Dec. 10, 1890), the testatrix neither directly nor by implication declared the paper to be a will, but stated, in a jesting way, that it was her death warrant. At the time, she did not present the paper in a form by which her signature could be seen by the witnesses, but told it so as to conceal it from their sight, if it had been affixed. "Though it has a full attestation clause, it having been executed in March, 1888, the date is too recent to aid the proponent who seeks its probate, especially as the recitals in respect to the decedent's signing of the paper, and the declaration of its character are expressly denied by the positive statements of each of the three witnesses, who only inferred from the surrounding circumstances that it was

a will, and not from anything which she stated." Probate denied.

⁵⁹ *Kingsley v. Blanchard*, 66 Barb. 317.

⁶⁰ *Lane v. Lane*, 95 N. Y. 494; *Nelson v. McGiffert*, 3 Barb. Ch. 158. See *Seguine v. Seguine*, 2 Barb. 385; *Reeve v. Crosby*, 3 Redf. 74; *Gilbert v. Knox*, 52 N. Y. 125; *Thompson v. Leastedt*, 3 Hun, 395; *affd.*, 62 N. Y. 634; *Rugg v. Rugg*, 83 id. 592; *Dack v. Dack*, 84 id. 663; *Matter of Pepon*, 91 id. 255; *Matter of Hardenburg*, 85 Hun. 580; 33 N. Y. Supp. 150.

⁶¹ *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 id. 486; *Neugent v. Neugent*, 2 Redf. 369; *Barry v. Brown*, 2 Dem. 309; *Matter of Forman*, 54 Barb. 274.

⁶² *Lane v. Lane*, *supra*; *Matter of Voorhis*, 125 N. Y. 765; 36 St. Rep. 173. See § 190, *ante*.

⁶³ *Rieben v. Hicks*, 3 Bradf. 353; *Belding v. Leichardt*, 2 Sup. Ct. (T. & C.) 52; *Kinne v. Kinne*, id. 391; *Dack v. Dack*, 19 Hun. 630; *Matter of Murphy*, 15 Misc. 208.

⁶⁴ *Tunison v. Tunison*, 4 Bradf. 138; *Gombault v. Public Adm'r*, 4 Bradf. 226; *Whitbeck v. Patterson*, 10 Barb. 608; *Reeve v. Crosby*, 3 Redf. 74; *Matter of Murphy*, 15 Misc. 208; 37 N. Y. Supp. 223; *Matter of Seagrist*, 11 Misc. 188; 1 App. Div. 615; *Matter of Menge*, 13 Misc. 553; 35 N. Y. Supp. 493. A response by the testatrix, to whom the will was read in the presence of the subscribing witnesses, "It is all right," is a sufficient publication. (*Matter of Buel*, 44 App. Div. 4.)

⁶⁵ *Belding v. Leichardt*, 56 N. Y. 680; *Smith v. Smith*, 2 Lans. 266; *Brown v. De Selding*, 4 Sandf. 10; *Butler v. Benson*, 1 Barb. 526.

an implied declaration is relied upon, as reading the will aloud in testator's presence, proof of the state of his hearing at the time is proper.⁶⁶ The words of acknowledgment may proceed from another, and will be regarded as those of the testator, if the circumstances show that he adopted them, and that the person speaking them was acting for him with his assent.⁶⁷ In that case, the declaration must be made in the presence and hearing of both testator and the witnesses, so that the latter may know that the third person's act was that of the testator.⁶⁸ But the testator must declare, or give the witnesses in some form to understand, at the time of making or acknowledging his subscription, that the instrument signed is his will;⁶⁹ and that the signature is genuine.

§ 196. **Sufficiency of proof of publication.**— The execution of the will must be proved by evidence of what took place at the time the will was signed, and cannot be proved by declarations of the testator, that he had made such a will, naming the witnesses and where the will was made, etc.⁷⁰ The testator's declaration made on a subsequent occasion to one of the witnesses, that the paper signed by him was his last will, is not sufficient,⁷¹ although, after the proponents have made out a *prima facie* case, such declarations may be introduced as corroborative evidence in respect to the genuineness of the signature, or the freedom of the testator from undue influence, or to rebut the contestant's evidence on these points.⁷² Testator's antecedent declarations are admissible,

⁶⁶ McKinley v. Lamb, 64 Barb. 199. And see Trustees of Auburn Theol. Sem. v. Calhoun, 62 id. 381. A deaf person may publish his will by answering questions put to him in writing. (Gombault v. Public Adm'r, 4 Bradf. 226.)

⁶⁷ Gilbert v. Knox, 52 N. Y. 125; Burk's Will, 2 Redf. 239; Troup v. Reid, 2 Dem. 471; Smith v. Smith, 2 Lans. 266. Yet, where the testator was so feeble and exhausted that it is doubtful whether he understood the declaration of a third person in his presence, such declaration will not alone be sufficient. (Heath v. Cole, 15 Hun, 100.) See Stein v. Wilzinski, 4 Redf. 441; Jones v. Jones, 42 Hun, 563.

⁶⁸ Burke v. Nolan, 1 Dem. 436.

⁶⁹ For application of this principle in various peculiar cases, see Remsen v. Brinckerhoff, 26 Wend. 325; Torrey v. Bowen, 15 Barb. 304; Burritt v. Siliman, 16 id. 198; Nipper v. Groesbeck, 22 id. 670; Chaffee v. Baptist Missionary Convention, 10 Paige, 85; *Ex p.*

Beers, 2 Bradf. 163; Campbell v. Logan, id. 90; Robinson v. Smith, 13 Abb. Pr. 359; Brown v. De Selding, 4 Sandf. 10; Grant v. Grant, 1 Sandf. Ch. 235; Rutherford v. Rutherford, 1 Den. 33; Hunt v. Mootrie, 3 Bradf. 322; Moore v. Moore, 2 id. 261; Van Hooser v. Van Hooser, 1 Redf. 365; *In re Sheridan*, id. 447; Carle v. Underhill, 3 Bradf. 101; Vaughan v. Burford, id. 78; Trustees of Auburn Theol. Sem. v. Calhoun, 62 Barb. 381; McKinley v. Lamb, 64 id. 199; Smith v. Smith, 2 Lans. 266; Reeve v. Crosby, 3 Redf. 74. Matter of Smith (39 St. Rep. 698; 15 N. Y. Supp. 425) was a case where testator could neither read nor write: the attestation clause, though not the body of the will, was read to him. The will was admitted to probate.

⁷⁰ Johnson v. Hicks, 1 Lans. 150.

⁷¹ Matter of Dale, 56 Hun, 169; 9 N. Y. Supp. 396; *affd.*, 134 N. Y. 614.

⁷² Taylor's Will, 10 Abb. Pr. (N. S.) 300.

in connection with his indefinite declaration at the time of the execution, in aid of proof of a sufficient publication. So the fact that testator was fully apprised of the testamentary character of the instrument, may be considered in aid of proof tending to establish a publication.⁷³ Hence, while *holographic wills* are not excepted from the terms of the statute prescribing the method of publication, in case of such a will, criticism of the terms and manner of what is claimed to be a sufficient publication need not be so close or severe as where the question, as to whether the testator knew that he was executing a will, depends solely upon the facts of publication.⁷⁴

§ 197. Republication.— A will originally inadequately published may be subsequently republished and reaffirmed by a codicil. Thus, in one case, a married woman executed in due form a codicil, which, after referring to and describing a will executed by her before marriage, contained the following clause: "I do hereby republish, reaffirm, and adopt the aforesaid instrument as my present will in like manner as if so executed by me, but modified pursuant to this codicil, which, in connection with an amendment of my said will, I now publish and declare together as constituting my last will and testament." The will was present when the codicil was executed, and the attention of the witnesses was called to it, and the testatrix, at the time, declared the instrument

⁷³ *Matter of Hunt*, 110 N. Y. 278; *Thompson v. Stephens*, 62 id. 634. And see, generally, on the subject of due publication, *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 id. 9; *Nexsen v. Nexsen*, 3 Abb. Ct. App. Dec. 360; *Chaffee v. Baptist Miss. Con.*, 10 Paige, 85; *Matter of Gilman*, 38 Barb. 364; *Gamble v. Gamble*, 39 Barb. 373; *Doe v. Roe*, 2 id. 200; *Hutchings v. Cochran*, 2 Bradf. 295; *McDonough v. Loughlin*, 20 Barb. 238; *Hollenbeck v. Van Valkenburgh*, 5 How. Pr. 281; *Hunn v. Case*, 1 Redf. 307; *Heath v. Cole*, 15 Hun, 100; *Van Hooser v. Van Hooser*, 1 Redf. 365; *Von Hoffman v. Ward*, 4 id. 244. See § 203, *post*.

⁷⁴ *Matter of Carey*, 24 App. Div. 531; *Matter of Beckett*, 103 N. Y. 167. In that case testatrix, at the time of executing her will, simply referred to it, in addressing the witnesses, as a paper, but at the same time connected such expression with previous conversations had with the witnesses regarding a will. Held, sufficient. Although it may be that an imperfect and indefinite declaration cannot be made sufficient by proof of a previous conversation not connected with the *factum* by the words of publication used, yet it will be sufficient where they were so connected by the very language of the testatrix at the time of execution. (*Ib.*) Compare *Buckhout v. Fisher*, 4 Dem. 277, where it was held, in a case of a holographic will, that in the absence of direct testimony as to the fact, and in case of failure of recollection on the part of the witnesses, as to whether the will was signed by the testator before such presentation and declaration, the court may consider the internal evidence afforded by the examination of the paper itself, in determining such fact. To the same effect, *Matter of Cottrell*, 95 N. Y. 329; *Matter of Wilcox*, 37 St. Rep. 462; 14 N. Y. Supp. 109; *Matter of Stillman*, 29 St. Rep. 213; 9 N. Y. Supp. 446. But see *Matter of Turrell*, 28 Misc. 106, where the will was referred to as a "document," a declaration held to be insufficient, although the will was holographic.

to be "a codicil to her last will and testament, and a reaffirmation of the latter." It was held that the execution of the codicil was a republication of the will, and that it and the codicil together were to be considered as the will of the testatrix.⁷⁵

So where a will has been formally revoked by a subsequent will, but not destroyed, it may be revived by the execution of a codicil,⁷⁶ or by destruction of an instrument intended only as a *modification* thereof.⁷⁷ But a will that is revoked by a subsequent one which is destroyed by the testator, is not revived by his declaration that he desires his first will to stand, made to others than the subscribing witnesses, where the persons to whom such declaration was made do not subscribe as witnesses to the will.⁷⁸

§ 198. Attestation by witness.—*Each of the two attesting witnesses, at least, must sign his name as a witness at the end*⁷⁹ *of the will at the request of the testator.* Their signatures may be made by mark;⁸⁰ or by the aid of another;⁸¹ but the witness must sign with intention to be such. One who writes the name of another person as witness, not intending to attest the will himself, and not writing his own name, cannot be deemed a witness.⁸² Though the statute requires the witnesses to subscribe at the end of the will, yet where, by mistake, the attestation clause and witnesses' signatures were written on an intermediate blank page, the execution was sustained.⁸³ The witnesses must sign after the will has been

⁷⁵ Van Cortlandt v. Kip, 1 Hill, 590; Brown v. Clark, 77 N. Y. 369; affg. 16 Hun, 559, which reversed s. c., Proctor v. Clarke, 3 Redf. 445. See note to this case, 1 Am. Prob. Rep. 517; Masters' Estate, 1 Civ. Proc. Rep. 459; Matter of Nisbet, 5 Dem. 286; Matter of Miller, 11 App. Div. 337; affd., 161 N. Y. 71; Cook v. White, 43 App. Div. 388; 60 N. Y. Supp. 153; affd., 167 N. Y. 588.

⁷⁶ Matter of Knapp, 51 St. Rep. 517, 23 N. Y. Supp. 282.

⁷⁷ Matter of Johnston, 69 Hun, 157; 23 N. Y. Supp. 355. In Matter of Trost (38 Misc. 404), the testator had made two wills, and later executed a codicil which was written on the back of the first will. The codicil did not refer to either will, or by its terms republish either of them.—he'd insufficient as a republication of the first will.

⁷⁸ Matter of Stickney, 161 N. Y. 42. In that case, the court said: "We are of the opinion that it was the intent of the Legislature by this statute to require the same formalities and the

same proof to establish a republication of a will as are plainly required to establish its original publication, and hence, that a will which has been revoked can be revived only by its republication in the presence of its attesting witnesses." See § 230, *post*.

⁷⁹ Matter of Dayger, 47 Hun, 127; 110 N. Y. 666. See § 190, *ante*.

⁸⁰ Meehan v. Rourke, 2 Bradf. 385; Morris v. Kniffin, 37 Barb. 336.

⁸¹ Campbell v. Logan, 2 Bradf. 90. One witness may, in addition to his own signature, sign the name of the other, at the latter's request. (Matter of Strong, 39 St. Rep. 852.)

⁸² *Ex p. Leroy*, 3 Bradf. 227.

⁸³ Hitchcock v. Thompson, 6 Hun, 279; revg. Heady's Will, 15 Abb. Pr. (N. S.) 211; Matter of Singer, 19 Misc. 679; 44 N. Y. Supp. 606. Although the attestation clause is carried entirely across the face of the will and separates the signature of the testator from that of the witnesses, the execution is sufficient. (Matter of Beck, 6 App. Div. 211; 39 N. Y. Supp. 810; affd., 154 N. Y. 750.)

subscribed by the testator.⁸⁴ The signatures of the attesting witnesses need not, however, immediately follow that of the testator; the attestation clause may intervene,⁸⁵ but nothing more.⁸⁶ It is not essential that the attesting witnesses should each subscribe in the presence of the other. As has already been observed, the testator may sign in the presence of one witness, and afterward acknowledge the execution to another witness. Nor is it necessary that the attesting witnesses sign literally in the presence of the testator.⁸⁷ If they sign at his request, although in an adjoining hall out of his sight (which, according to the English cases, is not in his presence), it is sufficient, though their signing must be done at the time of the execution or acknowledgment, and with the knowledge and request of the testator.⁸⁸

The request to sign as witnesses may be presumed, as where two persons are called in to witness the paper, which they do, in the presence of the testator, he at the same time subscribing it, and declaring that it is his last will and testament.⁸⁹ And the reading

⁸⁴ Rugg v. Rugg, 21 Hun, 383; 83 N. Y. 592. See Matter of Purdy, 46 App. Div. 33.

⁸⁵ Williamson v. Williamson, 2 Redf. 449.

⁸⁶ In Matter of Hewitt (91 N. Y. 261), the will was written upon two sides of the paper: the subscribing witnesses signed their names at the bottom of the first side, and again at the top of the second side, following which was an important provision of the will. Held, that the witnesses did not sign their names at the end of the will. In Matter of Case (4 Dem. 124), the will contained disposing clauses signed by the testatrix, followed by an attestation clause, signed by the witnesses, and thereafter a clause nominating an executor, and a second subscription by the testatrix but not by the witnesses, and it appeared that the whole of the writing was made before there was a signing by any person. Held, that the witnesses did not sign their names at the end of the instrument. In Matter of Blair (84 Hun, 581; 32 N. Y. Supp. 845; affd., 152 N. Y. 645), a clause was added, after the attestation clause, just prior to execution of the will, which was signed and sealed by testator after the testimonium clause and also after the added clause, while the witnesses signed only after the attestation clause. Probate was refused. To the same effect, Matter of Albert,

38 Misc. 61. In Matter of Nies (13 St. Rep. 756), testator signed at the end of the first clause of the will; then followed a second clause, appointing an executor, followed by the attestation clause, at the foot of which the witnesses signed. Probate was denied. The presence of a memorandum of erasures and interlineations, at the end of the attestation clause, is not to be regarded. (McDonough v. Loughlin, 20 Barb. 238.)

⁸⁷ Ruddon v. McDonald, 1 Bradf. 352; Jackson v. Christman, 4 Wend. 277; Neugent v. Neugent, 2 Redf. 369; Herrick v. Snyder, 27 Misc. 462; 59 N. Y. Supp. 229; Matter of Phillips, 34 Misc. 442; 69 N. Y. Supp. 1011.

⁸⁸ Lyon v. Smith, 11 Barb. 124; Spaulding v. Gibbons, 5 Redf. 316.

But where witnesses to a will signed it out of the presence of the testatrix, and thereafter one of them brought it back and gave it to her, and the testatrix did not acknowledge to either of them that it was her will, or request one of the witnesses to sign the same, the execution was insufficient to establish the will. (Matter of Kivlin's Will, 37 Misc. 187; 74 N. Y. S. 937.)

⁸⁹ Butler v. Benson, 1 Barb. 526. And see Doe v. Roe, 2 id. 200; Brown v. De Selding, 4 Sandf. 10; Hutchings v. Cochrane, 2 Bradf. 295. Compare Matter of Kauze, N. Y. Law J., April 21, 1893. In Brady v. McCrosson (5

of the attestation clause in the testator's presence, subsequently to the witnesses signing, stating that they signed at his request, without objection from him, may be regarded as an adoption of a request to that effect.⁹⁰ A request to only one witness to sign is not enough; at least without constructive request to the other.⁹¹ Where there are three witnesses, at least two of them must act in compliance with the statute.⁹² But it should be observed that, although the statute declares that each witness must sign at the testator's request, it does not prescribe the manner and form in which the request must be made. No precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses, in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is sufficient.⁹³

§ 199. Sequence of acts of execution, etc.— The order in which the formal acts of execution and publication prescribed by the statute should be done, is not imperative, except that the attestation by the signing of the witnesses must be after the testator's execution.⁹⁴ If the testator subscribes after the witnesses sign, he must subsequently acknowledge his subscription in their presence.⁹⁵

§ 200. Witnesses' additions.— The validity of the will is not affected by the omission of witnesses to affix their residences to

Redf. 431), the decedent requested A. to ask a scrivener to come and draw his will, at the same time stating that he wished A. to be a witness. On a subsequent day,—that of the execution.—A. and another signed as subscribing witnesses in decedent's presence, after the will had been read in their presence, nothing further being said to A. about signing, but the other witness being duly requested. Held a sufficient request to A.

⁹⁰ *Stewart's Will*, 2 Redf. 77. And see *Smith v. Smith*, 40 How. Pr. 318.

⁹¹ *Rutherford v. Rutherford*, 1 Den. 33.

⁹² *Lyon v. Smith*, 11 Barb. 124; *Carroll v. Norton*, 3 Bradf. 291; *Hoysradt v. Kingman*, 22 N. Y. 372.

⁹³ *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 id. 9; *Gilbert v. Knox*, 52 id. 125. Thus a request to witnesses to sign a will made by one superintending its execution in the hearing of the testator and with his silent per-

mission, is sufficient. (*Matter of McGraw*, 9 App. Div. 372; 41 N. Y. Supp. 481; *Matter of Nelson*, 141 N. Y. 152; 56 St. Rep. 678.) Not so, however, where he is shown to have been under the influence of opiates at the time. (*Matter of Lyman*, 14 Misc. 352; 36 N. Y. Supp. 117.)

⁹⁴ *Jackson v. Jackson*, 39 N. Y. 153; *Rugg v. Rugg*, 21 Hun, 383.

⁹⁵ *Sisters of St. Vincent, etc. v. Kelly*, 67 N. Y. 409; *Lyman v. Phillips*, 3 Dem. 459; *Matter of Phillips*, 98 N. Y. 267. Where a will was subscribed by the testatrix in the presence of the witnesses, and was declared by her to be her will, and they subsequently signed in her presence and at her request, although the declaration and request were made before testatrix signed. Held, that the will was properly executed. (*Matter of Williams*, 2 Connolly, 579; *affd.*, 19 N. Y. Supp. 778.)

their signatures, as required by the statute,⁹⁶ or by the omission of any person who signs the testator's name by his direction, to write his own name as a witness; but the statute imposes a penalty for omission so to do.⁹⁷

§ 201. **Proof of observance of requisite formalities.**—It is not essential that each subscribing witness should be able to testify that all the formalities required by law were complied with.⁹⁸ Where the witnesses are dead, or, from lapse of time, do not remember the circumstances attending the attestation, if there are no circumstances of suspicion, and all the evidence then existing has been produced, a proper execution of the will may be presumed, particularly where the attestation clause is full,⁹⁹ and even though there be no attestation clause at all.¹ Indeed, a will may be admitted to probate (both the witnesses being dead) notwithstanding proof of declarations by one of them to the effect that

⁹⁶ 2 R. S. 63, § 41; *Matter of Phillips*, 98 N. Y. 267.

⁹⁷ See *Dodge v. Cornelius*, 168 N. Y. 242.

⁹⁸ *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Weir v. Fitzgerald*, 2 Bradf. 42; *Newhouse v. Godwin*, 17 Barb. 236; *Matter of Graham*, 30 St. Rep. 292; 9 N. Y. Supp. 122; *Matter of Hardenburg*, 85 Hun, 580; 33 N. Y. Supp. 150, and cases *infra*. Evidence as to the publication and other formalities of execution by illiterate testatrix was considered, sustaining probate, in *Matter of Voorhis*, 27 St. Rep. 368; 7 N. Y. Supp. 596; motion for reargument denied in 9 id. 201; 30 St. Rep. 620; *affd.*, 125 N. Y. 765; and in *Matter of Bedell*, 32 St. Rep. 1022.

⁹⁹ *Butler v. Benson*, 1 Barb. 526; *Matter of Pepoon*, 91 N. Y. 255; *Matter of Sears*, 33 Misc. 141; 68 N. Y. Supp. 363; *Matter of Brissell*, 16 App. Div. 137; 45 N. Y. Supp. 122. To the same effect, see *Cheeny v. Arnold*, 18 Barb. 434; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Hunn v. Case*, 1 Redf. 307; *Van Hooser v. Van Hooser*, *id.* 365; *Moore v. Griswold*, *id.* 388. And see *Lawrence v. Norton*, 45 Barb. 448; *Rider v. Legg*, 51 Barb. 260; *Matter of Kellum*, 52 N. Y. 517; *Sarvent v. Hesdra*, 5 Redf. 47; *Matter of Frey*, 26 St. Rep. 425; 7 N. Y. Supp. 330; *Matter of Sanderson*, 9 Misc. 574; 30 N. Y. Supp. 848; *Matter of Klett*, 3 Misc. 385; 24 N. Y. Supp. 721; *Matter of De Haas*, 19 App. Div. 266; 46 N. Y. Supp. 189.

"If the recollection of both witnesses fail, the will may be admitted on testimony of others who can recall the facts, and even by the recitals in a full attestation clause, where there has been a considerable lapse of time between the date of the instrument and the examination of the witnesses. And where both witnesses are dead, and no living person can testify to the facts that took place at the execution of the will, proof of the handwriting of the signatures of the testator and the witnesses, with the recitals in a full attestation clause, will suffice. The law is thus liberal that the intentions of a testator may not be frustrated by the accident of death or the infirmities of memory, when, for want of better proof, the court is satisfied that the paper was executed in good faith as a testamentary instrument." (Per Ransom, S., in *Matter of Wilt*, N. Y. Law J., Nov. 25, 1891.)

¹ *Matter of Briggs*, 47 App. Div. 47; 62 N. Y. Supp. 294. In that case the will offered for probate was wholly in the testator's handwriting and contained no attestation clause; the signatures of the testator, and of the subscribing witnesses, who were dead, were proved, as was the fact that the will was found among testator's papers, and a notary, a friend of the testator, testified that in 1890 the latter brought the paper to the office of the witness, stated it was his will, and asked the witness to "freshen it up," since it was made so long before that it

the will was a forgery, and that he had fabricated it.² But where the will was only recently executed, the presumption is not so strong, and in one case, where not more than three months had intervened between the execution of the will and the application for probate, and neither of the witnesses could remember any testamentary declaration, it was held that due execution of the will could not be presumed, and probate was refused.³

§ 202. **Will signed by mark.**— Some difficulty has been encountered in applying to cases of wills signed by a mark, the provision of the statute that in case of the death, absence, or disability of one or all the subscribing witnesses, "the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such circumstances as would be sufficient,"⁴ and upon this question the decisions of the different Surrogates' Courts are not in harmony. It has now been decided, however, by the appellate court, that a will signed by a mark may be admitted to probate upon proof of the formal requisites by one witness, the other being dead.⁵

might be supposed that a later will existed: told the witness the circumstances of its execution, which corresponded with the legal requirements, desired the witness to sign it as witness, or take the testator's acknowledgment, whereupon an acknowledgment was drawn by witness which the testator signed and swore to before him.—Held, that the proof of execution was sufficient.

² *Matter of Hesdra*, 119 N. Y. 615; 28 St. Rep. 810. In *Matter of Kane* (2 Connolly, 249), a will containing a full attestation clause was admitted to probate, notwithstanding testimony of surviving subscribing witness that he signed before testatrix. See *Matter of Menge*, 13 Misc. 553; 35 N. Y. Supp. 493.

³ *Wilson v. Hetterick*, 2 Bradf. 427.

⁴ Co. Civ. Proc., § 2620.

⁵ *Matter of Wilson*, 76 Hun. 1; 27 N. Y. Supp. 957, overruling *Matter of Walsh*, 1 Tuck. 132, and *Matter of Reynolds*, 4 Dem. 68, and approving *Matter of Dockstader*, 6 id. 106; *Matter of Hyland*, 27 N. Y. Supp. 961; *Matter of Kane*, 20 id. 123. See also *Matter of Murphy*, 15 Misc. 208; 37 N. Y. Supp. 223. In the *Wilson* case (*supra*) the court said: "The only objection to the sufficiency of proof by a single surviving attesting witness is, that in every case the

statute requires the testator to either sign in the witness's presence, or acknowledge his signature, and to prove the will the witness must testify to either one or the other of such requisites, either of which would be proof of the handwriting of the deceased; that, hence, when the statute prescribes proof must be made of the handwriting of the testator, some further evidence, or evidence of further witnesses, is required. If the section cited referred only to the cases where some attesting witness survived or could be produced, there would be great force in this objection. But the provision of the Code is general, and applies to cases where the testimony of no attesting witness can be obtained. We think that we are not warranted in limiting the provisions of this section to the proof of handwriting by others than the attesting witnesses. It is possible to imagine cases where our construction would perhaps render fraud more easy, but such a danger is more imaginary than real. On the other hand, to uphold the rule laid down by the surrogate will cause many properly executed wills to fail without any fault or neglect on the testator's part. The current of practice and authority being against that rule, we think that it should not be upheld."

In the absence of evidence that tes-

It is obvious that "the circumstances which would be sufficient to prove the will," including the making of the mark, are provable by any persons who were present at the time of the execution, and this has been held to be sufficient.⁶ But where no persons, other than the witnesses, were present, or if present, are not producible, and only one of the subscribing witnesses is alive or producible, then (as the testator had no handwriting), "the circumstances," except as proved by the surviving witness, may be difficult to discover. The recitals of a full attestation clause constitute a prime factor in the proof of the circumstances they relate;⁷ the books of the deceased subscribing witness showing a receipt of money for drawing the will, the fact that the will, on its face, is a natural one, that it is intelligently drawn and couched in the language of the law appropriate to such documents, all aid to prove the *factum*, and, taken in connection with the unimpeached testimony of the surviving witness, should be "sufficient to prove the will."⁸

§ 203. **Recitals in attestation clause as proof.**—The attestation clause, so called, under which the witnesses sign, if it recites fully the observance of the several formalities of signing, publication, request, and witnessing, may be, and in some cases is, an essential factor in the proponent's proof—that is, it may, by the presumption it raises, supply the want of testimony by a subscribing witness who has since died, or who is out of the jurisdiction, or after a lapse of time, it may supply the witness's want of memory of the transaction.⁹ Even after the lapse of a period of less than four months from the execution of the will, probate has been granted on the recitals in the attestation clause, when one of the witnesses could not be produced, and the other was not positive whether or not testator signed before the witnesses signed.¹⁰ In the absence of an attestation clause there is never a presumption

tator actually made the mark offered as the signature to the will, one witness having died and the other *not having seen the mark made*.—Held, that probate must be denied. (Matter of Porter, 1 Misc. 262; 22 N. Y. Supp. 1062.)

⁶ Simpson's Will, 2 Redf. 29.

⁷ See § 203. *post*.

⁸ In Matter of Dockstader (6 Dem. 106; 19 St. Rep. 245), the testimony of a sole surviving witness that she signed the testatrix's name and saw her make her mark, and that the other

requisite formalities were observed, was sufficient proof.

⁹ Brown v. Clark, 77 N. Y. 369; Matter of Klett, 3 Misc. 385; Matter of Carey, 14 id. 486; 36 N. Y. Supp. 817; *affd.*, 24 App. Div. 531; Matter of Schweigert, 17 Misc. 186; 40 N. Y. Supp. 979; Matter of Menge, 13 Misc. 553; 35 N. Y. Supp. 493. and cases *infra*.

¹⁰ Matter of Harkins, N. Y. Law J., May 20, 1892. Compare Matter of Oldham, N. Y. Law J., Dec. 10, 1890; *ante*, § 194, note 58.

of due execution, publication, etc.,¹¹ on the other hand the want of such clause creates no presumption against the fact of due execution.¹² Standing alone, it can hardly be said to be evidence of the truth of its recitals;¹³ in connection with oral testimony, weight will be given it, according to the circumstances of the case.¹⁴ But it is settled that, notwithstanding a lapse of time — say a year after its execution — any presumption in favor of the truth of the recitals is destroyed by the testimony of the witnesses themselves on the trial, in contradiction thereof,¹⁵ and an untrue recital materially affects its value.¹⁶ Where there is a full and complete attestation clause, properly signed, the will may be admitted, even against the direct testimony of the sole surviving witness;¹⁷ but where, for example, the publication of the will was

¹¹ *Dodworth v. Crow*, 1 Dem. 256.

¹² *Leaycraft v. Simmons*, 3 Bradf. 35. See *Chaffee v. Baptist Miss. Conv.*, 10 Paige, 85; *Matter of Burk*, 2 Redf. 239; *Matter of Crane*, 68 App. Div. 355; 74 N. Y. Supp. 88.

¹³ *Matter of Look*, 26 St. Rep. 745; 7 N. Y. Supp. 298; *Matter of Delprat*, 27 Misc. 355.

¹⁴ See, generally, *Morris v. Porter*, 52 How. Pr. 1; *Hunn v. Case*, 1 Redf. 307; *Van Hooser v. Van Hooser*, id. 365.

¹⁵ *Woolley v. Woolley*, 95 N. Y. 231; *Matter of Higgins*, 94 id. 554; *Burke v. Nolan*, 1 Dem. 436; *Rumsey v. Goldsmith*, 3 id. 494; *Matter of Dale*, 56 Hun. 169; *affd.*, 134 N. Y. 614; *Rutherford v. Rutherford*, 1 Den. 33; *Matter of Gibhardi*, N. Y. Law J., Nov. 14, 1890. See *contra*, *Matter of Van Houten*, 15 Misc. 196.

¹⁶ *Matter of Turrell*, 28 Misc. 106; 59 N. Y. Supp. 780.

¹⁷ *Matter of Bernsee*, 141 N. Y. 389; 57 St. Rep. 601. In *Matter of Cottrell* (95 N. Y. 329), there was an attestation clause in due form, signed by a man and wife with whom the testator had boarded. Both witnesses testified that none of the formalities required by law were complied with in their presence, and they denied that either was present at the execution or signed the attestation clause. Yet the will was sustained, it being shown that both the will and the signature at its end were in the handwriting of the testator, that during his sickness he had said that his will, which he described as executed with the two witnesses as present, was either among his papers or in the hands of his executor, and

it was, in fact, found among his papers. Though the will was in his own handwriting, it was proven that it had been more or less copied from a previous will. It was also shown to the satisfaction of the court, by the opinions of experts who had made a comparison of the signatures of the witnesses to the attestation clause, with others admitted to be theirs, that they were identical. The court said: "It was always considered to afford a strong presumption of compliance with the requirements of the statute in relation to the execution of wills, that they had been conducted under the supervision of experienced persons, familiar not only with the forms required by law, but also with the importance of a strict adherence thereto."

In *Orser v. Orser* (24 N. Y. 51), a will was attested by two witnesses, one of whom was dead, and the other testified that the will was not signed, or the signature thereto acknowledged in his presence, and that it was not declared by the testator to be his will. The attestation clause recited a perfect compliance with the provisions of the statute; and the signatures of the testator and the deceased witness were shown to be genuine. The deceased witness was in the habit of drawing wills, and was familiar with the requisites to due execution, and the certificate or attestation clause was in his handwriting. On the other hand, the witness who was sworn had never been called upon to witness a will, and knew nothing of the formalities required. Held, sufficient to sustain a verdict that the will was duly executed. In

not recited, though the will was holographic, and the only subscribing witness who was called to testify could not recollect that anything was said by the testator by which witness could infer that the paper was a will, though many years had elapsed, probate was denied.¹⁸ In another case, however, where the attestation clause did not state that the witnesses signed at the request of the testator, and the surviving witness testified that he signed at the request of the other (deceased) witness, and not at that of testator, though in his presence, and it appeared that both the testator and the deceased witness who drew the will were experienced lawyers, it was held that the presumption was in favor of the due observance of all the formalities and that probate was rightly granted.¹⁹

§ 204. Weight of evidence of subscribing witnesses.— The testimony of the subscribing witnesses has no controlling effect, and may be rebutted by other evidence, either direct or circumstantial; although, on account of their direct participation in the transaction, their testimony has great weight.²⁰ Indeed they may be contradicted, and the will sustained even in opposition to the

Matter of Pepoon (91 N. Y. 255), the witnesses (the attestation clause being in due form, and the will executed more than fourteen years before the death of the testatrix) testified in substance that they had not a clear recollection of what occurred at the time of the execution; that they must have read or heard read and understood the purport of the attestation clause, as they never signed any document without knowing its contents, and that they would not have signed if the facts stated in said clause had not occurred. One of them also testified that the signatures of the testatrix and two witnesses were made in the presence of each other, and that he recollected that said clause was read or that he heard it read. It was held that the evidence justified the probate of the will.

In *Peebles v. Case* (2 Bradf. 226), two wills, bearing the same date, and purporting to be attested by the same witnesses, were pronounced. The witnesses testified to the execution of one, and disclaimed all knowledge of the other; and yet, upon proof of their handwriting, and that of the testator, and proofs by memoranda of the testator, and otherwise, it was held that the latter was established as the will. See *Lane v. Lane*, 95 N. Y. 494; *Taylor v. Brodhead*, 5 Redf. 624; *Milligan v. Al-*

len, 18 Week. Dig. 485; *Matter of Rounds*, 7 St. Rep. 730; *Rolla v. Wright*, 2 Dem. 482; *Matter of Kane*, 2 Connoly, 249.

¹⁸ *Matter of Pennevet*, N. Y. Law J., Feb. 23, 1893.

¹⁹ *Matter of Nelson*, 141 N. Y. 152; 56 St. Rep. 678.

²⁰ *Orser v. Orser*, 24 N. Y. 51. The testimony of persons who were accidentally present at the execution of a will is not entitled to the same weight as that of the subscribing witnesses. (*Matter of Higgins*, 94 N. Y. 554; *Humphreys' Estate*, 1 Tuck. 142.) Such third persons are competent to corroborate the testimony of one of the subscribing witnesses. (*Matter of Bernsee*, 45 St. Rep. 11; 17 N. Y. Supp. 669.) Failure to call such witness on the part of the proponents when the subscribing witnesses contradicted each other in almost every particular,—Held, to discredit the subscribing witness whose testimony proponents relied on, and to strengthen the presumption that the testimony of the other subscribing witness was true. (Ib.)^{*} See *Matter of Fitzgerald*, 33 Misc. 325, where probate was granted upon the testimony of a third person (legatee) in opposition to both subscribing witnesses.

positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact.²¹ If the attesting witnesses contradict each other as to the formalities of execution, the surrogate is not, therefore, bound to pronounce against the validity of the will, but may give credence to the affirmative rather than the negative testimony.²² The positive recollection of one such witness will not be overcome by the nonrecollection of the other.²³ Proof of the handwriting of the testator, and of the subscribing witnesses, will justify a decree of probate, even against the positive testimony of both the witnesses that they had never acted as such.²⁴ And, in such a case, other things being equal, the testimony of lawyers will outweigh that of laymen.²⁵

²¹ *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85; *Peebles v. Case*, 2 Bradf. 226; *Jackson v. Christman*, 4 Wend. 277; *Orser v. Orser*, 24 N. Y. 51; *Kinne v. Kinne*, 2 Sup. Ct. (T. & C.) 391; *Rugg v. Rugg*, 83 N. Y. 592; *Theological Seminary v. Calhoun*, 25 id. 422; *Peck v. Cary*, 27 id. 9; *Reeve v. Crosby*, 3 Redf. 74; *Matter of Fitzgerald*, 33 Misc. 325; 68 N. Y. Supp. 632; *Matter of Stockwell*, 17 Misc. 108; 40 N. Y. Supp. 734.

As to uncertainty or conflict in witness's testimony generally, see *Matter of Forman*, 54 Barb. 274; *McKinley v. Lamb*, 56 id. 284; *Merchant's Estate*, 1 Tuck. 151.

²² *Theo. Seminary v. Calhoun*, 25 N. Y. 422. And see, as to the effect of conflict or uncertainty in witnesses' testimony as to publication, *Matter of Forman*, 54 Barb. 274; *Newton's Estate*, 1 Tuck. 349; *Lawrence's Will*, id. 243; *Hopper's Estate*, id. 378; *Merchant's Estate*, id. 151; *Matter of Bogert*, 6 Civ. Proc. Rep. 128; *Matter of Look*, 26 St. Rep. 745; 7 N. Y. Supp. 298. But due execution and publication cannot be established by the testimony of one of the subscribing witnesses against that of the other, where there is no attestation clause and the testimony of such witness is discredited by contrary statements made about the time of the alleged execution. (*Matter of Barber*, 92 Hun. 489; 37 N. Y. Supp. 235.)

²³ *Morris v. Porter*, 52 How. Pr. 1;

Matter of Graham, 30 St. Rep. 292; *Whitfield v. Whitfield*, 19 Week. Dig. 386; *Rugg v. Rugg*, 83 N. Y. 592.

²⁴ *Matter of Cottrell*, 95 N. Y. 329. ²⁵ *Humphreys' Estate*, 1 Tuck. 142; *Neiheisel v. Toerge*, 4 Redf. 328; *Matter of McKenna*, 16 St. Rep. 971; *Matter of Merriam*, 42 id. 619; 16 N. Y. Supp. 738; *Matter of Snelling*, 44 St. Rep. 477; 17 N. Y. Supp. 683.

A will containing a full attestation clause subscribed by three witnesses, — admitted to probate upon the testimony of one of them, an attorney-at-law, who drew the will, showing full formal execution thereof, notwithstanding the testimony of the other two witnesses, neither of whom was shown to know the essential elements of a valid execution of a will, to the effect that there had been no publication. (*Egan v. Pease*, 4 Dem. 301.)

In *Matter of Kummer* (N. Y. Law J., Apr. 30, 1892), each of the subscribing witnesses testified with positiveness that they signed the will before the testatrix made her signature; but the notary who drew and superintended the execution testified that the signing by testatrix was first; that he had been a notary for fifteen years, and during that time had drawn and superintended the execution of at least a dozen wills and knew what was requisite for a valid execution. The mother-in-law of the residuary legatee, a stranger to decedent in blood, also testified that the signing by the testatrix preceded that of the witnesses. "As

SUBDIVISION 3.

TESTATOR'S KNOWLEDGE OF CONTENTS OF THE WILL.

§ 205. **Object of statutory requirement.**—As already stated,²⁶ the object of the statutory requirement that the testator declare in the presence of each witness that the instrument is his will, is to secure him against being fraudulently induced to execute a will, while he is under the belief that he is signing some other than a testamentary paper. His knowledge that he is executing such a paper will be sometimes inferred from the fact of its publication and the circumstances attending the ceremony of execution; the fact that the paper was in testator's own handwriting goes far toward creating a presumption of such knowledge; but an issue in a probate case may be, whether, notwithstanding the observance of all the formalities of execution and publication, the testator had a competent knowledge of the contents of the paper. For the will offered for probate must be *the* will of the testator, and of no one else; it cannot be said to be *his* will, if he was ignorant of its contents. Something more needs to be said, on this subject, in amplification of the observations already made under the head of *publication of will*.

A testator who executes a will without knowing and comprehending its contents, cannot be said to be capable. It has been said by an eminent judge, in one case, that a testator may, if he likes, authorize another person to make a will for him, and may say: "I do not know what you have put down, but I am quite ready to execute it."²⁷ But this doctrine has been declared, by another equally eminent judge, to be at variance with one of the first principles of testamentary law.²⁸ The testator's knowledge of the contents of the will forms a part of the proposition that a will was made, and stands upon a like footing with general testamentary capacity.²⁹ That the testator did know and approve of

the two subscribing witnesses were laymen, and not informed in respect to what was essential for the execution of legal papers, I believe that their memory must be at fault. The will is admitted." (Per Ransom, S.)

²⁶ See § 194, *ante*.

²⁷ And accordingly it was held that a plea was bad which alleged that a codicil was not in conformity with the testator's instructions, and that he was ignorant of its contents. (Per Sir C.

Cresswell, *Cunliffe v. Cross*, 3 Sw. & Tr. 38.) The same rule was adopted in *Middlehurst v. Johnson*, 30 L. J. P. M. & A. 14.

²⁸ Per Sir J. Wilde, *Hastilow v. Stobie*, L. R., 1 P. & D. 64.

²⁹ To make a will valid, testator must know the contents before execution, and that fact must be shown. Subsequent ratification is not sufficient. (*Matter of White*, 15 St. Rep. 753.)

the contents of the alleged will is, therefore, part of the burden of proof assumed by every one who propounds it as a will.

§ 206. **Presumption of knowledge of contents.**— A very strong presumption of the testator's knowledge and approval of the contents of the will arises from the fact that he read it, and then formally executed it. Indeed, it has been claimed that such reading is conclusive on the question of a competent testator's knowledge. In one case³⁰ the court charged the jury that, if they were satisfied that the testator read the contents of the will, they were bound to find that he knew and approved them. But it cannot be said that there is any rigid rule by which, when you are once satisfied that a competent testator has had his will read over to him, and has thereupon executed it, all further inquiry is shut out.³¹ Unquestionably there is danger in holding a rule that any man of sound mind, who has put his hand to an instrument, after having had that instrument read over to him, can have meant otherwise than what he said; nevertheless, the circumstances of the case may be such, that the court or jury should be satisfied

³⁰ Lord Penzance, in *Atter v. Atkinson* (L. R. 1 P. & D. 664, 670), said: "If, being of sound mind and capacity, the testatrix read this residuary clause, the fact that she afterward put her signature to it, is conclusive to show that she knew and approved of its contents. Reflect upon the contrary proposition. Suppose that a long will, with a number of complicated arrangements, is read to a competent testator, and is executed by him: if we were permitted, some time after his death, to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved, that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered."

³¹ *Fulton v. Andrew*, L. R. 7 H. L. 438; 15 Moak, 67. In that case Lord Hatherly said: "No doubt those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator; still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact

of the testator having been a person of sound mind and memory, and also having had read over to him that which had been prepared for him and which he executed as his will. It is impossible, as it appears to me, in the case where the ingredient of fraud enters, to lay down any clear and unyielding rule like this. One is strongly impressed with the consideration that, according to the natural habits and conduct of men in general, if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed, and that very strong evidence is required in opposition to it in order to set aside any instrument so executed." It was accordingly held, that though the jury found, on the trial of separate issues, 1st, that the testator was of sound mind, etc.; 2d, that he knew and approved of the contents of the will; yet having found for the contestant, on the issue, whether he knew and approved of the residuary clause, the proponents were not entitled to a probate of the *whole* will. It should be added that, in this case, the circumstances indicated fraud on the part of the beneficiaries under the residuary clause.

that it was not only read over to him, but that it was read over in such a manner that the discrepancy between the instructions and the will was brought before the consideration of the testator.³²

§ 207. **In case of impaired faculties.**— Whatever may be the rule in the case of a perfectly competent and capable testator, the principle is clear and well settled, that when a case presents any circumstances naturally calculated to excite suspicion — such as impairment of the sense of sight or hearing, the physical prostration or mental weakness of the testator, or the beneficial interest of the person who prepared the will — the court may, and it is his duty to, require the proponents to show affirmatively, as a condition of probate, that the testator had an intelligent knowledge of the contents of the will.³³ Thus, a testator who was deaf and dumb,³⁴ or was blind,³⁵ or was unable to read or write,³⁶ or was illiterate,³⁷ or was enfeebled by old age, sickness,³⁸ intemperance, and the like causes, must be shown not only to have read, or heard

³² Probate cannot be sustained if it does not appear that the testator had any opportunity to learn the contents of the instrument before its execution. (Matter of Hatten, 10 St. Rep. 19.) See *Rundell v. Downing*, 5 St. Rep. 253; *Hagan v. Yates*, 1 Dem. 584; *Rollwagen v. Rollwagen*, 5 Sup. Ct. (T. & C.) 402; *affd.*, 63 N. Y. 504. But it is not absolutely essential to the validity of a will that it should be read by or to testator previous to its execution by him. (Will of Crumb, 6 Dem. 478.) To the same effect, see *Matter of Sheldon*, 40 St. Rep. 369; 16 N. Y. Supp. 454; *Matter of Smith*, 53 St. Rep. 658; 24 N. Y. Supp. 928; *Matter of Seagrist*, 11 Misc. 188; *affd.*, 1 App. Div. 615; 153 N. Y. 682; *Matter of Hall*, 5 Misc. 461.

Where a testator could read writing and was capable of transacting business, his knowledge of the contents of the will may be inferred, even though it was not read to him. (*Matter of Metcalf*, 16 Misc. 180; 38 N. Y. Supp. 1131.) In the absence of circumstances showing want of good faith, knowledge of the testator as to the contents of the will is sufficiently shown by testimony of the draughtsman as to the instructions received from the testator and that he followed them. (*Matter of Seagrist*, *supra*.)

³³ *Barry v. Boyle*, 1 Sup. Ct. (T. & C.) 422; *Townsend v. Bogart*, 5 Redf. 93; *Hyatt v. Lunnin*, 1 Dem. 14;

Cooper v. Benedict, 3 id. 136; *Heath v. Cole*, 15 Hun. 100; *Jones v. Jones*, 42 id. 563; *Matter of Green*, 67 id. 527. In *Matter of Sampson* (N. Y. L. J., June 7, 1891, N. Y. Surr. Ct.), the court said: "With the advanced age of the wife, her debilitated condition for years, her inability to plainly express her thoughts in speech, and the fact that the instructions in respect to its provisions had come from the husband, mere proof of formal execution was not sufficient to admit the instrument to probate. It was incumbent upon the proponent to prove, to the satisfaction of the court, that she understood the provisions of the instrument, and that they expressed her wishes at the time of its execution."

³⁴ *Matter of Perego*, 65 Hun. 478; 20 N. Y. Supp. 394; *Matter of Brommer*, 78 Hun. 611; 28 N. Y. Supp. 907.

³⁵ *Fincham v. Edwards*, 3 Curt. 63; *Hemphill v. Hemphill*, 2 Dev. (N. C.) 291; 21 Am. Dec. 331; *Weir v. Fitzgerald*, 2 Bradf. 42; *Mowry v. Silber*, id. 133; *Matter of Clausman*, 9 St. Rep. 182.

³⁶ *Van Pelt v. Van Pelt*, 30 Barb. 134; *Matter of Smith*, 39 St. Rep. 698; 15 N. Y. Supp. 425.

³⁷ *Chaffee v. Baptist Miss. Conv.*, 10 Paige, 85; *Matter of Murphy*, 15 Misc. 208; 37 N. Y. Supp. 223.

³⁸ *Matter of De Castro*, 32 Misc. 193; 66 N. Y. Supp. 239.

read, the contents of the will, but he must be shown to have comprehended their meaning. In all such cases large latitude will be allowed in the admission of any evidence tending to show that the testator had full knowledge of the contents of the will.³⁹

SUBDIVISION 4.

TESTAMENTARY CAPACITY.

§ 208. **Testamentary age.**—To entitle a will to be admitted to probate, it must appear that the testator, at the time of executing the will, was of an age competent to execute it, and of sound mind and memory.⁴⁰ It should appear that the testator, if a male, was, at the time of executing the will, if it relates to personal property only, of the age of eighteen years or upward, and of the age of sixteen years or upward if a female;⁴¹ and if relating to real property, of lawful age, viz., twenty-one years.⁴² Courts will always examine the circumstances attending the execution of a minor's will with more than usual care to see that it really represents the deliberate and intelligent wish of the testator, and, if this is doubtful, will refuse probate.⁴³

§ 209. **Citizenship.**—It is commonly averred, in the petition for the proof of a will, that the testator was a citizen of the United States; but this is not necessary. The testator's citizenship does not affect his power to dispose by will, but only his right to hold real property in this State. One who is civilly dead, *e. g.*, a con-

³⁹ *Lake v. Ranney*, 33 Barb. 49; *Matter of Carver*, 23 N. Y. Supp. 753. Where it appeared that testator, at the execution of the will, was weak, stupid, and at times delirious, and did not understand the will when read to him, and the physician testified against his mental capacity to understand it, the question as to the execution should go to a jury before probate. (*Matter of Totten*, 21 St. Rep. 950.) See *Matter of Anderson*, 18 id. 517.

⁴⁰ 2 R. S. 56, 60, §§ 1, 21; L. 1867, c. 782, §§ 3, 4.

⁴¹ 2 R. S. 60, § 21; L. 1867, c. 782, § 4. The policy of this statute is explained in *Townsend v. Bogart* (5 Redf. 93). The nonage of the testator cannot be shown by declarations of the testator as to his age, nor by a memorandum in the handwriting of a physician and surgeon, in an account-book kept by him, of the time the

child was born, at whose birth he attended, unless sustained by proof of its truth. But the mother of the testator is a competent witness to prove the time of his birth. (*Matter of Paige*, 62 Barb. 476.)

⁴² 2 R. S. 56, § 1; L. 1867, c. 782, § 3. Before the Revised Statutes, a married woman could make a will of her separate personal estate, which would be valid in a court of equity; but those statutes took away the right. By the Married Woman's Act of 1849, the right was restored, and in 1867 the Revised Statutes were amended so as to express the same rule. (*Moehring v. Thayer*, How. App. Cas. 502; *Wadhams v. American Home Miss. Society*, 12 N. Y. 415.) But a married woman, who is a minor, has no more power than if she were single, to devise her real estate. (*Zimmerman v. Schoenfeldt*, 3 Hun, 692.)

⁴³ *Seiter v. Straub*, 1 Dem. 264.

vict, may still make a valid will.⁴⁴ In the case of the will of a nonresident of the State, the fact of the testator's residence, either at the time of making the will or at his decease, may become material.⁴⁵

§ 210. **Mental capacity.**—The statute relative to wills of real property declares that all "persons, except idiots, persons of unsound mind, and infants," may devise their real estate.⁴⁶ The statute relative to wills of personal property declares that persons of certain ages or upward, "of sound mind and memory," and no others, may bequeath personal estate.⁴⁷ No difference of principle is intended by this difference of language. The general principle applicable to both classes of cases, as deduced from the authorities to which we shall presently refer in more detail, is that, to be of sound mind and memory within the intent of either of these statutes, the testator must, at the time of executing the will, have had sufficient capacity to comprehend the conditions of his property, and his relations toward the persons who are, or might be, the objects of his bounty, and the scope and bearing of the provisions of his will.⁴⁸ Mere imbecility, old age, or weakness of mind and body does not incapacitate, if there be sufficient understanding to satisfy the foregoing rule.⁴⁹ According to the doctrine of *Stewart v. Lispenard*,⁵⁰ the test of testamentary capacity in each case is, had the testator capacity to make any will? and that reference cannot be had to the nature of the will and the claims on the testator's benefactions, to determine

⁴⁴ *Stephani v. Lent*, 30 Misc. 346; 63 N. Y. Supp. 471.

⁴⁵ See *ante*, § 152.

⁴⁶ 2 R. S. 56, § 1; L. 1867, c. 782, § 3; L. 1896, c. 547.

⁴⁷ 2 R. S. 60, § 21; L. 1867, c. 782, § 4.

⁴⁸ This is the rule established in *Delafield v. Parish* (25 N. Y. 9, as explained in 1 Redf. 204), and reiterated in *Van Guysling v. Van Kuren* (35 N. Y. 70), and *Tyler v. Gardiner* (35 id. 559), modifying to some extent the doctrine laid down in *Stewart v. Lispenard* (26 Wend. 255), and other prior cases. (*Kinne v. Johnson*, 60 Barb. 69.) The doctrine of the principal case is discussed in *Sheldon v. Dow*, 1 Dem. 503, and approved in *Matter of Johnson*, 7 Misc. 220; 27 N. Y. Supp. 649; *Matter of Lewis*, 81 Hun. 213; 30 N. Y. Supp. 675; *Matter of Townsend*, 75 Hun. 593; 27 N. Y. Supp. 603; *Matter of Skaats*, 74

Hun. 462; 26 N. Y. Supp. 494; *Matter of Flansburgh*, 82 Hun. 49; 31 N. Y. Supp. 177; *Matter of Seagrist*, 1 App. Div. 615; 37 N. Y. Supp. 496; 153 N. Y. 682; *Matter of Carey*, 14 Misc. 486; 36 N. Y. Supp. 817; *Matter of Tredale*, 53 App. Div. 45; 65 N. Y. Supp. 533.

⁴⁹ *Horn v. Pullman*, 72 N. Y. 269; *Cornwell v. Riker*, 2 Dem. 354; *Matter of Weil*, 5 St. Rep. 363; *Matter of Gross*, 14 id. 429; *Matter of Metcalf*, 16 Misc. 180; 38 N. Y. Supp. 1131; *Matter of Halbert*, 15 Misc. 308; 37 N. Y. Supp. 757; *Matter of Seagrist*, 1 App. Div. 615; 153 N. Y. 682; *Matter of McGraw*, 9 id. 372; 41 N. Y. Supp. 481; *Matter of Pike*, 83 Hun. 327; 31 N. Y. Supp. 689; *Matter of Harris*, 19 Misc. 388; 44 N. Y. Supp. 341; *Matter of Dixon*, 42 App. Div. 481; 59 N. Y. Supp. 421.

⁵⁰ 26 Wend. 255.

whether he had a sufficient degree of intelligence to make a will with reference to the complexity of those circumstances. By the rule now settled, reference may be had to the nature of the particular case, and the question is, whether the testator had sufficient intelligence to be capable of acting with sense and judgment in reference thereto.⁵¹ Hence, where it appeared that at the time the will was executed, the testator was suffering from a mental disease, which resulted shortly thereafter in a total loss of mentality, the mere fact of such disease was declared to be immaterial, the question being whether, at the time of executing the will, the disorder had so far progressed as to seriously impair his faculties and prevent an intelligent disposition of his property.⁵²

§ 211. **Insane delusions.**— The doctrine that any insane delusion incapacitates from making a will has commanded the assent of some high authorities. But the weight of authority and the better opinion accord with the rule settled in this State, by which mental capacity is measured in this, as in every other legal aspect, by its relation to the act. Hence, a person having any insane delusion relating either to the property, to the persons concerned, or to the provisions of the will, is incapable; while delusions which in no way relate to these do not, as matter of law, incapacitate, for they involve no more likelihood of actual incapacity than many other latent causes.⁵³ A person may have an insane belief or delusion as to one or more subjects, and not as to others. The question, in respect to the testamentary capacity, in the abstract, is, had the testator, at the time, a sufficiently sound mind to make a will; but practically, in most cases, the question is, had the testator a sufficiently sound mind to make *the* will in question. There is but one standard of testamentary capacity known to the law of this State, and that is embraced in the inquiry, was the

⁵¹ So far as they followed *Stewart v. Lisenard*, the following cases must be considered overruled by more recent ones: *Blanchard v. Nestle*, 3 Den. 37; *Person v. Warren*, 14 Barb. 488; *Newhouse v. Godwin*, 17 id. 236; *Osterhout v. Shoemaker*, 3 Den. 37, note; *Petrie v. Shoemaker*, 24 Wend. 85. Compare *Clarke v. Sawyer*, 2 N. Y. 498; *Cornwell v. Riker*, 2 Dem. 354; *Potter v. McAlpine*, 3 id. 108.

⁵² *Matter of Lawrence*, 48 App. Div. 83; 62 N. Y. Supp. 673; *Hoey v. Hoey*, 53 App. Div. 208.

⁵³ See *Bonard's Will*, 16 Abb. Pr. (N. S.) 128. The fact that an aged

person is forgetful, and, at times, labors under slight delusions, does not *per se* establish want of testamentary capacity. (*Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Matter of Vedder*, 6 Dem. 92; *Cornwall v. Riker*, 2 id. 354; *Matter of Williams*, 40 St. Rep. 356; 2 Connoly. 579; 15 N. Y. Supp. 828; *affd.*, 46 St. Rep. 791; 19 N. Y. Supp. 778; *Matter of Hopkins*, 6 St. Rep. 390; *Matter of Buckley*, 16 id. 983; *Coit v. Patchen*, 77 N. Y. 533; *Matter of Folts*, 71 Hun. 492; 24 N. Y. Supp. 1052; *Matter of Richardson*, 51 App. Div. 637; 64 N. Y. Supp. 944.)

decedent *compos mentis*, or *non compos mentis*, as those terms are settled in the law, at the time of the execution of the instrument.⁵⁴ A man's ability to transact his ordinary business with judgment and discretion is very strong, if not conclusive, evidence of testamentary capacity.⁵⁵ A monomaniac may make a perfectly valid will, if the delusion which affects the general soundness of his mind has no relation to the subject or object of the will, or the persons who would otherwise be likely, ordinarily, to be the recipients of his bounty; or where the provisions of the will are entirely unconnected with, and uninfluenced by, the particular delusions; on the other hand, if the will is the result of that particular delusion which has seized his mind, and controls its operations, it is no will.⁵⁶ Thus probate was refused where the will gave all the property to the testator's widow, to the exclusion of his children, on the ground that he was a monomaniac on the subject of his children, that he had the insane delusion that they were his enemies and were combined against him to rob him of

⁵⁴ *White v. Ross*, 48 St. Rep. 599.

⁵⁵ *Matter of Birdsall*, 34 St. Rep. 626; 13 N. Y. Supp. 421. A person having capacity sufficient to acquire a large fortune by personal industry and intelligence, who successfully conducts a large business, whose business correspondence shows a clear comprehension of the subjects upon which he writes, and who is pronounced by his intimate friends of sound mind, and of more than ordinary intelligence and firmness, will not be considered as incompetent to make a will simply because he exhibits eccentricities of character in regard to himself, is subject to fits of melancholy in regard to his health, even amounting to hypochondria. (*Brick v. Brick*, 66 N. Y. 144.) See *Dobie v. Armstrong*, 160 id. 584.

Confirmed drunkards.—The principles of law applicable to the avoidance of wills by reason of the drunkenness of testators were exhaustively considered in *Peck v. Cary* (27 N. Y. 9). The testator in that case was a young man, a confirmed drunkard, who had more than once attempted suicide: "It is not the law that dissipated men cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has

supervened upon intemperate habits, the man is incompetent and irresponsible for his acts. If he is so excited by present intoxication as not to be master of himself, his legal acts are void though he may be responsible for his crimes" (per Denio, C. J.). To the same effect is the language of Judge Earle, in *Van Wyck v. Brasher* (81 N. Y. 260), who says: "A drunkard is not incompetent like an idiot or like one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded or his reason dethroned by actual intoxication." See *Matter of Fenton*, N. Y. Law J., June 22, 1893; *Matter of Peck*, 42 St. Rep. 898; *Matter of Reed*, 2 Connoly. 403; *Matter of Halbert*, 15 Misc. 308; 37 N. Y. Supp. 757; *Matter of Woolsey*, 17 Misc. 547; 41 N. Y. Supp. 263; *Matter of Johnson*, 7 Misc. 220; 27 N. Y. Supp. 649.

⁵⁶ *Lathrop v. American Board*, 67 Barb. 590; *Stanton v. Wetherwax*, 16 id. 263; *Seamen's Friend Society v. Hopper*, 33 N. Y. 624; *Burdin v. Williamson*, 5 Hun. 560; *Miller v. White*, 5 Redf. 320; *Matter of Ziegler*, 47 St. Rep. 491; *Matter of Gannon*, 2 Misc. 329; 21 N. Y. Supp. 960; *Matter of Iredale*, 53 App. Div. 45; 65 N. Y. Supp. 533; *Matter of Lapham*, 19 Misc. 71; 44 N. Y. Supp. 90.

his property, leading him to disown them as his children and to disinherit them from any share in his property, which they had assisted him in accumulating; and that such tendency and delusion were aggravated by the undue influence of the stepmother of his children, although the surrogate found that he was rational and competent to transact business upon other subjects.⁵⁷ Wherever it appears from the evidence that the will was unnatural in its provisions and inconsistent with the duties and obligation of the testator to his family, the burden is imposed upon the proponent of giving some reasonable explanation of its unnatural character, or at least of showing that it was not the result of mental defect, obliquity, or perversion.⁵⁸ But a man's right to dispose of his estate depends neither upon the justice of his prejudices nor the soundness of his reasoning. Thus where a testator in making provision for his daughter believed her to be insane, it is not sufficient to show merely that his belief was unfounded; it must have been an insane belief — a delusion.⁵⁹

⁵⁷ *Matter of Dorman*, 5 Dem. 112. To the same effect, see *Esterbrook v. Gardner* (2 Dem. 543), where probate of a codicil was refused of a woman of advanced years and feeble health by which she disinherited her daughter, with whom she was living happily, in the absence of proof as to condition of testatrix's mind. But probate will not be refused on such considerations as that the will is mean, unjust, and inequitable; or that it withholds the absolute ownership of decedent's property from his own children, or makes unequal provisions for them; or that public sentiment and the moral sense of the community condemn the instrument and its author. (*Potter v. McAlpine*, 3 Dem. 108; *Matter of Finn*, 1 Misc. 280; 22 N. Y. Supp. 1066.) Compare *Matter of Shaw*, 2 Redf. 107; *Lathrop v. Borden*, 5 Hun, 560; *Stanton v. Wetherwax*, 16 Barb. 259; *Seamen's Friend Society v. Hopper*, 33 N. Y. 619; *Riggs v. American Tract Society*, 95 id. 503; *Morse v. Scott*, 4 Dem. 507; *Matter of McCue*, 14 Week. Dig. 501; *Bull v. Wheeler*, 5 Dem. 123; *Matter of Weil*, 16 St. Rep. 1; *Matter of Fricke*, 47 id. 10; 19 N. Y. Supp. 315.

⁵⁸ *Matter of Budlong*, 54 Hun. 131; 18 Civ. Pro. 18; affd., 126 N. Y. 423. See *Matter of White*, 121 N. Y. 406. Testamentary capacity in a case in which testator changed his will, which gave absolute be-

quests, by a codicil which gave life interests, only, to his children, was sustained in *Matter of Dates*, 35 St. Rep. 338; 12 N. Y. Supp. 205. In *Matter of Hamersley* (*Daily Reg.*, Jan. 8, 1886), a will was admitted to probate, where the testator's nearest relatives, beside his wife, were uncles and aunts and the children and grandchildren, of uncles and aunts deceased, and the will gave his wife his entire estate with a power, exercisable in a certain contingency, of making a testamentary disposition of the principal for general purposes of charity.

⁵⁹ *Hoyt v. Hoyt*, 9 St. Rep. 731; *Matter of O'Dea*, 84 Hun. 591; 33 N. Y. Supp. 463; *Matter of Suydam*, 84 Hun. 514; 32 N. Y. Supp. 449; affd., 152 N. Y. 639; *Matter of Bedlow*, 67 Hun. 408. In *Matter of Gannon* (2 Misc. 329; 21 N. Y. Supp. 960) the will was set aside, notwithstanding the jury found that testator had testamentary capacity, because they also found he had a delusion as to the fidelity of his wife, whom he deprived of any portion of his property. But in *Matter of Smith* (53 St. Rep. 658), probate was granted notwithstanding testator's erroneous belief that the contestant was not his son. In that case it was said that, to constitute a delusion there must be a belief in the existence, as a fact, of something which does not exist; such belief must be without basis for its

§ 212. Burden of proof as to mental capacity.—A *prima facie* case being made out, probate will be granted, unless a contestant, either by the cross-examination of the subscribing witnesses themselves, or by other witnesses, successfully impeaches the proponent's witnesses. The proponent is bound to show general competency to perform ordinary business transactions, and having done this, the burden is shifted from the proponent; and the contestant must show that at the time of the execution of the will the testator labored under a delusion, aberration, or weakness of mind;⁶⁰ or that the will was obtained by undue influence.⁶¹ But where the testator could neither read, write, nor speak, or was a feeble and aged person, or had previously been adjudged incompetent,⁶² there should be not only proof of the *factum* of the will, but also that the mind of the testator accompanied the act: that he knew and understood the contents of the instrument and that it expressed his will.⁶³

There is an apparent inconsistency and want of reasonableness in requiring the proponent to prove as a fact what the law has invariably declared to be presumed and as of course. It has never been doubted, as the law of England and of this country, that "every person is presumed to be of perfect mind and memory, unless the contrary be proved;"⁶⁴ and yet the law requires evidence of the fact as requisite to the probate of the person's will. It is true that the subscribing witnesses, though not experts, are allowed to satisfy this requirement of the law, by expressing naked opinions as to the testator's mental capacity, and are not required to state any facts upon which they base their opinions —

support, springing up without cause in the imagination of the person entertaining it, and become so firmly implanted in the mind as to withstand such evidence and argument as would convince reasonable persons of its falsity. See *Matter of Lapham*, 19 Misc. 71; 44 N. Y. Supp. 90. It is proper in order to account for an alleged prejudice against his children, which they claim constituted a delusion, to show that, just previous to the execution of the will, the children attempted to have testator declared a lunatic, and that the jury found him sane; but the record of such proceedings is incompetent to show his testamentary capacity. (*Matter of Springstead*, 28 St. Rep. 186; 8 N. Y. Supp. 596.)

⁶⁰ *Allen v. Public Adm'r*, 1 Bradf. 378; *Ramsdell v. Viele*, 6 Dem. 244;

Jones v. Jones, 43 St. Rep. 434; 17 N. Y. Supp. 905.

⁶¹ *Marvin v. Marvin*, 3 Abb. Ct. App. Dec. 192; 4 Keyes, 9.

⁶² *Matter of Widmayer*, 34 Misc. 439; 69 N. Y. Supp. 1014.

⁶³ *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Matter of O'Dea*, 84 Hun. 591; 33 N. Y. Supp. 463; *Matter of Barbineau*, 27 Misc. 417; 59 N. Y. Supp. 375. Burden of proof that the testator understood the nature of his act is upon the proponent. (*Rundell v. Downing*, 5 St. Rep. 253.) See § 205, *ante*.

⁶⁴ *Swinb.* 45, pt. 2, § 3, pl. 4. And see *Ean v. Snyder*, 46 Barb. 230; *Brown v. Torrey*, 24 id. 583; *Matter of Lapham*, 19 Misc. 71; 44 N. Y. Supp. 90; *Matter of Dwyer*, 29 Misc. 382; 61 N. Y. Supp. 203.

which cannot, of course, be considered of any value as evidence — and, therefore, no hardship is imposed upon the proponent of the will. A reasonable explanation of this anomalous requirement, as given by a legal writer,⁶⁵ is that, by requiring the proponent to ask the opinion of the subscribing witnesses upon the point of testamentary capacity, or apparent capacity, the object is not to prove the fact, but to give the contestants an opportunity of cross-examining these confidential witnesses in the first instance, in order to become apprised of what passed at the execution of the will; and the law will not, therefore, compel the contestants to make the subscribing witnesses their own, by recalling them upon any point involved in the entire issue, and thereby lose the advantage of cross-examination. This explanation, in which we concur, will not in any way affect the question of burden of proof, or entitle the contestant to claim the right to go forward with his case, and thus give him the advantage of closing the proof and argument. It may be said, therefore, that so strong is the presumption of sanity, that the only burden on the proponent is to produce the subscribing witnesses, when required to do so, and obtain their general opinion as to the mental capacity of the testator at the time of the execution of the will. Not more than this is required, even in a case where it appears that there had been, formerly, a want of testamentary capacity.⁶⁶

§ 213. Opinions as evidence of mental capacity.—The ordinary rule, as it is generally laid down, is that a witness cannot give his conclusions from facts, but must state the facts, leaving the inferences to be drawn by the court or jury. But it has been remarked that there are few statements of fact that are not conclusions of fact; and that the true line of distinction is, that an inference necessarily involving certain facts may be stated with-

⁶⁵ Redfield's American Cases upon Wills, 31, note.

⁶⁶ *Brown v. Torrey*, 24 Barb. 583; *Potter v. McAlpine*, 3 Dem. 108. And see *Ean v. Snyder*, 46 Barb. 230. But compare *Jackson v. Van Dusen* (5 Johns. 144), where it was held, that after a general derangement has been shown, the other side must show that the party was sane at the very time the act was performed; and *Matter of Taylor* (1 Edm. 375), where it was held that the fact that the testator, two years before making his will, was adjudged insane, and that he was insane at the time of his death, two

years after making his will, although it was not conclusive upon his insanity at the time of making the will, yet threw the burden of proof upon the proponents. See also *Matter of Widmayer*, 34 Misc. 439; *Gombault v. Public Adm'r*, 4 Bradf. 226. The surrogate will exact from proponent only slight evidence of testator's mental capacity, and at the end of contestant's proof, further evidence, though not strictly in rebuttal, may be furnished by the proponent, in the discretion of the court. (*Hoyt v. Jackson*, 2 Dem. 443.)

out the fact,—the inference being an equivalent to a specification of the facts; but when the facts are not necessarily involved in the inference, as where the inference may be sustained upon any of several distinct phases of fact, none of which it necessarily involves, then the facts must be stated.⁶⁷ At any rate, there are certain well-recognized exceptions to the rule above mentioned. Thus, experts may give their opinions upon questions of trade, skill, or science, from the facts proven or the circumstances noted by themselves;⁶⁸ and in respect to the question of sanity, the opinions not only of medical experts, but of nonprofessional witnesses, are in some cases competent.⁶⁹ To prove capacity or incapacity of a testator, it is competent to prove either his acts and declarations, showing his mental condition, or the opinions of witnesses upon the question. Evidence of what his mental condition was, both previously and subsequently to the testamentary act, is admissible as throwing light upon the question of capacity at the time.⁷⁰

In respect to the competency and weight of the opinions of witnesses, there are three classes to be considered: 1. Medical experts; who are specially capable of forming an opinion by reason of their professional acquaintance with mental disorders. 2. The subscribing witnesses to the will; who, though they be not experts, are, by reason of their essential connection with the testamentary act, allowed to express their convictions as to the

⁶⁷ Wharton on Ev. (2d ed.). §§ 436, 507, 510; Abb. Trial Ev. 116.

⁶⁸ Hewlett v. Wood, 55 N. Y. 634.

⁶⁹ Fagnan v. Knox, 40 N. Y. Supr. 41, 53; Clapp v. Fullerton, 34 N. Y. 190.

⁷⁰ Matter of Comstock, 26 St. Rep. 292; 7 N. Y. Supp. 334; Matter of Brunor, 21 App. Div. 259. Repeated statements of testamentary intentions, made to acquaintances, may have weight in ascertaining whether the will accorded with his mind. (O'Neil v. Murray, 4 Bradf. 311.) See Matter of Soden, 38 Misc. 25; Matter of Wilde, id. 149. The subject is fully discussed in Wood v. Bishop, 1 Dem. 512. The general rule undoubtedly is, that the declarations of the testator, if made near the time of making the will, are competent, on the issue of mental capacity, as a part of the *res gestæ*, for the purpose of showing the state of the testator's mind. (Matter of Green, 67 Hun. 527; 20 N. Y. Supp. 538.) In Marx v. McGlynn (4 Redf.

455; affd., 88 N. Y. 357), the contestant offered in evidence a diary kept by the testatrix in which, besides a statement of facts and events, there were expressions of her sentiments toward her sister, the contestant, and of her interest in, and fondness for, the chief beneficiary under her will. Held, that as to these latter expressions, the memoranda of the diary were admissible as bearing upon the probability of decedent making such a will as the one propounded, if in her sound mind; but that all statements of facts tending to show the conduct of the decedent, the beneficiary, or the contestant, unless made at the time, and forming part of the transaction of the execution of the will, were not competent. See La Bau v. Vanderbilt, 3 Redf. 384; Matter of Rapplee, 66 Hun. 558; affd., 141 N. Y. 553; and also the statement of the principle and illustrations of the rule, in Abbott's Trial Ev. 115 *et seq.*

testator's capacity. 3. Nonprofessional witnesses who did not attest the will. It is not within our province to treat of the permissible methods of presenting the testimony of medical experts.⁷¹

§ 214. **Opinions of subscribing witnesses.**— The subscribing witnesses to the will constitute an exception to the rule that nonprofessional witnesses can be questioned only as to the facts and circumstances within their personal knowledge, and are not allowed to give their opinions upon, or inferences from, those facts. They are present at the very act of execution, and their opinions on the general question of testamentary capacity are admitted *ex necessitate*. It is the policy of the law to provide all possible safeguards for the protection of the heir as well as the testator. No light is excluded in reference to the *res gestæ* which can be furnished by the immediate actors. The subscribing witnesses may be required to state not only such facts as they remember, but their own convictions as to the testator's mental state; for it may well happen that on so vital a point they may retain a clear recollection of the general results, long after the particular circumstances are effaced by lapse of time or obscured by failing memory.⁷² They are to be looked to as the most trustworthy source of information in regard to the then condition of the testator, and whether or not the act was free, voluntary, and unrestrained.⁷³ It does not follow, however, that a lay witness, although a subscribing witness, may testify that, in his judgment, the testator had not sufficient mind to give the specific directions with reference to a testamentary disposition of his property.⁷⁴

§ 215. **Opinions of lay witnesses.**— An ordinary nonprofessional witness cannot be asked the broad question, whether he considered the testator *non compos mentis*, or, which is the same

⁷¹ See generally, on this subject, *Matter of Snelling*, 136 N. Y. 515.

⁷² *Clapp v. Fullerton*, 34 N. Y. 190; *Hewlett v. Wood*, 55 id. 635; *Dumond v. Kiff*, 7 Lans. 465; *Matter of Peck*, 42 St. Rep. 898; 17 N. Y. Supp. 248; *Matter of Potter*, 17 App. Div. 267; 45 N. Y. Supp. 563; *revd. on other points*, 161 N. Y. 84.

⁷³ *Matter of Comstock*, 26 St. Rep. 292; 7 N. Y. Supp. 334. The testimony of unimpeached witnesses as to testator's condition and capacity, and the circumstances attending the execution of his will, are not to be overcome because physicians who were not present testify from anterior observations that

they are quite confident that the events related by the witnesses present could not have occurred. (*Matter of Connor*, 27 St. Rep. 905; *affd.*, 124 N. Y. 663; *Matter of Kearney*, 69 App. Div. 481; 74 N. Y. Supp. 1045; *Matter of Phillips*, 34 Misc. 442; 62 N. Y. Supp. 1011; *Matter of Seagrist*, 1 App. Div. 615; 37 N. Y. Supp. 496; *affd.*, 153 N. Y. 682; *Matter of Connor*, 29 Misc. 391; 61 N. Y. Supp. 910; *Matter of Conaty*, 26 Misc. 104; 56 N. Y. Supp. 854.) See *Dobie v. Armstrong*, 160 N. Y. 584.

⁷⁴ *Matter of McCarthy*, 55 Hun, 7; 28 St. Rep. 342.

thing, incapable of managing his affairs.⁷⁵ Except in matters of science, art, skill, trade, navigation, value, and other similar inquiries, witnesses are confined in their statements to facts observed and known by them, as distinguished from their opinions and conclusions.⁷⁶ Where, however, the alleged imbecility is attributed to old age, idiocy, or intoxication, these being causes which indicate themselves in outward appearances, in motions, gestures, tones of voice, and expression of the eye and face, the opinion of the witness who has testified to these facts is admissible. These causes show themselves by indications which are equally patent to all; any man of sound judgment and experience in life is competent to observe these indications, and to draw just inferences from them. Thus the witness may testify that "he thought" the person was growing childlike, or, "as he took it," light-headed.⁷⁷ And it seems that the same rule applies in cases of insanity, strictly so called, if the derangement of the mind is general, for, in such cases, scientific knowledge is rarely necessary to enable persons having opportunities for personal observation to judge of its existence.⁷⁸ When a layman is thus examined as to facts within his own knowledge and observation, tending to show the soundness or unsoundness of a mind alleged to be diseased, he may characterize as rational or irrational the acts and declarations to which he testifies.⁷⁹ But he cannot be asked what construction he placed upon certain motions of the decedent, or the meaning of certain sounds uttered by him.⁸⁰

It is not within the scope of this volume to illustrate the foregoing general principles by discussing the numerous cases upon which they are founded. We shall do no more here than refer in

⁷⁵ *Dewitt v. Barley*, 9 N. Y. 371, as modified on a further decision given in 17 N. Y. 340; *Hewlett v. Wood*, 55 N. Y. 635; *Matter of Arnold*, 14 Hun, 525; *Goodell v. Harrington*, 3 Sup. Ct. (T. & C.) 345; *Bell v. McMaster*, 29 Hun, 273; *Matter of McCarthy*, 48 St. Rep. 315; 20 N. Y. Supp. 581.

Opinions of witnesses that certain acts of testator, described by them, were irrational, are no evidence of unsoundness of mind; but facts must be given from which it may be judicially determined that the unsoundness of mind exists, before the legal presumption of sanity can be overcome. (*Matter of Rapplee*, 66 Hun, 558; 21 N. Y. Supp. 801; *affd.*, 141 N. Y. 553.)

⁷⁶ *Matter of Ross*, 87 N. Y. 514;

Rollwagen v. Rollwagen, 3 Hun, 121; *affd.*, 63 N. Y. 504.

⁷⁷ *Dewitt v. Barley*, 17 N. Y. 340, 350.

⁷⁸ *Ib.* And see *Abb. Trial Ev.* 235.

⁷⁹ *Clapp v. Fullerton*, 34 N. Y. 190; *Howell v. Taylor*, 11 Hun, 214; *Matter of Saddlemire*, 22 Week. Dig. 411; *Ledwith v. Claffey*, 18 App. Div. 115. In *Sisson v. Conger* (1 Sup. Ct. [T. & C.] 564), a stricter rule was laid down, but the only authority cited was a criminal case, and the distinction between cases of that class and cases of wills and deeds was not noticed. Compare *O'Brien v. People*, 36 N. Y. 276; 3 *Abb. Pr. (N. S.)* 368; *affg.* 48 *Barb.* 274; *Matter of Rapplee*, *supra*.

⁸⁰ *Rollwagen v. Rollwagen*, 3 Hun, 121; *affd.*, 63 N. Y. 504.

a note to some cases in this State, in which the rule of law as to testamentary capacity was discussed and applied to particular facts.⁸¹

⁸¹ *Incapacity, generally.* Alston v. Jones, 17 Barb. 276; Burger v. Hill, 1 Bradf. 360; Bleecker v. Lynch, id. 458; Meehan v. Rourke, 2 id. 385; Rollwagen v. Rollwagen, 63 N. Y. 504; Tyler v. Gardiner, 35 id. 559; Children's Aid Soc. v. Loveridge, 70 id. 387; Brick v. Brick, 66 id. 144; Cudney v. Cudney, 68 id. 148; McLaughlin v. McDevitt, 63 id. 213; Mairs v. Freeman, 3 Redf. 181.

Old age, but unimpaired faculties. Van Alst v. Hunter, 5 Johns. Ch. 148; Butler v. Benson, 1 Barb. 526; Moore v. Moore, 2 Bradf. 261; Maverick v. Reynolds, id. 360; Leaycraft v. Simmons, id. 35; Creely v. Ostrander, id. 107; Wightman v. Stoddard, id. 393; Bleecker v. Lynch, 1 id. 458; Carroll v. Norton, 3 id. 291; Clarke v. Davis, 1 Redf. 249; Mairs v. Freeman, 3 id. 181; Matter of Hurlbut, 26 Misc. 461; 57 N. Y. Supp. 648.

— *and impaired powers.* Moore v. Moore, 2 Bradf. 261; Pilling v. Pilling, 45 Barb. 86; Carroll v. Norton, 3 Bradf. 291; Lee v. Dill, 11 Abb. Pr. 214; Rollwagen v. Rollwagen, 63 N. Y. 504; Children's Aid Soc. v. Loveridge, 70 N. Y. 387; Matter of Moon, 28 St. Rep. 205; Matter of Coop, 24 id. 417; Paine v. Aldrich, 38 id. 402; Dunham v. Dunham, 63 App. Div. 264; 71 N. Y. Supp. 330; Matter of Drake, 45 App. Div. 206; 60 N. Y. Supp. 1020; Matter of Ehminne, 30 Misc. 21; 62 N. Y. Supp. 1006; Matter of Dixon, 42 App. Div. 481; 59 N. Y. Supp. 421; Matter of Wheeler, 56 St. Rep. 709; 5 Misc. 279; Matter of McCarthy, 48 St. Rep. 315; Matter of Snelling, 136 N. Y. 515; 49 St. Rep. 695; Matter of O'Dea, 84 Hun, 591; 33 N. Y. Supp. 463.

— *and paralysis.* Matter of Iredale, 53 App. Div. 45; 65 N. Y. Supp. 533; Matter of Cruger, 36 Misc. 477; 73 N. Y. Supp. 812; Matter of Dixon, 42 App. Div. 481; 59 N. Y. Supp. 421.

— *and deafness.* Gombault v. Public Adm'r, 4 Bradf. 226; Mowry v. Silber, 2 id. 133.

— *and blindness.* Weir v. Fitzgerald, 2 Bradf. 42.

Loss of memory. Bleecker v. Lynch, 1 Bradf. 458; Creely v. Ostrander, 3 id. 107; Weir v. Fitzgerald, 2 id. 42; Mowry v. Silber, id. 133; Reynolds v.

Root, 62 Barb. 250; Matter of Stewart, 39 St. Rep. 801; Matter of Folts, 71 Hun, 492; 24 N. Y. Supp. 1052; Cheney v. Price, 90 Hun, 238; 37 N. Y. Supp. 117; Matter of Lang, 9 Misc. 521; 30 N. Y. Supp. 388; Matter of Mabie, 5 Misc. 179; 24 N. Y. Supp. 855.

Illness and stupor. McGuire v. Kerr, 2 Bradf. 244; Meehan v. Rourke, id. 385.

Illness and undue influence. Clarke v. Sawyer, 2 N. Y. 498; Matter of Welsh, 1 Redf. 238; McSorley v. McSorley, 2 Bradf. 188; Brush v. Holland, 3 id. 461; Darley v. Darley, id. 481; Matter of Barbineau, 27 Misc. 417; 59 N. Y. Supp. 375; Matter of Gihon, 60 id. 65; Matter of Nolte, 10 Misc. 608; 32 N. Y. Supp. 226.

Weakness and undue influence. Mowry v. Silber, 2 Bradf. 133; Nexsen v. Nexsen, 3 Abb. Ct. App. Dec. 360; 2 Keyes, 229; Matter of Ehminne, 30 Misc. 21; 62 N. Y. Supp. 1006; Matter of Wilde, 38 Misc. 149.

Intemperance and undue influence. O'Neil v. Murray, 4 Bradf. 311; Hagan v. Sone, 68 App. Div. 60; 74 N. Y. Supp. 109; Matter of Hewitt, 31 Misc. 81; 64 N. Y. Supp. 571; Matter of Jones, 5 Misc. 199; Matter of Rintelen, 37 id. 462; 75 N. Y. Supp. 935.

Sickness and habits of intemperance. McSorley v. McSorley, 2 Bradf. 188; Allen v. Public Adm'r, 1 id. 378; Vreeland v. McClelland, id. 393; Brush v. Holland, 3 id. 461; Gardner v. Gardner, 22 Wend. 526; Burritt v. Silliman, 16 Barb. 198; *Ex p.* Patterson, 4 How. Pr. 34; Matter of Tracy, 3 St. Rep. 239; Matter of Reed, 2 Connolly, 403; 20 N. Y. Supp. 91; Matter of Peck, 42 St. Rep. 898; Matter of Sutherland, 28 Misc. 424; 59 N. Y. Supp. 989.

Intoxication at time of execution of will. Peck v. Cary, 27 N. Y. 9; 38 Barb. 77; Julke v. Adam, 1 Redf. 454.

Delirium tremens and delusions. Waters v. Cullen, 2 Bradf. 354. See Brown v. Torrey, 24 Barb. 583.

Heart disease and delusions. Matter of Richardson, 51 App. Div. 637; 64 N. Y. Supp. 944.

Delusions, monomania, and speculative belief in witchcraft, mesmerism, spiritualism, and absurd ideas gener-

SUBDIVISION 5.

FRAUD AND UNDUE INFLUENCE.

§ 216. **Distinguished from testamentary incapacity.**—A man's intellect may not be so weak as to render him incapable of making a will, yet it may be in so feeble a state as to make him an easy victim of the improper influences of unprincipled and designing persons. The finding that the testator had capacity to make a will is not inconsistent with the finding that the same was made under restraint or undue influence.⁸² Undue influence must be an influence exercised by coercion, imposition, or fraud, and not such as arises from gratitude, affection, or esteem;⁸³ and its exertion upon the very act must be *proved*, by the party alleging it.⁸⁴

ally. Thompson v. Quimby, 2 Bradf. 449; as Thompson v. Thompson, 21 Barb. 107; Amer. Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; 43 Barb. 625; Gamble v. Gamble, 39 id. 373; Clarke v. Davis, 1 Redf. 249; Stanton v. Wetherwax, 16 Barb. 259; La Bau v. Vanderbilt, 3 Redf. 384; Children's Aid Soc. v. Loveridge, 70 N. Y. 387; Bonard's Will, 16 Abb. (N. S.) 128; Lathrop v. Borden, 5 Hun. 560; Fowler v. Ramsdell, 4 Alb. L. J. 94; Matter of Keeler, 12 St. Rep. 148; Matter of Liney, 34 id. 700; Matter of Ziegler, 47 id. 491; Matter of Brush, 35 Misc. 689; 72 N. Y. Supp. 421; Matter of Rohe, 22 Misc. 415; 50 N. Y. Supp. 392.

Eccentricity. Matter of Journeay, 15 App. Div. 567; 44 N. Y. Supp. 548; affd., 162 N. Y. 611.

General insanity, moroseness, melancholy, nervousness, gloomy, solitary habits, violence, and apprehension of being murdered and deprived of property. Morrison v. Smith, 3 Bradf. 209; Matter of Forman, 54 Barb. 274; Matter of Ely, 16 Misc. 228; 39 N. Y. Supp. 177; Matter of McKean, 31 Misc. 703; 66 N. Y. Supp. 44; Matter of Murphy, 41 App. Div. 153; 58 N. Y. Supp. 450.

Fecbleness and previous insanity. Matter of Rounds, 25 Misc. 101; Matter of Widmayer, 34 id. 439; 69 N. Y. Supp. 1014; Matter of Coe, 47 App. Div. 177; 62 N. Y. Supp. 376; Matter of Evans, 37 Misc. 337; 75 N. Y. Supp. 491.

Incipient paresis. Matter of Lawrence, 48 App. Div. 83; Hoey v. Hoey,

53 id. 208; Matter of Soden, 38 Misc. 25.

Temporary periods of irrational action. Matter of Davis, 91 Hun. 209; 39 N. Y. Supp. 344; Matter of Buchan, 16 Misc. 204; 38 N. Y. Supp. 1124; Matter of Cornelius, 23 Misc. 434; 51 N. Y. Supp. 877.

Lunacy. Matter of Coe, 47 App. Div. 177; 62 N. Y. Supp. 376.

Imbecility and idiocy. Stewart v. Lispenard, 26 Wend. 255; Blanchard v. Nestle, 3 Den. 37; Person v. Warren, 14 Barb. 488; Newhouse v. Godwin, 17 id. 236; Petrie v. Shoemaker, 24 Wend. 85; Pilling v. Pilling, 45 Barb. 86; Van Pelt v. Van Pelt, 30 id. 134; Crolus v. Stark, 64 id. 112; 7 Lans. 311; Bleecker v. Lynch, 1 Bradf. 458; Davis v. Culver, 13 How. Pr. 62; Matter of Miller, 36 Misc. 310; 73 N. Y. Supp. 508; Matter of Loewenstine, 2 Misc. 323; 21 N. Y. Supp. 931.

Suicide as evidence of insanity. Matter of Card, 28 St. Rep. 528; 8 N. Y. Supp. 297.

⁸² Reynolds v. Root, 62 Barb. 250; Marvin v. Marvin, 3 Abb. Ct. App. Dec. 192; 4 Keyes, 9.

⁸³ Matter of McGraw, 9 App. Div. 372; 41 N. Y. Supp. 481; Matter of Read, 17 Misc. 195; 40 N. Y. Supp. 974; Matter of Otis, 1 Misc. 258; 22 N. Y. Supp. 1060; Matter of Johnson, 7 Misc. 220; 27 N. Y. Supp. 649; Doheny v. Lacy, 42 App. Div. 218; 59 N. Y. Supp. 724; affd., 168 N. Y. 213.

⁸⁴ Matter of Murphy, 41 App. Div. 153; 58 N. Y. Supp. 450; Matter of Pike, 83 Hun. 327; 31 N. Y. Supp. 689; Matter of Read, *supra*; Matter

§ 217. **Presumptions of fraud, etc.**—It is the duty of the proponent to satisfy the conscience of the court, and where there are circumstances of suspicion, as where the will was drawn up by a devisee,⁸⁵ or by a person standing in a confidential relation, as a

of McGraw, *supra*; Matter of Mabie, 5 Misc. 179; 24 N. Y. Supp. 855; Matter of Wheeler, 56 St. Rep. 709; Matter of Hurlbut, 48 App. Div. 91.

⁸⁵ Lake v. Ranney, 33 Barb. 49; Vreeland v. McClelland, 1 Bradf. 393; Mowry v. Silber, 2 id. 133; Lansing v. Russell, 13 Barb. 510; Coffin v. Coffin, 23 N. Y. 9. And see Children's Aid Soc. v. Loveridge, 70 id. 387; Whelpley v. Loder, 1 Dem. 368.

In *Sears v. Schafer* (6 N. Y. 268), it is said that in some cases undue influence will be inferred from the nature of the transaction, and the exercise of occasional or habitual influence, citing several authorities. And in *Tyler v. Gardiner* (35 N. Y. 559), it is stated that when the beneficiary is the active agent in procuring the execution, by one *in extremis*, of an instrument disturbing dispositions previously settled, and where the transaction is surrounded by the usual *indicia* of undue influence, he is called upon to show that the inducements which professedly led to the change were not unfounded and illusory. In that case, Judge Porter says: "It is no sufficient answer to the presumption of undue influence, which results from the undisputed facts, that the testatrix was aware of the contents of the instrument and assented to its provisions. This was the precise purpose which the undue influence was employed to accomplish;" and he quotes, with approbation, the language of Lord Eldon (14 Ves. 299), as follows: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced."

Where it appears that the testatrix was *in extremis* and *unable to speak* at the time of the execution of the will; that the principal beneficiary acted as interpreter and made suggestions as to the dispositions to be made, which were answered by a nod, and that on an application for immediate probate one of the legatees was personated by a stranger and the names of infant legatees suppressed, the facts raise such a suspicion of fraud as to require refusal of probate. (Matter of

Graf, 10 Misc. 293; 31 N. Y. Supp. 682.) In *Nesbitt v. Lockman* (34 N. Y. 167), the general rule was laid down that "where persons standing in a confidential relation make bargains with or receive benefits from the person for whom they were counsel, attorney, agent, or trustee, the transaction is scrutinized with the extremest vigilance, and regarded with the utmost jealousy. The clearest evidence is required that there was no fraud, influence, or mistake; that the transaction was perfectly understood by the weaker party, and usually evidence is required that a third and disinterested person advised such party as to his rights. The presumption is against the propriety of the transaction, and the *onus* of establishing the gift or bargain to have been fair, voluntary, and well understood, rests upon the party claiming, and this in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property. S. P., *Kinne v. Johnson*, 60 Barb. 69; *Wade v. Holbrook*, 2 Redf. 378; *McLaughlin's Will*, id. 504; *Brick v. Brick*, 66 N. Y. 144; *Horn v. Pullman*, 72 id. 269; *Demmert v. Schnell*, 4 Redf. 409; *Baker's Will*, 2 id. 179; *Legg v. Myer*, 5 id. 628; *Dickie v. Van Vleck*, id. 284; Matter of Brush, 35 Misc. 689; 72 N. Y. Supp. 421; Matter of Manhardt, 17 App. Div. 1; 44 N. Y. Supp. 836; *Snook v. Sullivan*, 53 App. Div. 602; 66 N. Y. Supp. 24; *affd.*, 167 N. Y. 536.

In *Post v. Mason* (91 N. Y. 539), the testator had full testamentary capacity, and the will contained a legacy to the draughtsman, an attorney, who, at the time of the execution of the will, and for a long time previous, had been the counsel of the testator;—Held, that this alone did not raise a presumption, in aid of one seeking to overthrow the will, that the influence of the attorney was unduly exercised, nor did it, in the absence of evidence, warrant a presumption that the intention of the testator was improperly, much less fraudulently, controlled; that it was for the plaintiff, therefore, in an action brought to set aside the

family physician,⁸⁶ or a clergyman,⁸⁷ or a guardian of the testator;⁸⁸ or where the testator was blind,⁸⁹ or was unable to read or write, and was weak in body and mind, and susceptible to undue influence,⁹⁰ and the will was not in harmony with his previously expressed intentions,⁹¹ the ordinary presumption flowing from the fact of formal execution does not obtain, and the proponents must give affirmative evidence that the testator knew its contents, and that it expressed his real intentions;⁹² but any evidence is sufficient for this purpose which shows that the testator had full knowledge of the contents of the will, and executed it freely, and without undue influence, and large latitude will be allowed in the admission of any such evidence. But the law looks with a very jealous eye upon any one who, standing in a relation of confidence and influence with the testator, superintends or in any way influences the testator's disposition of property, especially if such disposition is to his personal advantage. The presumption is against the instrument.⁹³ But old age of a testator is not alone sufficient ground for presuming imposition.⁹⁴ Secrecy and contrivance may be a badge of fraud in the execution of a will when they indicate coercion, persuasion, etc., of other persons, which influenced the testator. But when they can be clearly traced to the wishes of

will, to give some other evidence tending to show fraud or undue influence.

S. P., *Matter of Murphy*, 48 App. Div. 211; 62 N. Y. Supp. 785.

Undue influence will not be presumed from the mere fact that an apparent relation of *master and servant* existed between the legatee and testatrix, where it appears that they were relatives, sustaining close and friendly relations to each other and that testatrix performed the services voluntarily and without salary. (*Matter of Murphy*, 15 Misc. 208; 37 N. Y. Supp. 223.) See *Matter of Hurlbut*, 48 App. Div. 91.

⁸⁶ *Crispell v. Dubois*, 4 Barb. 393.

⁸⁷ *Matter of Welsh*, 1 Redf. 238; *Marx v. McGlynn*, 4 id. 455; 88 N. Y. 357; *Van Kleeck v. Phipps*, 4 Redf. 99; *Matter of Monroe*, 2 Connolly, 395.

⁸⁸ *Limburger v. Rauch*, 2 Abb. Pr. (N. S.) 279.

⁸⁹ *Weir v. Fitzgerald*, 2 Bradf. 42.

⁹⁰ *Van Pelt v. Van Pelt*, 30 Barb. 134; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Matter of Bedlow*, 67 Hun, 408; 22 N. Y. Supp. 290.

⁹¹ *Lee v. Dill*, 11 Abb. Pr. 214; *Mowry v. Silber*, 2 Bradf. 133; *Matter*

of *Nolte*, 10 Misc. 608; 32 N. Y. Supp. 226. But the mere fact of a sudden change of testamentary intention is not sufficient. (*Matter of Green*, 67 Hun, 527; 20 N. Y. Supp. 538; *Matter of Wheeler*, 56 St. Rep. 709.)

⁹² *Lake v. Ranney*, 33 Barb. 49; *De-la-field v. Parish*, 25 N. Y. 9; *Hayes v. Kerr*, 19 App. Div. 91; 45 N. Y. Supp. 1050, and cases above cited.

⁹³ *Matter of Welsh*, 1 Redf. 238; *Leayercraft v. Simmons*, 3 Bradf. 35; *Clark v. Fisher*, 1 Paige, 171; *Matter of Paige*, 62 Barb. 476; *Voorhees v. Voorhees*, 39 N. Y. 463; *Allen v. Public Adm'r*, 1 Bradf. 378; *Bleecker v. Lynch*, id. 458; *O'Neil v. Murray*, 4 id. 311; *Lee v. Dill*, 11 Abb. Pr. 214. In *Tilby v. Tilby* (2 Dem. 514), a will to a supposed wife was refused probate by reason of the fraud of the beneficiary in concealing the fact that she had a former husband living, her marriage with testator being, therefore, void.

⁹⁴ *Butler v. Benson*, 1 Barb. 526; *Matter of Williams*, 46 St. Rep. 791; 19 N. Y. Supp. 778; *Matter of Otis*, 1 Misc. 258; 22 N. Y. Supp. 1060.

the testator *himself*, they cannot be received as having any tendency to impeach his testament.⁹⁵

§ 218. **Partiality and injustice.**— Mere inofficiousness or injustice in the provisions of a will does not raise an inference of unsoundness of mind, or of undue influence. Although the character of the provisions of the will may be considered in connection with the other evidence in trying the question of undue influence, it is not in itself evidence of such influence. However partial or unjust a testator may seem to have been in his testamentary dispositions, if the instrument propounded was clearly his will, effect must be given to it.⁹⁶ When it is said that there must be affirmative evidence that the person having the motive and opportunity to exercise undue influence, did so, it is not to be understood that there must be direct evidence of such undue influence. Undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and his mind, dependence upon, and subjection to the control of, the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person at the time of execution.⁹⁷ Hence, a discrimination against a son whose char-

⁹⁵ Coffin v. Coffin, 23 N. Y. 9. In Matter of Lowman (1 Misc. 43; 22 N. Y. Supp. 1055), the only evidence to impeach the will was that before its execution one of the executors and legatees, who was a nephew and a physician, administered to testator proper quantities of morphine to allay pain caused by rheumatism in his legs; and that deceased, who never married, often visited such nephew and left to his management some of his business. Held, insufficient to justify the setting aside of the probate.

⁹⁶ Cudney v. Cudney, 68 N. Y. 148; La Bau v. Vanderbilt, 3 Redf. 384; Marx v. McGlynn, 4 id. 455; Phillips v. Chater, 1 Dem. 533; Hagan v. Yates, id. 584; Matter of Bedlow, 67 Hun. 408; 22 N. Y. Supp. 290; Matter of Harris, 19 Misc. 388; 44 N. Y. Supp. 341; Dobie v. Armstrong, 160 N. Y. 584; 55 N. E. Rep. 302; Matter of Woodward, 52 App. Div. 494; 65 N. Y. Supp. 405; Matter of Hurlbut, 48 App. Div. 91; 62 N. Y. Supp. 698; Matter of Connor, 29 Misc. 391; 61 N. Y. Supp. 910, and cases cited *infra*.

⁹⁷ Per Rapallo, J., Rollwagen v. Rollwagen, 63 N. Y. 504. See also Sears v. Shafer, 6 id. 268; Tyler v. Gardiner, 35 id. 559; McLaughlin v. McDevitt, 63 id. 213; Reynolds v. Root, 62 Barb. 253; Matter of Wheeler, 56 St. Rep. 709; Forman v. Smith, 7 Lans. 443; Fagan v. Dugan, 2 Redf. 341; Deas v. Wandell, 3 Sup. Ct. (T. & C.) 128; Demmert v. Schnell, 4 Redf. 409. But where there are a number of heirs, legatees, and next of kin, the declarations of one of them are not competent (Matter of Kennedy, 167 N. Y. 163; Matter of Campbell, 67 App. Div. 418), unless there is proof of a conspiracy, since one tenant in common cannot admit away the rights of his cotenant and a will cannot be admitted as to one and rejected as to the other. Nor are the declarations of the testator competent to prove the facts of fraud and undue influence. (Jackson v. Kniffen, 2 Johns. 31; Waterman v. Whitney, 11 N. Y. 157; Matter of Metcalf, 16 Misc. 180; 38 N. Y. Supp. 1131; Matter of Palmateer, 78 Hun. 43; 28 N. Y. Supp.

acter and course of conduct had displeased the testator for some years, though it may betoken a lack of affection and a sense of justice, is not incompatible with mental soundness. And so, a discrimination in favor of a son, as against other children, to whom the testator bequeathed the greater part of his estate, is not of itself proof of mental unsoundness, although the motive in making such a disposition may have been the gratification of an inordinate ambition to perpetuate the success of a particular business enterprise, in which he had himself acquired a wide notoriety and a large fortune, by confiding it to the possession and control of a single individual bearing his name.⁹⁸ What the law terms undue influence must be such as overpowers the will of a testator, and subjects it to the will and control of another; it is not established by proof simply tending to show that the testator, acting from motives of affection or gratitude, gave his property to strangers to his blood.⁹⁹

§ 219. **Opportunity and interest.**—Undue influence will not be inferred from opportunity and interest,¹ or from the fact that

1062.) In *Hagan v. Yates* (1 Dem. 584), the contestants, for the support of their allegations of undue influence exercised upon decedent in respect to his will, relied almost entirely upon the facts that proponent, decedent's second wife, had opportunity to influence him, and that the will, while it made munificent provision for her, was both ungenerous and unjust to the family of his first wife. Held, no proof. But where, in addition to opportunity and interest, it was shown that the party in whose favor the will was made had refused to allow the one disinherited to have private interviews with the testatrix, this was held sufficient to set aside the will. (Marvin v. Marvin, 3 Abb. Ct. App. Dec. 192; 4 Keyes, 9.) And see *Bristed v. Weeks*, 5 Redf. 529; *Nexsen v. Nexsen*, 3 Abb. Ct. App. Dec. 360.

⁹⁸ *La Bau v. Vanderbilt*, 3 Redf. 384, and cases cited; *Matter of Banner*, 33 Misc. 9; 67 N. Y. Supp. 1117. See, to same effect, *Bicknell v. Bicknell*, 2 Sup. Ct. (T. & C.) 96; *Deas v. Wandell*, 3 id. 128; *McLaughlin v. McDewitt*, 63 N. Y. 213.

⁹⁹ *Matter of Snelling*, 136 N. Y. 515; *Matter of Williams*, 46 St. Rep. 791; 19 N. Y. Supp. 778; *Matter of Bolles*, 37 Misc. 562; 75 N. Y. Supp. 1062. The selection by a testatrix as the principal object of her bounty, of a

man in no way related to her, but upon the ground that he had at the risk of his own life saved her from accidental drowning, she leaving surviving a sister, a niece and two nephews.—Held not sufficient ground for refusing probate of her will. (*Matter of Cleveland*, 28 Misc. 369; 59 N. Y. Supp. 985.)

¹ *Seguine v. Seguine*, 4 Abb. Ct. App. Dec. 191; *Kinne v. Johnson*, 60 Barb. 69; *Van Hanswyck v. Wiese*, 44 id. 494; *Clarke v. Davis*, 1 Redf. 249; *Turhune v. Brookfield*, id. 220; *Julke v. Adam*, id. 454; *Newhouse v. Godwin*, 17 Barb. 236; *Cudney v. Cudney*, 68 N. Y. 148; *Coffin v. Coffin*, 23 id. 9; *Matter of Martin*, 21 Week. Dig. 1; *Matter of Smith*, 3 St. Rep. 137; *Matter of Clausmann*, 9 id. 182; *Matter of Hatten*, 10 id. 19; *Matter of Phalen*, 47 id. 44; 19 N. Y. Supp. 358; *Doheny v. Lacy*, 42 App. Div. 218; 59 N. Y. Supp. 724; *affd.*, 168 N. Y. 213; *Matter of Seagrist*, 1 App. Div. 615; *affd.*, 153 N. Y. 682; *Matter of Keefe*, 47 App. Div. 214; 62 N. Y. Supp. 124 (*revd.*, on other grounds, 164 N. Y. 352); *Matter of Gihon*, 44 App. Div. 621; *affd.*, 163 N. Y. 595; *Matter of Murphy*, 41 App. Div. 153; 58 N. Y. Supp. 450; *Matter of Spratt*, 4 App. Div. 1; *Matter of Bolles*, 37 Misc. 562; 75 N. Y. Supp. 1062.

Where, however, *interest and op-*

testator was weak and easily influenced.² While it may be inferred from circumstances, the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator.³ It is said that one has a right by fair argument or persuasion, to induce another to make a will and even to make it in his own favor.⁴ Influence exerted only to give effect to the testator's previously declared intention of producing equality between brothers or their families in the distribution of the estate, is not

portunity are shown and testimony is adduced tending to show a disposition to use undue influence, the *burden* is cast upon the person charged with exercising it to show freedom therefrom in the dispositions of property made in the will. (Matter of Wheeler, 5 Misc. 279.) In Matter of Jones (N. Y. Law J., Aug. 4, 1890), the contestant claimed that, the fact of illicit sexual relations existing between the testatrix and a person who concededly influenced her in the scheme of the will, though the latter derived no benefit under it, raised a presumption of undue influence, and cited Dean v. Negley, 45 Pa. St. 312. But Ransom, S., held that the doctrine of that case had never been accepted in this State. "Where a testator makes a mistress the beneficiary of his bounty when he has a wife living, it only suggests the necessity of the closest scrutiny in reference to the facts attending the execution and preparation of the will, but it does not raise a presumption which shifts the burden of proof upon the proponent. In this case no such state of facts exists, for the person with whom it is said the decedent held the meretricious relation, is not a beneficiary under the will."

² Matter of Bedlow, 67 Hun. 408. 22 N. Y. Supp. 290.

³ Brick v. Brick, 66 N. Y. 144; Baker's Will, 2 Redf. 179; Colhoun v. Jones, id. 34; Matter of Drake, 45 App. Div. 206; 60 N. Y. Supp. 1020. It is not necessary that the precise mode of committing the fraud should be proved. (McLaughlin v. McDewitt, 63 N. Y. 213.) To prove undue influence by duress or threats it is not necessary to show that the duress was visible or physically exercised at the moment of the execution. It is enough that the duress existed shortly before and continued in its domination over

the mind at the time of the execution of the will. (Fagan v. Dugan, 2 Redf. 341.) It is only where the relation between the parties is one of dependence on the one hand and control on the other that the presumption of undue influence will arise. Merely confidential and affectionate relations have no such effect. (Tucker v. Tucker, 45 St. Rep. 458; 18 N. Y. Supp. 629.) In Matter of Cline (N. Y. Law J., Jan. 30, 1890), testatrix was a feeble old woman, more than eighty years of age, and entirely dependent upon the adopted brother of the sole legatee, who was a stranger to her blood, and who was practically unknown to her, although nearly forty years before, she had known the legatee as a child. Probate was denied.

⁴ Blanchard v. Nestle, 3 Den. 37. Even the earnest persuasions of the interested and self-seeking will not necessarily vitiate a testamentary instrument by which they are largely benefited, if it appears that the testator, in selecting them as the recipients of his bounty, has acted on his own judgment, and not merely given expression to the purposes of others, by whose will his own has been subdued. (Seiter v. Straub, 1 Dem. 264.) See Tucker v. Field, 5 Redf. 139; Merrill v. Rolston, id. 220; Tunison v. Tunison, 4 Bradf. 138; Matter of Huestis, 23 Week. Dig. 224; Matter of Cruger, 36 Misc. 272; Matter of Seagrist, 1 App. Div. 615; 37 N. Y. Supp. 496; affd., 153 N. Y. 682; Matter of Spratt, 4 App. Div. 1; 38 N. Y. Supp. 329; Matter of Halbert, 15 Misc. 308; 37 N. Y. Supp. 757; Matter of Dwyer, 29 Misc. 382; 61 N. Y. Supp. 903; Matter of McGill, 26 Misc. 102; 56 N. Y. Supp. 856; Matter of Journeay, 80 Hun. 315; 30 N. Y. Supp. 80; Matter of Bonner, 33 Misc. 9; 67 N. Y. Supp. 1117.

undue.⁵ The influence exercised must amount to moral coercion, which restrained independent action and destroyed free agency; or the importunity must have been such as the testator was unable to resist, and constrained him to do that which was against his free will and desire.⁶

Some of the cases illustrative of the foregoing general principles are collected in a note.⁷

⁵ *Gardiner v. Gardiner*, 34 N. Y. 155; *Wait v. Breeze*, 18 Hun. 403; *Matter of Clark*, 40 id. 233; *Ewen v. Perrine*, 5 Redf. 640.

⁶ *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387; *Brick v. Brick*, 66 id. 144; *Rollwagen v. Rollwagen*, 63 id. 504; *Matter of Martin*, 98 id. 193; *Matter of Burke*, 2 Redf. 239; *Wade v. Holbrook*, id. 378; *Marx v. McGlynn*, 88 N. Y. 357; *Post v. Mason*, 91 id. 539; *Rider v. Miller*, 86 id. 507; *Matter of Gross*, 7 St. Rep. 739; *Matter of Snelling*, 136 N. Y. 515.

⁷ Illustrations of the principles stated in the text may be found in the following cases. Doubtless many other cases might be added:

Undue influence, general principle. *Matter of Bedlow*, 67 Hun. 408; *Matter of Green*, 67 id. 527; *Wightman v. Stoddard*, 3 Bradf. 393; *Delafield v. Parish*, 25 N. Y. 9; *Sherman's Appeal*, 16 Abb. Pr. 397, note; *Julke v. Adams*, 1 Redf. 454; *Clarke v. Davis*, id. 249; *Turhune v. Brookfield*, id. 220; *Van Hanswyck v. Wiese*, 44 Barb. 494; *Seguine v. Seguine*, 4 Abb. Ct. App. Dec. 191; *Gardiner v. Gardiner*, 34 N. Y. 155; *Tyler v. Gardiner*, 35 id. 559; *Rollwagen v. Rollwagen*, 3 Hun. 121; 63 N. Y. 504; *Matter of Western*, 60 Hun. 298; 14 N. Y. Supp. 753; *Matter of Portingall*, 39 St. Rep. 903; *Matter of Connor*, 27 id. 905; *Matter of De Baum*, 32 id. 279; *Ross v. Gleason*, 26 id. 501.

— *by wife*. *Brush v. Holland*, 1 Bradf. 461; *Tunison v. Tunison*, 4 id. 138; *Delafield v. Parish*, 25 N. Y. 9; *Gardiner v. Gardiner*, 34 id. 155; *Tyler v. Gardiner*, 35 id. 559; *Brick v. Brick*, 66 id. 144; *Shields v. Ingram*, 5 Redf. 346; *Matter of Clark*, 40 Hun. 233; *Matter of Thorne*, 26 St. Rep. 240; *Matter of Birdsall*, 34 id. 626; *Matter of Lyddy*, 24 id. 607; *Matter of Eilers*, 29 id. 58; *Matter of Nolte*, 10 Misc. 608; 32 N. Y. Supp. 226.

— *by husband*. *Baker's Will*, 2 Redf. 179; *Ross' Will*, 20 N. Y. Supp.

520; *Matter of Brunor*, 21 App. Div. 259; *Matter of Gihon*, 60 N. Y. Supp. 65; *Matter of Stapleton*, 71 App. Div. 1; 75 N. Y. Supp. 657.

— *by child and legatee*. *Leayercraft v. Simmons*, 3 Bradf. 35; *Mowry v. Silber*, 2 id. 133; *Bleecker v. Lynch*, 1 id. 458; *Mairs v. Freeman*, 3 Redf. 181; *Cudney v. Cudney*, 68 N. Y. 148; *Tucker v. Field*, 5 Redf. 139; *Matter of Buckley*, 16 St. Rep. 983; *Banta v. Willets*, 6 Dem. 84; *Figueira v. Taaffe*, id. 166; *Peck v. Belden*, id. 299; *Matter of Mondorf*, 110 N. Y. 450; *Matter of Bernsee*, 45 St. Rep. 11; *Matter of Bedell*, 32 id. 1022; *Ledwith v. Chaffey*, 18 App. Div. 115; 45 N. Y. Supp. 612.

— *by brother or sister and legatee*. *Matter of Green*, 20 N. Y. Supp. 538; *Matter of Manton*, 32 App. Div. 626; 52 N. Y. Supp. 511; *Matter of Skaats*, 74 Hun. 462; 26 N. Y. Supp. 494.

— *by physician*. *Crispell v. Dubois*, 4 Barb. 393; *Colhoun v. Jones*, 2 Redf. 34; *Matter of Lowman*, 1 Misc. 43; 22 N. Y. Supp. 1055; *Matter of Cornell*, 43 App. Div. 241; 60 N. Y. Supp. 53; *affd.*, 163 N. Y. 608; *Matter of Keefe*, 27 Misc. 618; 59 N. Y. Supp. 490.

— *by grandson, a legatee*. *Carroll v. Norton*, 3 Bradf. 291; *Matter of Van Houten*, 17 Misc. 445; 41 N. Y. Supp. 250.

— *by niece or nephew and legatee*. *Matter of Hedges*, 57 App. Div. 48; 67 N. Y. Supp. 1028; *Chambers v. Chambers*, 61 App. Div. 299; 70 N. Y. Supp. 483.

— *by son-in-law and legatee*. *Matter of Journeay*, 15 App. Div. 567; 44 N. Y. Supp. 548; *affd.*, 162 N. Y. 611.

— *by business manager*. *Matter of Clark*, 5 Misc. 68; *Hayes v. Kerr*, 19 App. Div. 91; 45 N. Y. Supp. 1050.

— *by paramour*. *Matter of Rand*, 28 Misc. 465; 59 N. Y. Supp. 1082; *Matter of Westerman*, 29 Misc. 409; 61 N. Y. Supp. 1065; *Matter of Evans*, 37 Misc. 337; 75 N. Y. Supp. 491.

— *by housekeeper*. *Matter of Hamilton*, 29 Misc. 724; 62 N. Y. Supp. 820.

SUBDIVISION 6.

MISTAKES WHICH INVALIDATE A WILL.

§ 220. **Inquiry as to testamentary intention.**—An objection that the document propounded as a will, or any part of it, does not conform to the real wishes and intention of the decedent, goes to the foundation of the instrument itself. If such an objection is sustained, it is tantamount to a decision that the instrument, or a particular clause of it, is not the will of the decedent. Conformity with the testator's intention is a part of the *factum* of the

— *by executor and legatee.* Vreeland v. McClelland, 1 Bradf. 393; Booth v. Kitchen, 3 Redf. 52; Matter of Carver, 3 Misc. 567; 23 N. Y. Supp. 753; Matter of Sutherland, 28 Misc. 424; 59 N. Y. Supp. 989; Matter of Fox, 9 Misc. 661; 30 N. Y. Supp. 835.

— *by legal adviser and legatee.* Wilson v. Moran, 3 Bradf. 172; Matter of Edson, 70 Hun. 122; 24 N. Y. Supp. 71; Matter of Murphy, 48 App. Div. 211; 62 N. Y. Supp. 785; Clark v. Schell, 84 Hun. 28; 31 N. Y. Supp. 1053; Matter of Suydam, 84 Hun. 514; 32 N. Y. Supp. 449; affd., 152 N. Y. 639; Matter of Read, 17 Misc. 195; 40 N. Y. Supp. 974; Matter of Smith, 36 Misc. 128; Matter of Rintelen, 37 id. 462; 75 N. Y. Supp. 935.

— *by spiritual adviser.* *In re* Welsh, 1 Redf. 238; McGuire v. Kerr, 2 Bradf. 244; Marx v. McGlynn, 4 Redf. 445; 88 N. Y. 357; Merrill v. Rolston, 5 Redf. 220; Matter of Holohan, 24 St. Rep. 449; 5 N. Y. Supp. 342.

— *by draughtsman of will, whose wife or children are legatees.* Lake v. Ranney, 33 Barb. 49. See Coffin v. Coffin, 23 N. Y. 9; Burke's Will, 2 Redf. 239; Reeve v. Crosby, 3 id. 74; Matter of Sheldon, 40 St. Rep. 369; Matter of Miller, 36 Misc. 310; 73 N. Y. Supp. 508.

— *by guardian over minor ward.* Limberger v. Rauch, 2 Abb. Pr. (N. S.) 279; Matter of Bosch, N. Y. Daily Reg., July 12, 1883; Matter of Carland, 15 Misc. 355; 37 N. Y. Supp. 922.

— *by guardian, a draughtsman and beneficiary.* Matter of Paige, 62 Barb. 476; Bristed v. Weeks, 5 Redf. 529.

— *by parent over minor.* Nutting v. Pell, 11 App. Div. 55; 42 N. Y. Supp. 987.

— *by clergyman, whose church was a beneficiary.* Langton's Estate, 1 Tuck. 301; Merrill v. Rolston, 5 Redf. 220; Matter of Monroe, 2 Connolly, 395.

— *by father of infant legatee.* O'Neil v. Murray, 4 Bradf. 311; Burke's Will, 2 Redf. 239; Hazard v. Hazard, 5 Sup. Ct. (T. & C.) 79.

— *by a legatee not next of kin.* Weir v. Fitzgerald, 2 Bradf. 42; Hutchings v. Cochrane, id. 295. See Lansing v. Russell, 13 Barb. 510; Matter of Buckley, 16 St. Rep. 983; Matter of Pike, 83 Hun. 327; 31 N. Y. Supp. 689; Clark v. Schell, 84 Hun. 28; 31 N. Y. Supp. 1053.

— *by nurse.* Neiheisel v. Toerge, 4 Redf. 328; Matter of King, 29 Misc. 268; Matter of Lacy, 35 id. 581; 71 N. Y. Supp. 1129.

Undue influence to induce charitable bequests. Wightman v. Stoddard, 3 Bradf. 393; McLaughlin v. McDevitt, 63 N. Y. 213; Burritt v. Silliman, 16 Barb. 198; Marx v. McGlynn, 4 Redf. 455; 88 N. Y. 357; Matter of Monroe, 2 Connolly, 395; Matter of Shannon, 11 App. Div. 581; 42 N. Y. Supp. 670; Matter of Johnson, 28 Misc. 363; 59 N. Y. Supp. 906.

Incapacity and undue influence. Allen v. Public Adm'r, 1 Bradf. 378; Hutchings v. Cochrane, 2 id. 295; Thompson v. Quimby, id. 449; Bristed v. Weeks, 5 Redf. 529.

Age and undue influence. Butler v. Benson, 1 Barb. 526; Matter of Romaine, 6 N. Y. Leg. Obs. 156; Weir v. Fitzgerald, 2 Bradf. 42; Maverick v. Reynolds, id. 360; Creely v. Ostrander, 3 id. 107; Matter of Soule, 1 Connolly, 18; Matter of Bartholick, id. 373; Matter of Kahn, id. 510; Matter of Johnson, id. 518; Matter of McCarthy, 20 N. Y. Supp. 581; 48 St. Rep. 315;

will.⁸ The Surrogate's Court has power, therefore, to determine, upon a probate proceeding, whether the instrument is, in all its parts, according to the real wishes and intention of the decedent. This power is distinct from the power to expound the meaning and effect of wills, as to which we shall speak more fully on a subsequent page.

Where, therefore, by reason of physical prostration, or impairment of the faculties, or weakness of capacity, or other circumstances, a doubt is raised whether the will propounded is according to the real testamentary intentions of the testator, it becomes competent, and even necessary, to inquire how far, in fact, the will conforms to the real wishes of the deceased. The testator may have had capacity to make a will, and may have intended a testamentary disposition of his property, but by a mistake of the lawyer who drew it, or of the scrivener who engrossed it, the document, as propounded, may contain a provision contrary to the real intention of the testator. In such cases it is competent to receive proof of the instructions given by the deceased, his declarations, the position of his estate, his previous testamentary intentions, the condition of his family relations, the state of his affections, and a variety of other facts bearing upon the ascertainment of the fact whether the particular instrument conformed to the real intentions of the deceased. This is not admitting parol testimony to vary the will, but to ascertain whether it is really *the will* of the decedent.⁹ And parol evidence is always admissible to impeach the *validity* of a will, or any part of it, though never to contradict, vary, or control the words of a will, except in certain cases to explain the meaning of the words used by the

Matter of Bishop, 31 id. 314; Matter of Stewart, 10 N. Y. Supp. 744.

Secrecy, artifice, and contrivance as badges of fraud. Coffin v. Coffin, 23 N. Y. 9; Blanchard v. Nestle, 3 Den. 37; Tunison v. Tunison, 4 Bradf. 138.

Duress and threats. Fagan v. Dugan, 2 Redf. 341; Matter of Spratt, 17 App. Div. 636; 45 N. Y. Supp. 273.

Mistake in or unequal provisions of will. Burger v. Hill, 1 Bradf. 360; Mowry v. Silber, 2 id. 133; Waters v. Cullen, id. 354; Creely v. Ostrander, 3 id. 107; O'Neil v. Murray, 4 id. 311; Morrison v. Smith, 3 id. 209; Wightman v. Stoddard, id. 393; Coffin v. Coffin, 23 N. Y. 9; Jackson v. Jackson, 39 id. 153; American Seamen's Friend Soc. v. Hopper, 33 id. 619; 43 Barb. 625; Gamble v. Gamble, 39 id. 373;

Seguine v. Seguine, 4 Abb. Ct. App. Dec. 191; Clapp v. Fullerton, 34 N. Y. 190; Clarke v. Davis, 1 Redf. 249; Clarke v. Fisher, 1 Paige, 171; Watson v. Donnelly, 28 Barb. 653; La Bau v. Vanderbilt, 3 Redf. 384; Deas v. Wandell, 1 Hun. 120; Matter of Lasak, 57 id. 417; 131 N. Y. 624; Matter of Monroe, 2 Connolly, 395; Matter of Williams, 46 St. Rep. 791.

⁸ Blackwood v. Damer, 2 Phillim. 458, and other cases cited in Williams on Exrs., 406, 408. See 1 Jarman on Wills, 415; 1 Redf. on Wills, 499.

⁹ Burger v. Hill, 1 Bradf. 360. Compare Matter of Chapman, 27 Hun. 573. See 2 Whart. on Ev., § 992; Abbott's Trial Ev. 135; 1 Jarman on Wills (415); 1 Redf. on Wills, 499.

testator. The importance of exercising this jurisdiction in proceedings for the probate of wills of personal property is apparent, when we consider the effect of such probate as conclusive of the validity of the will.¹⁰

§ 221. **Immaterial error.**—But an error as to a matter of fact, unless of such a character as to affect the testamentary intention,—*e. g.*, an overstatement of the amount of certain advances,¹¹ which the will directed to be deducted from a legacy,—is not a ground for denying probate. If the amount is misstated, the error may, perhaps, be corrected on the settlement of the estate, when the amount is to be deducted from the share of the beneficiary, or on an application to pay off the advance and stop the interest. A mere accidental omission in a will, unless it clearly appears that the omission, as the will stands, defeats entirely the testator's intention, is not a ground for refusing probate. Nor has the court any power to correct the mistake by inserting anything in the will, or otherwise reforming it. The extent of its jurisdiction is the negative power of refusing probate to the instrument, in a proper case.¹²

¹⁰ See *Hill v. Burger*, 10 How. Pr. 264; *Burger v. Hill*, 1 Bradf. 360; *Sanders v. Stiles*, 2 Redf. 1. In *Burger v. Hill* (*supra*), the decedent had sufficient testamentary capacity, but his mind was enfeebled by disease. Shortly before his death, he gave instructions to counsel in regard to his will; and on directing the draughtsman to give all his personal property to P., and all his real property to his mother and sisters, was asked by the counsel whether he had any real property, and replied affirmatively, specifying his store in Greenwich street, New York, which was, in fact, leasehold property. The will was drawn accordingly; but it was held, that as the will did not correctly express the testator's testamentary intentions, it could be admitted to probate only under a limited decree, establishing its validity, except as to the leasehold premises, which, not being bequeathed, would go to the next of kin.

¹¹ *Boell v. Schwartz*, 4 Bradf. 12. See 1 Jarman on Wills (412), Ran-

dolph & T.'s notes, pp. 717, 723. A mistake made in the person named as executor will not avoid a will; the will should be proved, and an administrator with the will annexed appointed. (*Matter of Finn*, 1 Misc. 280; 22 N. Y. Supp. 1066.) Parol evidence is admissible to correct the date of a will. (*Matter of Haviland*, 17 Misc. 193; 40 N. Y. Supp. 973.)

¹² *Creely v. Ostrander*, 3 Bradf. 107, 114. Compare *Matter of Chapman*, 27 Hun. 573. In *Matter of Forbes* (60 id. 171; 14 N. Y. Supp. 460; *affd.*, 128 N. Y. 640), the probate of a will was resisted because the name of a son of the testator, as a recipient for a portion of the income of the trust estate created by the will, was omitted, and the claim was made that such omission was a mistake;—Held, that it did not justify the rejection of the will. So, too, in *Matter of Tousey* (34 Misc. 363; 69 N. Y. Supp. 846), where the will recited that the testatrix had no "direct heirs."

SUBDIVISION 7.

REVOCATION AND ALTERATION OF WILL.

§ 222. **Direct revocation.**—It sometimes becomes a question in proceedings for the probate of a will, or even upon an accounting by the executor,¹³ whether or not the alleged will was revoked by the testator. When a will has once been duly executed, it remains as a disposition of the testator's property, to take effect at his death, and can only be revoked in the manner provided in the statute, at the time the revocation was effected.¹⁴

The statute declares that no written will, nor any part of it, can be expressly revoked or altered, except, either (1), "by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or (2) unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."¹⁵ Not only must a written revocation, to be valid, be executed with the same formalities with which the will itself is required by law to be executed,¹⁶ but a codicil cannot be deemed effective to revoke a prior will, unless it is proved to have been a valid testamentary disposition.¹⁷

§ 223. **Revocation by later will or codicil.**—A revocation in writing may be either by a clause of revocation in a later will or other

¹³ Davis' Estate, 1 Tuck, 107.

¹⁴ As to how a will, executed *before* the statute, could be revoked *after* the statute took effect, see *Sherry v. Lozier*, 1 Bradf. 437; *Matter of Griswold*, 15 Abb. Pr. 299.

¹⁵ 2 R. S. 64, § 42. For the distinction between the revocation of provisions in a will, and the ademption or satisfaction thereof, see *Langdon v. Astor*, 16 N. Y. 41. At common law, revocation of a devise could not be proved by parol. (*Jackson v. Kniffen*, 2 Johns. 31.) All that can be shown are intrinsic circumstances, showing a change in the subject of the devise, but nothing more. (*Adams v. Winne*,

7 Paige, 97.) A writing stating that a specific sum was received in lieu of a devise in a will does not of itself revoke the devise; the devise will not stand where the will was unaltered. (*Burnham v. Comfort*, 108 N. Y. 535.)

As to revocation of mutual wills, see *Edson v. Parsons*, 155 N. Y. 555.

¹⁶ *Nelson v. Public Adm'r*, 2 Bradf. 210; *Ex p. Lindsay*, id. 204; *Leacycraft v. Simmons*, 3 id. 35; *McLoskey v. Reid*, 4 id. 334; *Langdon v. Astor*, 16 N. Y. 9; *Barry v. Brown*, 2 Dem. 309; *Dyer v. Erving*, id. 160.

¹⁷ *Delafield v. Parish*, 25 N. Y. 9; *Matter of Johnston*, 23 N. Y. Supp. 355.

instrument¹⁸ in writing, executed in conformity with the statute, or it may be implied from the fact that a later will is inconsistent with the one already executed. If the later will contains a clause revoking a former will, then the former will is rendered absolutely nugatory, although the later will does not dispose of the property embraced in the first;¹⁹ but if the later will contains no such revoking clause, then the former will is revoked *pro tanto* only, *i. e.*, only so far as it is inconsistent with the latter one.²⁰ On the same principle, a codicil is not a revocation of a will further than in respect to provisions in the will inconsistent with those of the codicil.²¹ The rule is, that a codicil will not operate as a revocation beyond the clear import of its language; and an expressed intention to alter a will in one particular negatives an intention to alter it in any other respect.²² But a will which makes a full disposition of all the testator's property, renders useless, and therefore amounts to a total revocation of, every prior will.²³ And an inconsistent devise in a later will is a revocation of the other devise in the earlier.²⁴ The mere existence, however, of a later will, is not necessarily a revocation of a former

¹⁸ Matter of Backus, 49 App. Div. 410; 63 N. Y. Supp. 544. See Matter of Barnes, 70 App. Div. 523; 75 N. Y. Supp. 373.

¹⁹ Matter of Thompson, 11 Paige, 453. See Pinckney's Estate, 1 Tuck, 436. So a clause may revoke, *pro tanto*, a prior clause of the same will. (Tuttle v. Heiderman, 5 Redf. 199.)

²⁰ Nelson v. McGiffert, 3 Barb. Ch. 158; Brant v. Wilson, 8 Cow. 56; Robinson v. Smith, 13 Abb. Pr. 359; McLoskey v. Reid, 4 Bradf. 334. The provisions of the Code as to what kind of evidence is necessary to prove a lost will, do not apply where it is sought to prevent probate by showing the existence of a revoking clause in a will that has since been lost. (Colligan v. McKernan, 2 Dem. 421.)

²¹ Conover v. Hoffman, 15 Abb. Pr. 100; Brant v. Wilson, 8 Cow. 56. See Cooper v. Heatherton, 65 App. Div. 561. But a bequest in a will is superseded by the execution of a codicil containing a different disposition of the same property. (Alvord v. Sherwood, 21 Misc. 354.) A void disposition in a codicil repugnant to a valid one in a will does not revoke the former one, the codicil not containing an express revocation of the will. (Altrock v. Vandenburg, 54 St. Rep. 327.)

²² Wetmore v. Parker, 52 N. Y. 451; Viele v. Keeler, 129 id. 190; 41 St. Rep. 187. See Appleton v. Fuller, id. 386; 16 N. Y. Supp. 353. In Matter of Lockwood (43 St. Rep. 618; 17 N. Y. Supp. 771), the will provided for a certain disposition of the residuary estate and that a sum of money should be retained to pay legacy taxes and administration expenses, but the codicil created trusts and directed the balance to be paid to legatees, with a provision that the codicil should control where it conflicted with the will. Held, that the specific provision for legacy taxes was annulled.

²³ Simmons v. Simmons, 26 Barb. 68; Van Wert v. Benedict, 1 Bradf. 114. An *irrevocable will* may not be admitted to probate in the face of a later testamentary paper expressly revoking it. (Matter of Gloucester, 32 St. Rep. 901.) If the first will was made for a valuable consideration, its provisions may be enforced against his estate as a binding contract, in a court of equity; but a Surrogate's Court has no jurisdiction to deal with it. (Ib.) See Edson v. Parsons, 155 N. Y. 555.

²⁴ Barlow v. Coffin, 24 How. Pr. 54.

will; so that, where the later will has been lost or destroyed, and its provisions cannot be ascertained, the mere fact that such a will was duly executed is not a ground for refusing probate of a former will.²⁵ When it clearly appears, however, that a subsequent will, duly executed, contained a revocation clause, though the will itself cannot be found,²⁶ or where the proof of execution of the later will is insufficient,²⁷ probate will be refused.

§ 224. **Burning, tearing, obliterating, etc., of will.**—Revocation of a will may be accomplished by burning, tearing, canceling, obliterating or destroying the instrument itself with the intent of revoking the same, in the manner provided in the statute. It is only when the act is done by another person that the fact of injury or destruction, together with the direction and consent of the testator, are to be proved by at least two witnesses.²⁸ The revocation by destruction or cancellation must extend to the whole will and not to a part of it only. Where a will is found among the testator's papers with his signature and the name of the principal legatee partially obliterated, there is a presumption of revocation by cancellation.²⁹ In order to constitute revocation, complete destruction or cancellation of the will is not necessary. Tearing the will into several fragments is sufficient, although the fragments are capable of being restored.³⁰ But revocation of a particular provision or clause of the will cannot be effected by merely canceling or erasing such clause, or making interlineations which change its character.³¹ If a particular clause is canceled or altered, the will should be reacknowledged, to give effect to the change. In a case of an unattested interlineation, erasure or other alteration either by the testator or a stranger,

²⁵ *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Matter of Williams*, 34 Misc. 748; 70 N. Y. Supp. 1055. See *Pinekney's Estate*, 1 Tuck. 436; *Clark v. Kingseley*, 37 Hun. 246.

²⁶ *Moore v. Griswold*, 1 Redf. 388; *Matter of Myers*, 28 Misc. 359; 59 N. Y. Supp. 908; *Matter of Forbes*, 24 id. 841. And see *Bloomer v. Bloomer*, 2 Bradf. 339.

²⁷ *Matter of Barnes*, 70 App. Div. 523; 75 N. Y. Supp. 373.

²⁸ *Timon v. Claffy*, 45 Barb. 438.

²⁹ *Clark's Will*, 1 Tuck. 445. See *Matter of Alger*, 38 Misc. 143.

³⁰ *Sweet v. Sweet*, 1 Redf. 451. Compare *Matter of Forman*, 54 Barb. 274. But where a will was written on two separate sheets of paper, originally being one sheet of legal cap, one of which

contained the disposing part and the other the signature and attestation clause, proved to have been duly executed, found in the desk of the scrivener who drew it, but with the separation unexplained, in which was also found a memorandum signed by the testatrix but not duly executed as a will, for a different disposition of the property. Held not to have been revoked, and to be entitled to probate. (*Matter of Ackels*, 23 Misc. 321; 52 N. Y. Supp. 246.)

³¹ *Lovell v. Quitman*, 88 N. Y. 377; *Quinn v. Quinn*, 1 Sup. Ct. (T. & C.) 437; *Matter of Prescott*, 4 Redf. 179; *Clark v. Smith*, 34 Barb. 140; *Gugel v. Vollmer*, 1 Dem. 484. So far as it holds otherwise, the case of *McPherson v. Clark*, 3 Bradf. 92, is overruled.

after the execution of the instrument, the court will disregard the change, and probate the will according to its original language.³² A question is always likely to arise whether an erasure or interpolation was made before or after the execution of the instrument. The rule is that, in the absence of suspicious circumstances, no presumption arises that an interlineation or erasure, fair upon its face and entirely unexplained, was fraudulently made after the will was executed.³³ But material alterations will not be presumed to have been made prior to execution,³⁴ and in the absence of direct evidence as to when the cutting, tearing, or the obliteration and interlineations were made, circumstances may be sufficient to justify an inference that they were done before, and not after, the execution of the will.³⁵

§ 225. **Intent to revoke.**—To effect a revocation by destruction or cancellation of the instrument, it is essential that there should be an intention, as well as a physical act; the mere act of cancelling a will is not a revocation, unless it be done *animo revocandi*.³⁶ But a mere intention to revoke, however strongly declared, is of no effect unless carried out by some act amounting to a cancellation or revocation.³⁷ The *act*, however, being done, the intention may be inferred from the circumstances attending the act. Thus, the fact that the instrument was last seen in the decedent's

³² Matter of Wilcox, 46 St. Rep. 877; Matter of Carver, 3 Misc. 567; 23 N. Y. Supp. 753; Matter of Lang, 9 Misc. 521; 30 N. Y. Supp. 388. In Quinn v. Quinn (*supra*), the testator, after he had executed his will, made, in his own handwriting, various alterations, erasing some legacies altogether, and changing the names of some of the legatees. He also changed one of the executors. Held, that the will as originally executed should be upheld. In Wetmore v. Carryl (5 Redf. 544), the will had been admitted to probate and recorded as altered. An application to change the record by substituting the original for the altered form of the will was granted. Compare Dyer v. Erving, 2 Dem. 160. In Stevens v. Stevens (6 Dem. 262), the testatrix, after the execution of a will, desired to make certain further bequests which were inserted by the draughtsman, there being no re-execution or republication. Held, that the instrument should be admitted as executed and without the interpolated clause.

³³ So held, admitting the will to probate, where testator's signature had been obliterated, then rewritten. (Matter of Wood, 32 St. Rep. 286; Matter of Tighe, 24 Misc. 459; 53 N. Y. Supp. 718; Matter of Dwyer, 29 id. 382; 61 N. Y. Supp. 903; Crossman v. Crossman, 95 N. Y. 145.)

³⁴ Matter of Barber, 92 Hun, 489; 37 N. Y. Supp. 235.

³⁵ Matter of Homes, 32 St. Rep. 902; Matter of Potter, 33 id. 936; 12 N. Y. Supp. 105; Matter of Carver, 23 id. 755; Matter of Voorhees, 6 Dem. 162; Matter of Barber, *supra*. Interlineations need not be noted at the foot of the instrument, if the place where they should appear is clearly designated. (Matter of Whitney, 90 Hun, 138; 35 N. Y. Supp. 798; *revd.* on other grounds in 153 N. Y. 259.)

³⁶ Jackson v. Holloway, 7 Johns. 394; Jackson v. Potter, 9 id. 312; Sweet v. Sweet, 1 Redf. 451; Smith v. Wait, 4 Barb. 28.

³⁷ Clark v. Smith, 34 Barb. 140.

possession, but could not be found, upon due search, after his death, raises a presumption of intended revocation by destruction;³⁸ and there is a like presumption where it was found in his drawer with his signature canceled.³⁹ But such a presumption is entirely overcome when it appears that, upon its execution, the will was deposited by testator with a custodian, and that the testator did not thereafter have it in his possession, or have access to it.⁴⁰ Since an *animus revocandi* is essential, it must be shown that the testator was of sound mind, and that the act of destruction was done freely, and not under undue influence. It must appear that the testator had, at the time of the act of destruction, sufficient capacity to understand the nature and effect of the act, and performed it, or directed it to be performed, freely and voluntarily, with the intent to effect a revocation.⁴¹ "Upon a question of revocation, no declarations of the testator are admissible, except such as accompany the act by which the will is revoked; such declarations being received as part of the *res gesta*, and for the purpose of showing the intent of the act."⁴²

§ 226. **Effect of revocation of will upon codicil.**—The destruction or mutilation of a will is not *necessarily* a revocation of a codicil, if the latter is so independent of, and unconnected with,

³⁸ *Idley v. Bowen*, 11 Wend. 227; *Bulkley v. Redmond*, 2 Bradf. 281; *Holland v. Ferris*, id. 334; *Betts v. Jackson*, 6 Wend. 173; *Matter of Kennedy*, 53 App. Div. 105; 65 N. Y. Supp. 879; *affd.*, 167 N. Y. 163; *Hard v. Ashley*, 88 Hun. 103; 34 N. Y. Supp. 583.

³⁹ *Clark's Estate*, 1 Tuck. 445; *Matter of Philip*, 46 St. Rep. 356; 19 N. Y. Supp. 13; *Collyer v. Collyer*, 3 St. Rep. 135; *Matter of Nichols*, 40 Hun. 387; *Crossman v. Crossman*, 95 N. Y. 145. But see *Matter of Hopkins*, 73 App. Div. 559, where it was held that the mere fact that canceling marks appeared upon the signature to a will offered for probate was not sufficient to authorize the inference that such marks were made by the testator so as to require the rejection of the instrument as having been revoked, where there was no other evidence of an intention to revoke, and the will had been formally executed ten years previous to the testator's death and was found some days after his death in a drawer of a desk which he had been accustomed to use, but had not been found upon a thorough search made

about two hours previously; distinguishing *Matter of Clark*, 1 Tuck. 445.

⁴⁰ *Schultz v. Schultz*, 35 N. Y. 653.

⁴¹ *Idley v. Bowen*, 11 Wend. 227; *Smith v. Wait*, 4 Barb. 28; *Matter of Forman*, 54 id. 274; *Voorhis v. Voorhis*, 50 id. 119; *Matter of Waldron*, 19 Misc. 333; 44 N. Y. Supp. 353.

Where a will is made in a sound state of mind, and is subsequently revoked without the slightest evidence of any change of purpose, or any ground for it, after the testator has shown signs of breaking up mentally, the revocation may be attributed to delusion. (*Miller v. White*, 5 Redf. 320.) In *Matter of De Groot* (18 Civ. Proc. Rep. 102), testimony as to the destruction of a will in the lifetime of the testatrix was considered, and destruction held to be without her direction or consent, and fraudulent, and the same admitted to probate upon proof of the contents thereof. See, as to proof of lost or destroyed wills, § 234, *post*.

⁴² Per Selden, J., *Waterman v. Whitney*, 11 N. Y. 157; *Matter of Hopkins*, 35 Misc. 702; *affd.*, 73 App. Div. 559.

the will that, under the circumstances, it solely expresses the testator's testamentary intentions.⁴³ But the general rule is that a codicil is, *prima facie*, dependent on the will, and that the destruction of the will is an implied revocation of the codicil.

§ 227. **Revocation implied from change of property.**—A total or partial revocation may be effected indirectly or impliedly, as by a change in the condition of the property devised, or in the deviser's interest in it, such revocation being deduced from the facts of each case, under familiar rules of law. Accordingly, where a testator, having devised or bequeathed specific property, afterwards in his lifetime sells or otherwise absolutely disposes of the same property, this amounts to a revocation of such devise or legacy,⁴⁴ to the extent that he has divested himself of the property devised or bequeathed.⁴⁵ Where the testator does not *wholly* divest himself of his interest in the property, but retains any portion thereof, as, *e. g.*, a life estate in lands devised, or reserves rent and a right of re-entry,⁴⁶ this does not work a revocation. In regard to such revocations, the common law has, in most cases, been declared or modified by the statute. A mere agreement to convey is not a revocation, but the property passes by the devise or bequest, subject to the same remedies for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.⁴⁷ In the same way, a charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, is not a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein

⁴³ Wms. on Exrs. 126; Matter of Day, 1 Bradf. 476.

⁴⁴ Livingston v. Livingston, 3 Johns. Ch. 148; Minuse v. Cox, 5 id. 441; Walton v. Walton, 7 id. 258; Herrington v. Budd, 5 Den. 321; Ametrano v. Downs, 170 N. Y. 388; 63 N. E. Rep. 340; McNaughton v. McNaughton, 34 N. Y. 291; Adams v. Winne, 7 Paige, 97; Beck v. McGillis, 9 Barb. 35; Brown v. Brown, 16 id. 569; Barstow v. Goodwin, 2 Bradf. 413; Nottbeck v. Wilks, 4 Abb. Pr. 315; Gilbert v. Gilbert, 9 Barb. 532; Arthur v. Arthur, 10 id. 9.

⁴⁵ Vreeland v. McClelland, 1 Bradf. 393.

⁴⁶ Herrington v. Budd, 5 Den. 321. See Vandemark v. Vandemark, 26

Barb. 416. As to restoration of the devise, upon a reconveyance of the land, see Walton v. Walton, 7 Johns. Ch. 258; Brown v. Brown, 16 Barb. 569. As to effect of devise of land contracted to be sold, see McCarty v. Myers, 5 Hun, 83.

⁴⁷ 2 R. S. 64, § 45. And see Knight v. Weatherwax, 7 Paige, 182; Walton v. Walton, 7 Johns. Ch. 258; Gaines v. Winthrop, 2 Edw. 571; Roome v. Phillips, 27 N. Y. 357, 364; Guelich v. Clark, 3 Sup. Ct. (T. & C.) 315; Nutzhorn v. Sittig, 34 Misc. 486; 70 N. Y. Supp. 287; Williams v. Haddock, 78 Hun. 429; 29 N. Y. Supp. 199; *affd.*, 145 N. Y. 144; Holly v. Hirsch, 135 N. Y. 590; 49 St. Rep. 14.

contained, pass and take effect subject to such charge or incumbrance.⁴⁸ Nor is any act of a testator, by which his interest in property is altered, but not wholly divested, to be deemed a revocation of a previous devise or bequest of such property; but the devise or bequest gives to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.⁴⁹ But if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of the previous devise or bequest, the instrument operates as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition is not performed, or such contingency does not happen.⁵⁰

§ 228. **Subsequent marriage.**—The common-law rule that the marriage of a woman operated as an absolute revocation of her prior will was made a part of the statute law of this State by the Revised Statutes.⁵¹ And this provision is not repealed by implication by the Married Women's Acts of 1848, 1849, and 1860, but is still in force.⁵² Notwithstanding these acts (which confer testamentary capacity upon married women) there is sufficient reason for the continuance of the rule in the changed relations of the woman by her marriage. Her new status as wife induces the presumption of a new testamentary intention and demands a new testamentary act. Hence the unmarried woman of the statute is the woman who is not in a state of marriage, *e. g.*, a widow.⁵³ But a will executed by a married woman is not revoked by the death of her husband and her subsequent remarriage,⁵⁴ nor by a marriage following a divorce.⁵⁵ After her marriage, the testatrix may republish her will made before marriage, with the same effect as if re-executed after marriage.⁵⁶

⁴⁸ 2 R. S. 65, § 46. And see *Vandemark v. Vandemark*, 26 Barb. 416.

⁴⁹ 2 R. S. 65, § 47; *Burnham v. Comfort*, 108 N. Y. 535.

⁵⁰ 2 R. S. 65, § 48; *Ludlum v. Otis*, 15 Hun, 410.

⁵¹ 2 R. S. 64, § 44.

⁵² *Brown v. Clark*, 77 N. Y. 369; *Loomis v. Loomis*, 51 Barb. 257; *Lathrop v. Duhiop*, 6 Sup. Ct. (T. & C.) 512. See *McMahon v. Allen*, 4 E. D. Smith, 519.

⁵³ *Matter of Kaufman*, 131 N. Y.

620; 43 St. Rep. 282; *Croner v. Cowdrey*, 139 N. Y. 471; 54 St. Rep. 728.

⁵⁴ *Matter of McLarny*, 153 N. Y. 416; 47 N. E. Rep. 817.

⁵⁵ *Matter of Burton*, 4 Misc. 512.

⁵⁶ *Brown v. Clark*, *supra*. In that case a single woman made a will and afterward married, whereby the will was revoked. Thereafter she duly executed a codicil referring to and describing her said will and containing the following clause: "I do hereby republish, reaffirm, and adopt the afore-

In the case of *a man*, who has disposed of his whole estate by will, his subsequent marriage does not operate to revoke such will except he has issue of such marriage, born either in his lifetime or after his death, and the wife or issue of such marriage shall be living at his death, unless provision is made for such issue by some settlement, or unless such issue be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision.⁵⁷ No other evidence to rebut the presumption of such revocation can be received.⁵⁸

§ 229. Subsequent birth of child.— It is further provided, that whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned, in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.⁵⁹ The

going said instrument as my present will, in like manner as if so executed by me, but modified pursuant to this codicil, which, in connection with an amendment of my said will, I now publish and declare together as constituting my last will and testament." The will was present when the codicil was executed, and the testatrix, at the time, declared the instrument executed to be a codicil to her last will and testament, and a reaffirmation of the latter. Held, that the effect was to republish the will, which, with the codicil, constituted the testatrix's last will and testament.

⁵⁷ 2 R. S. 64, § 43.

⁵⁸ It was held, before the Revised Statutes, that marriage and birth of a child might amount to an implied revocation, and that such revocations were not within the Statute of Frauds. (*Brush v. Wilkins*, 4 Johns. Ch. 506; *Sherry v. Lozier*, 1 Bradf. 437.) See *Bloomer v. Bloomer*, 2 id. 339.

The presumption of intent to revoke a will arising from subsequent marriage and birth of issue, is considered in *Havens v. Van Denburgh*, 1 Den. 27.

A will made in ignorance of the existence of a living child is not revoked,

even at common law, by the discovery of its existence. (*Ordish v. McDermott*, 2 Redf. 460.)

Testator made a will in 1883, and a codicil in 1884. In the former year he began illicit intercourse with a woman who afterward became his wife, and he gave her a house, but did not live with her before the codicil was made or then hold her out as his wife. Held, that at the date of the codicil the parties had not passed from a state of illicit intercourse to that of marriage, and the will was revoked by the subsequent marriage of the testator and birth of issue. (*Matter of Gall*, 31 St. Rep. 954; 9 N. Y. Supp. 466; *affd.*, 10 id. 661; 32 St. Rep. 695.)

⁵⁹ 2 R. S. 65, § 49, as amended L. 1869, c. 22, § 1. See also Co. Civ. Proc., § 1868. Where the testator, after giving the residue of his estate in trust for his wife during life, made the disposal, "I give the reversion of all said residue and remainder" * * * "to those persons who, if my death occurred at the time of her death, would then be my heirs-at-law by blood," and a son was born in his lifetime after the exe-

statute, it will be observed, says *parent*, thus including mother as well as father.⁶⁰ It has no application, however, to an adopted child.⁶¹ The birth of a post-testamentary only child is, however, no ground for refusing probate.⁶²

§ 230. **Revocation of subsequent will.**—Where a subsequent will affects one previously made (which, as has been seen above, is not always the case), the revocation of the later will does not revive the first, unless it appears, by the terms of the revocation, that it was the testator's intention to revive his first will;⁶³ or unless, after such revocation, he duly republishes his first will.⁶⁴

cution of the will.—Held, that the son took under the will and was not entitled to a distributive share of the estate, as if his father had died intestate, as a child "unprovided for by any settlement, and neither provided for nor in any way mentioned in such will," within 2 R. S. 65, § 49. (*Minot v. Minot*, 17 App. Div. 521; 45 N. Y. Supp. 554.)

⁶⁰ The amendment of 1869 consisted of substituting the word *parent* for *father*; thus rendering obsolete the case of *Cotheal v. Cotheal* (40 N. Y. 405), which held that under the original statute the will of a married woman was not revoked by the subsequent birth of children who survived her. See *Plummer v. Murray*, 51 Barb. 201; *Smith v. Robertson*, 24 Hun, 210.

⁶¹ *Matter of Gregory*, 15 Misc. 407; 37 N. Y. Supp. 925.

⁶² *Matter of Bunce*, 6 Dem. 278; *Matter of Huiell*, id. 352; *Matter of Murphy*, 144 N. Y. 557; 64 St. Rep. 249; *Luce v. Burchard*, 78 Hun, 537; 29 N. Y. Supp. 215.

⁶³ In *Matter of Campbell* (170 N. Y. 84; 62 N. E. Rep. 1070), testatrix executed a will in 1897. In 1899 another will was executed, and in 1900 an instrument was executed which declared itself to be a codicil to the last will of testatrix, "which will bears date July 6, 1897." The will of 1899 modified the provisions of the will of 1897 in respect to certain legacies. Each of the wills was executed with the requisite statutory formalities, and contained the usual revocation clause. The codicil modified some provisions

of the will of 1897, revoked others, and added some legacies. Held, that the effect of the codicil was to republish the earlier will as of the date of the codicil, and to revoke the intermediate will.

Where, however, a codicil is written partly upon the will itself, modifies it only in a few particulars and its provisions are inseparably blended with those of the will, and it appears that testator had had trouble with a brother who was named as executor of the will, which resulted in changes in his estate, creating inequalities in the devises made, an erasure of the signature to the codicil will be held to revoke the will as well as the codicil. (*Matter of Brookman*, 11 Misc. 675; 33 N. Y. Supp. 575.)

Revocation of probate of a will as to personalty, by the surrogate,—Held to abrogate, at least as to personalty, a revocation clause therein, so as to make it inoperative as against the probate of a prior valid will. (*Matter of Miller*, 28 Misc. 373; 59 N. Y. Supp. 978.)

⁶⁴ 2 R. S. 66, § 53; *Matter of Barnes*, 70 App. Div. 523; 75 N. Y. Supp. 373. A will expressly revoked by the terms of a subsequent will, afterward destroyed by the testator, is not republished so as to become a valid will, by the testator's declaration to persons other than the subscribing witnesses, that he desires the will first executed to stand as his last will, and that it is his last will. (*Matter of Stickney*, 161 N. Y. 42.)

ARTICLE FIFTH.

CODICILS AND INSTRUMENTS ANNEXED TO WILLS.

§ 231. **Execution and effect of codicil.**— A codicil is defined to be a supplement or an addition to a will, for an explanation or alteration of the former dispositions of the testator, and is to be taken as a part of the will, all making but one testament. Except where a contrary intent is expressed or shown, the effect of the codicil is to bring down the date of the will to the date of the codicil, making the will speak as of that date, unless the effect of the change of date is to alter the meaning of the will.⁶⁵ The execution of a codicil amounts to a republication of the will to which it refers unless a contrary intention appears on the face of the paper, and corrects any informality in the execution of the latter.⁶⁶ The effect of a codicil to revoke a will has been previously considered.⁶⁷ There can be but one *last will*, but the testator may make any number of codicils, all being of equal force, if not contradictory. It is not necessary that the codicil should be written on the same sheet with the will, nor that it be affixed to it bodily, but to entitle a codicil to be proved and so take effect as a part of the will, it must be executed, published, and attested with the same formalities as the will itself.⁶⁸ The facts that it was presented for probate with the will, that evidence was received with regard to it, and that the paper was received by the surrogate in connection with the will do not establish it as a codicil, in the absence of proof of formal statutory execution.⁶⁹

⁶⁵ Stillwell v. Mellersh, 5 Eng. L. & Eq. Rep. 185. See Brown v. Clark, 77 N. Y. 369, 375. By adding a codicil, after the Revised Statutes, the testator republishes his will, and subjects its construction, and the validity of its trusts and powers, to those statutes. (Salmon v. Stuyvesant, 16 Wend. 321; Root v. Stuyvesant, 18 id. 257.) See Langdon v. Astor, 16 N. Y. 9.

A provision in a will, modified by a codicil, is to be read as though it had been written in conformity with the change. (Simonson v. Elmer, 17 Week. Dig. 345.)

⁶⁶ Brown v. Clark, 77 N. Y. 369; Matter of Storms, 3 Redf. 327; Caulfield v. Sullivan, 85 N. Y. 154; Cook v. White, 43 App. Div. 388; 60 N. Y. Supp. 153; Matter of Campbell, 35

Misc. 572; 72 N. Y. Supp. 55. See Southgate v. Continental Trust Co., 36 Misc. 415; Farmers' L. & T. Co. v. Ferris, 67 App. Div. 1.

⁶⁷ See § 223, *ante*; and, in addition to the cases there cited, Kane v. Astor, 9 N. Y. 113; 5 Sandf. 467, 519; Coster v. Coster, 3 Sandf. Ch. 111; Howland v. Union Theological Sem., 5 N. Y. 193; Wagstaff v. Lowerre, 23 Barb. 209; Conover v. Hoffman, 1 Abb. Ct. App. Dec. 429; Matter of Manning, 50 App. Div. 407; 64 N. Y. Supp. 222.

⁶⁸ Dack v. Dack, 19 Hun, 630; Matter of Buckwell, N. Y. Law J., March 18, 1891. That there is no attestation clause to a codicil to a will does not invalidate it. (Matter of Crane, 68 App. Div. 355; 74 N. Y. Supp. 88.)

⁶⁹ Burhans v. Haswell, 43 Barb. 424.

§ 232. **Propounding codicil.**— The Revised Statutes declare that the term “will,” as used in the chapter relating to wills, testaments, etc., includes all codicils as well as wills;⁷⁰ and a provision of the present Code is to the same effect.⁷¹ Where, on the probate of a will, an alleged codicil is brought in by parties who are interested, but who were not cited, the proper course is to direct them to file an allegation propounding the codicil for proof, as a part of the pending proceeding.⁷²

§ 233. **Instruments referred to in will.**— The surrogate can only prove, as a will or part of a will, such instruments as have been made conformably to the statute. But it is settled, by a long line of authorities, that any written testamentary document in existence at the execution of a will may, by reference, be incorporated into, and become a part of, the will, provided the reference in the will is distinct, and clearly identifies, or renders capable of identification by the aid of extrinsic proof, the document to which reference is made.⁷³ Entries in a book, referred to in a will, become, on being identified, incorporated into the latter, in order to enable the court to reach the testator's intention.⁷⁴ Still, instruments so incorporated into a will are not proved or recorded with it. Whether such papers have existence or not, or whether the reference is properly made, or the provisions of the will are nugatory, has no effect on the question of probate.⁷⁵ Although reference may be made in a will to another document

⁷⁰ 2 R. S. 68, § 71.

⁷¹ Co. Civ. Proc., § 2514, subd. 4.

⁷² *Carle v. Underhill*, 3 Bradf. 101. And see *Van Wert v. Benedict*, 1 id. 114.

⁷³ *Brown v. Clark*, 77 N. Y. 369, 377. But see *Matter of Sanderson* (9 Misc. 574), where the paper referred to was not properly executed. See also *Matter of Fults*, 42 App. Div. 593; 59 N. Y. Supp. 756. In that case a will drawn on a one-page printed form, midway of the page of which a double sheet of foolscap, containing bequests, was attached by pins, *neither the part on the form nor that on the foolscap referring to the other.*—Held to have been properly denied probate, though no fraud was alleged. As to when a reference in a will to an unexecuted paper is sufficient to incorporate it in the will, see *Ludlum v. Otis*, 15 Hun, 410; *Dyer v. Erving*, 2 Dem. 160; *Webb v. Day*, id. 459; *Matter of Robert*, 4 id. 185.

⁷⁴ In *Guion v. Underhill* (1 Dem. 302), testatrix, by her will, after giving one-third of the residue to her executors, in trust, to apply the interest and income to the use of her daughter for life, with remainder over, directed “that this distribution of said residue of said property is subject to this provision—that the third so directed to be invested for the benefit of my daughter *is to be charged with the amount which shall be found on my books charged to her.*” Held, that the amount to be deducted from the daughter's third must include the charges found on the books as of dates subsequent, as well as prior, to the date of the will. See also *Lawrence v. Lindsay*, 68 N. Y. 108.

⁷⁵ *Matter of Tonnele*, 5 N. Y. Leg. Obs. 254; *affd.*, 4 N. Y. 140. See *Matter of Brand*, 68 App. Div. 225; *Matter of Mandelick*, 6 Misc. 71.

already in existence, for the purpose of description, there can be no valid disposition except in the will; and a will cannot reserve the power to give by an instrument not executed as a will.⁷⁶ But a provision that advancements or beneficial provisions for persons and purposes provided for in the will, "if charged in my books of account, shall be deemed so much on account of the provision in my will or codicils in favor of such persons or purposes," is valid; and gifts actually made in the testator's lifetime, and so charged, are to be deemed advancements.⁷⁷ Several testamentary instruments executed at the same time will be taken and construed together as one instrument.⁷⁸

TITLE SIXTH.

LOST OR DESTROYED WILLS.

§ 234. **Jurisdiction of surrogate.**—Previously to 1870, Surrogates' Courts had not jurisdiction to take proof of lost or destroyed wills, the only method of establishing such a will being by civil action in a court of record. In that year, the surrogate of New York county was authorized to take proof of the execution of such a will in the same manner as the Supreme Court might do.⁷⁹ This power is now extended to all surrogates by a section of the Code which, in form, specifies the cases in which the Surrogate's Court may decree probate of such a will. By implication, this jurisdiction is coextensive with that of the Supreme

⁷⁶ *Thompson v. Quimby*, 2 Bradf. 449. Thus, in *Locke v. Farmers' Loan & T. Co.* (21 N. Y. Supp. 524; s. c., as *Locke v. Rings*, 66 Hun, 428), the will directed the executors to carry out the terms of a certain deed of trust executed by the testator, and if this could not be done, to set aside from his estate a certain net income, and pay such income to the beneficiaries named in such deed of trust, in the proportions set out therein. Held, that no trust was created by the will, because it disposed of no property; and it received no support by the reference to the deed of trust, because such deed was neither authenticated according to the Statute of Wills, nor incorporated in the will. See *Matter of Sanderson*, 9 Misc. 574.

⁷⁷ *Langdon v. Astor*, 16 N. Y. 9; *Matter of Twombly*, 24 Misc. 51; 53 N. Y. Supp. 385.

⁷⁸ *Howland v. Union Theo. Sem.*, 5 N. Y. 193; *Pierpont v. Patrick*, 53 id. 591; *Haven v. Haven*, 1 Redf. 374; *Matter of Forman*, 54 Barb. 274; *Lynch v. Pendergast*, 67 id. 501. In *Matter of Purdy* (47 St. Rep. 284; 20 N. Y. Supp. 307), two instruments, written upon blanks, each in form a complete will, but without a date, were offered for probate; one disposed of money and specific articles, and the other of specific articles only; it appeared that the two were executed at different dates, and that after the execution of the first, the testatrix received a lot of household furniture. Held, that the instrument disposing of specific articles only was to be taken as executed last and interpreted as a codicil to the other, rejecting the revocation clause in the printed blank, and thus both admitted to probate.

⁷⁹ L. 1870, c. 359, § 8. See *Sheridan v. Houghton*, 84 N. Y. 643.

Court, which inherits its jurisdiction of such cases from the former Court of Chancery. Under the Revised Statutes, that jurisdiction embraced any will of real or personal estate, lost or destroyed by accident or design; and the court had the same power to take proof of the execution and validity of the will and to establish it, as it had to establish a lost deed.⁸⁰ But this provision of the statute has been repealed,⁸¹ and replaced by a provision of the Code of Civil Procedure, to the effect that an action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, where the will has been lost or destroyed by accident or design before its proof and record within the State.⁸² Such action may be maintained where the will (1) was in existence at the time of the testator's death, or (2) was fraudulently destroyed in his lifetime, and (3) where its provisions are clearly and distinctly proved by at least two credible witnesses — a correct copy or draft being equivalent to one witness.⁸³ In the same cases, and those only, a lost or destroyed will can be admitted to probate in a Surrogate's Court.⁸⁴

§ 235. **The existence of the will.**— The legal existence of the will at the death of the testator, or its fraudulent destruction during his lifetime, are the essential facts. The existence will not be presumed from the fact that it was seen shortly before testator's death, nor is it proved by a declaration of the testator, made seven months before his death, that he had made a will; for this does not suffice to rebut the presumption of destruction with intent to revoke, which arises from the fact that no will could be found, after diligent search made soon after death.⁸⁵ The burden of proof is on the proponent to show either the existence of the will at testator's death or its prior destruction.⁸⁶ Either fact may be proved by circumstantial evidence. Thus when it appears that the will, at the time of its execution, was placed by the tes-

⁸⁰ 2 R. S. 67, § 63. As to jurisdiction of Court of Chancery, before the Revised Statutes, see *Bowen v. Idley*, 6 Paige, 46.

⁸¹ L. 1880, c. 245.

⁸² Co. Civ. Proc., § 1861. The action must be brought within six years after the testator's death, except that where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends. (Co. Civ. Proc., § 382, subd. 6.)

⁸³ Co. Civ. Proc., § 1865.

⁸⁴ Co. Civ. Proc., § 2621.

⁸⁵ *Collyer v. Collyer*, 4 Dem. 53; *affd.*, 110 N. Y. 481; *Matter of Kennedy*, 167 id. 163; 60 N. E. Rep. 442. See *Matter of Marsh*, 45 Hun. 107; *Matter of Barnes*, 70 App. Div. 523; 75 N. Y. Supp. 373.

⁸⁶ *Perry v. Perry*, 49 St. Rep. 291; 21 N. Y. Supp. 133; *McNally v. Brown*, 5 Redf. 372; *Keery v. Dimon*, 37 N. Y. Supp. 92; 72 St. Rep. 125; *Kahn v. Hoes*, 14 Misc. 63; 35 N. Y. Supp. 273.

tator in the hands of another person as custodian, who took charge of it, and locked it up in a trunk, and supposed it was there at the time of the testator's death, but, upon search after his death, it could not be found, its legal existence, at the time of the testator's death, is sufficiently shown.⁸⁷ If the will was not, in fact, in existence at the death of the testator, it is to be inferred, under such circumstances, that it was fraudulently destroyed or lost during his lifetime, and in that case, as well, it was his last will and testament.⁸⁸ But a lost will, not traced out of testator's possession, is presumed to have been revoked by him by destruction.⁸⁹

§ 236. *Its due execution.*-- The fact that the will is lost or has been destroyed does not affect the requisites to its due execution. These requisites must be proved as if the will were present. It cannot be done, it is true, by the same description of evidence in all respects, but some evidence sufficient to show a compliance with the statute, in all its provisions, must be given.⁹⁰ These facts are to be proved in the usual way, as other facts are required to be proved, to make them evidence in a court of justice. The fact of testator's mental capacity must be shown; if not, although the existence of the will is proved, probate will be refused.⁹¹ While the statute requires rules to be observed in the execution and publication of wills, which it does not prescribe in regard to the execution and delivery of other written instruments, the proof of the several acts so prescribed is the same as the proof required to establish any other fact. The law lays down no stubborn, in-

⁸⁷ *Schultz v. Schultz*, 35 N. Y. 653; *Matter of Cosgrove*, 31 Misc. 422; 65 N. Y. Supp. 570.

⁸⁸ *Id.* In *Matter of Soule* (40 St. Rep. 600; 15 N. Y. Supp. 934), the testatrix had made a will to take the place of one believed to have been wrongfully abstracted from her possession, and gave it to the person who drew it, for safe-keeping; the husband of testatrix obtained it two weeks before her death; it was in existence two days before that event, but was not found thereafter by those interested in its production, and was not produced by her husband, who contested the probate and was interested in its suppression. Held, that in the absence of evidence that the will was destroyed by testatrix, or that she had, at any time, an intention to revoke it, the presumption that it existed was

not overcome, and such question should be submitted to a jury.

⁸⁹ *Idley v. Bowen*, 11 Wend. 227; *Bulkley v. Redmond*, 2 Bradf. 281; *Holland v. Ferris*, *id.* 334; *Hard v. Ashley*, 88 Hun. 103; 34 N. Y. Supp. 583. See § 225, *ante*.

⁹⁰ *Grant v. Grant*, 1 Sandf. Ch. 235, 343; *Voorhees v. Voorhees*, 39 N. Y. 463; *Matter of Purdy*, 46 App. Div. 33; 61 N. Y. Supp. 430. It is equally necessary, as in the case of a will actually presented, that two at least of the subscribing witnesses be produced or the nonproduction of them, or either of them, satisfactorily accounted for, and then the handwriting, or the fact of their having signed the will as witnesses, must be duly proven by competent testimony. (*Collyer v. Collyer*, 4 Dem. 53; *affd.*, 110 N. Y. 481.)

⁹¹ *Matter of Paine*, 6 Dem. 361.

flexible rules in such cases, but accepts the best evidence that can be procured, adapted to the nature of human affairs, human infirmities and casualties, which tends with reasonable certainty to establish the fact in controversy.

§ 237. **Its fraudulent destruction.**—A will is “fraudulently destroyed,” within the meaning of the statute, when it is destroyed by the testator himself, in consequence of the undue influence exercised over him, and the misrepresentations made to him by a person interested to have the will destroyed. It is not necessary that the will should have been destroyed by some one other than the testator, or that the means by which the testator was induced to destroy it should have amounted to force or coercion.⁹² It is a fraudulent destruction, if accomplished without testator’s knowledge or consent, in disregard of his intention, and to the injury of a beneficiary, though with no design to gain advantage, or injure or deceive any one.⁹³ But in order to prove the will “fraudulently destroyed,” it is not necessary that it should have been destroyed in such a manner as to amount to a valid revocation.⁹⁴ The statute should be liberally construed in furtherance of justice and for the prevention of fraud; the fraudulent destruction of a single item or clause, or distinct portion or provision of a will, must be considered the destruction,—fraudulent or by design,—of the will, if the destruction affects the disposition of the testator’s property in any essential particular; and, accordingly, the courts have power to restore and establish portions of a will so destroyed or suppressed, even though a codicil, alleged to have been fraudulently procured, has been admitted to probate by a Surrogate’s Court.⁹⁵

§ 238. **Its contents.**—The statutory requirement, that the provisions of a lost or destroyed will must be “clearly and distinctly proved by at least two credible witnesses,” should receive a liberal construction; and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of property, and are of the substance of the will.⁹⁶ It is necessary,

⁹² Voorhees v. Voorhees, 39 N. Y. 463; Harris v. Harris, 26 id. 433; Matter of Forman, 54 Barb. 274; Smith v. Wait, 4 id. 28; Everitt v. Everitt, 41 id. 385. *Accidental destruction* of the will in charge of a custodian, during testator’s lifetime, is insufficient. (Matter of Reiffeld, 36 Misc. 472; 73 N. Y. Supp. 808.)

⁹³ Early v. Early, 5 Redf. 376.

⁹⁴ Timon v. Claffy, 45 Barb. 438.

⁹⁵ Hook v. Pratt, 8 Hun, 103; Timon v. Claffy, 45 Barb. 438; Voorhees v. Voorhees, 39 N. Y. 463; Schultz v. Schultz, 35 id. 656.

⁹⁶ Early v. Early, 5 Redf. 376. In that case, the subscribing witnesses agreed that the will was read aloud to and signed by the testator, in their presence, and that they signed in his

however, that *both* witnesses should testify upon personal knowledge of the contents; thus, it is not enough that one saw a draft which the other declared afterward became a will.⁹⁷ The proof of a lost or destroyed will proceeds upon the theory that it is not in existence and cannot be produced before the surrogate; and therefore the case is one of secondary evidence exclusively.⁹⁸ Where the two witnesses differ materially in their testimony either as to the beneficiaries or the amount of bequests, the will cannot be admitted upon their testimony.⁹⁹ It cannot be admitted upon the stipulation of counsel as to its contents.¹

§ 239. Issuing of letters.—Where the will is established in an action, letters issue thereupon from the Surrogate's Court having jurisdiction, if so directed by the judgment.² The judgment must contain a copy, or the substance, of the will, and must be

presence, but they differed as to whether the declaration of the nature of the instrument, and the request to sign, were made by the testator, one witness swearing positively that they were so made and the other stating that they were made in testator's presence, by M., who drew the will and supervised the execution. Though testator was ill and feeble, it did not appear that he was in such a condition as to be unable to make or dissent from such a request and declaration; the execution was not immediately before his death; and both subscribing witnesses testified that he was of sound mind. Two witnesses agreed that all the property was devised and bequeathed to testator's widow, but differed as to whether an executor was appointed. After the will was executed, the draughtsman took it with him to keep for testator, put it among his papers, and died. His son found it among his father's papers and destroyed it, during testator's lifetime, as a paper of no importance. Held, that the due and proper execution was shown, and that the provisions were sufficiently proved, notwithstanding the doubt as to the appointment of an executor, which was not an indispensable part of the will, and that the destruction was fraudulent, as against the beneficiary, within the meaning of the statute, and probate should be granted. In *McNally v. Brown* (5 Redf. 372), it appeared that the will was in existence at the time of decedent's death, and

was last seen in the possession of the principal beneficiary, the petitioner, but there was no evidence that it had been lost or destroyed; and the testimony of petitioner, the draughtsman, the subscribing witnesses, and another, as to its provisions, was such as only to enable the courts to surmise the nature thereof, and no two witnesses proved all the provisions. Held, that there was not a compliance with the statute, and probate was refused. See *Matter of Purdy*, 46 App. Div. 33; 61 N. Y. Supp. 430.

⁹⁷ *Matter of Waldron*, 19 Misc. 333; 44 N. Y. Supp. 353.

⁹⁸ *Everitt v. Everitt*, 41 Barb. 385; 27 How. Pr. 600; *Fetherly v. Waggoner*, 11 Wend. 599. See *Rider v. Legg*, 51 Barb. 260. As to admissibility of declarations made by the testator, see *Grant v. Grant*, 1 Sandf. Ch. 235, 243; *Timon v. Claffy*, 45 Barb. 438; 41 N. Y. 619. The declarations of decedent respecting its dispositions are admissible only as a circumstance taken in connection with other evidence tending to establish the facts. Reiterated declarations of this character, uttered by decedent to various persons, cannot be galvanized into the "two credible witnesses" made an indispensable necessity by the Code. (*Hatch v. Sigman*, 1 Dem. 519.)

⁹⁹ *Sheridan v. Houghton*, 6 Abb. N. C. 234. See *Harris v. Harris*, 26 N. Y. 433; *Grant v. Grant*, 1 Sandf. Ch. 235.

¹ *Matter of Ruser*, 6 Dem. 31.

² See Co. Civ. Proc., §§ 1864, 1865.

recorded in the surrogate's office. Where the proceedings for probate are taken in a Surrogate's Court, letters issue upon the will, when admitted, as in other cases.

TITLE SEVENTH.

NUNCUPATIVE WILLS.

§ 240. **Who may make.**—In the early history of wills, before the Statute of Frauds, the act of the testator in disposing of his property was not attested by any writing, but his will was declared by him verbally, in the presence of witnesses, usually when he was in his last sickness. But for the statute which declares the mode of executing testamentary dispositions of property, it would not be essential that a will should be in writing.³ The statute of this State restricts the making of unwritten or nuncupative wills to sailors and soldiers while in actual service and danger. It is provided by statute, that no nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea.⁴ Besides the restriction thus imposed by the statute, there is a common-law restriction, still recognized, that the will must be made when the testator is *in extremis*, or overtaken by sudden and violent sickness, and has no opportunity to make a written will;⁵ though it is not necessary that it should be made in the *last* sickness.⁶ A mariner is not "at sea," even when in the naval service, during a voyage upon a river;⁷ but a captain of a coasting vessel, on a voyage, and while lying at anchor in an arm of the sea, where the tide ebbs and flows, may make a nuncupative will.⁸

§ 241. **Mode of execution of will.**—Nuncupative wills not being regulated by statute as to their mode of celebration or execution, the single question for the judgment of the court is, whether the nuncupation was made by a person entitled to that privilege. It is sufficient that the testator, in prospect of death, states what dis-

³ For a history of the law of nuncupative wills, the curious reader is referred to the opinion of Chancellor Kent, in *Prince v. Hazelton*, 20 Johns. 502, and of Surrogate Bradford, in *Ex p. Thompson*, 4 Bradf. 154.

⁴ 2 R. S. 60, § 22. A cook on board a steamship is a "mariner." (*Ex p. Thompson*, 4 Bradf. 154.)

⁵ *Prince v. Hazelton*, 20 Johns. 502.

See the American cases collected in notes to 1 Jarman on Wills (ed. of Randolph & T.), 238.

⁶ *Ex p. Thompson*, 4 Bradf. 154. It was otherwise held under our former Statute of Wills. (*Prince v. Hazelton*, 20 Johns. 502.)

⁷ *Gwin's Estate*, 1 Tuck. 44.

⁸ *Hubbard v. Hubbard*, 8 N. Y. 196.

position he desires to make of his property; and it is enough if he does this in answer to questions. No particular form of language is necessary, nor need he request the persons present to be witnesses that it is his will; nor need he name an executor.⁹ A letter written by a soldier in actual military service, in anticipation of battle, and in view of death therein, has been held a valid nuncupative will, although the testator was not killed till several months thereafter.¹⁰

§ 242. **Proof of will.**— Formerly, no particular number of witnesses of the nuncupation was required to entitle such a will to probate, if the court was satisfied with the proof;¹¹ but now, before a nuncupative will is entitled to probate, its execution and the tenor thereof must be proved by at least two witnesses.¹² It is necessary, also, that the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation should be clearly and satisfactorily proved.¹³ The same mode of procedure, by petition and citation, is to be adopted to prove a nuncupative will, as has been detailed in regard to the proof of a written will. The citation must state that the will was nuncupative;¹⁴ and the petition should set forth the fact that the decedent was either a soldier or sailor, his rank or capacity, the extremity of his illness at the time, and the particular words or language used, which it is proposed to establish as a will. Forms of the petition and probate will be found in the appendix.

TITLE EIGHTH.

DECREE GRANTING OR REFUSING PROBATE; RECORDING WILL, ETC.

§ 243. **Surrogate's decree on probate.**— The parties for and against the probate having introduced their proofs, and summed up the case — the proponent being entitled, as having the affirmative of the issue, to the opening and closing — the admission or rejection of the instrument propounded then awaits the decision of the surrogate upon the law and facts. It appearing to the satisfaction of the court that the will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint, it must be admitted

⁹ *Ex p. Thompson*, 4 Bradf. 154; *Hubbard v. Hubbard*, 8 N. Y. 196. See *Botsford v. Krake*, 1 Abb. Pr. (N. S.) 112.

¹⁰ *Botsford v. Krake*, 1 Abb. Pr. (N. S.) 112.

¹¹ *Ex p. Thompson*, 4 Bradf. 154.

¹² Co. Civ. Proc., § 2618.

¹³ *Hubbard v. Hubbard*, *supra*.

¹⁴ Co. Civ. Proc., § 2616.

to probate as a will valid to pass real property or personal property, or both, as the surrogate determines, and the petition and citation require; and the decree must state whether the probate was or was not contested.¹⁵

§ 244. **All the issues to be decided.**—Where, in addition to questions as to the *factum* of the will, the court is called upon to determine the true construction and the legal effect of the instrument, as he may be required to do, the decree admitting the will to probate must contain the decision determining the true construction and meaning of the instrument. A question has been raised whether the determination of both these issues should be by one and the same decree, or whether the court may, on being satisfied of the validity of the execution of the will, or in case there is no contest on that question, decree the probate, and reserve the question of construction for further consideration and a subsequent decree. Notwithstanding the possibility of an injury to the estate, resulting from a delay in the grant of letters upon a probate to which the executor, in such a case, is confessedly entitled, we think it safer, if not indeed vital, that probate should not be granted until all the issues properly¹⁶ raised, whether of validity, construction, or otherwise, are determined. The statute declares, that “the surrogate must determine the question [of construction, etc.] upon rendering a decree,”—that is, a decree granting probate. After a will is once admitted to probate, the proceeding may be said to have come to an end, and the court to have lost jurisdiction to proceed further in the matter. There may be some question whether, notwithstanding the provision of section 2624, prescribing that the question of construction is to be determined, “*unless* the decree refuses to admit the will to probate,” etc., the unsuccessful party may not of right require a decision of the question of construction, even where probate is refused; for, by section 2625, it is provided that “where the surrogate decides against the sufficiency of the proof, or against the validity of a will, or upon the construction, validity, or legal effect of any provision thereof, he must make a decree accordingly; and, if required by either party, he must enter in the minutes the grounds of his decision.”

¹⁵ Co. Civ. Proc., § 2623.

¹⁶ Where a will presented for probate which is duly executed assumes to make a *devise of realty*, and the petition and citation so require, and the petitioner so requests, the surrogate

must probate it as a will of real property, without regard to, and without adjudicating upon, any question as to the validity of the devise. (Matter of Merriam, 136 N. Y. 58; 48 St. Rep. 897.) See c. VII. *post*.

The purpose of the requirement, that the surrogate must, on request, enter in the minutes the grounds of his decision, is to enable the appellate court to correct an erroneous conclusion of law, without the necessity of examining and passing upon all the facts.¹⁷ It will be borne in mind, however, that "an appeal from a decree or an order of a Surrogate's Court brings up for review, by each court to which the appeal is carried, each decision to which an exception is duly taken by the appellant."¹⁸

§ 245. **Probate of part of will.**— We have already pointed out that the court may deny probate of a particular clause of a will, or grant a limited probate of the will, as it is sometimes termed. This will be done where it is shown that a particular clause has been inserted by fraud or mistake, without the knowledge of the testator. It is not necessary that the whole will must stand or fall.¹⁹ A will should not be permitted to be made a vehicle for libel or contumely, and when such a design plainly appears from the context, such matter, in so far as it is not dispositive, should be refused probate and record.²⁰ Codicils, which are as much parts of the will as if incorporated therein and draw the will down to their date, as if then republished, may be rejected, leaving the will to stand.²¹ But where the surrogate has reached the conclusion that the *factum* of the will has not been established, he has no discretion and cannot admit it to probate for any purpose.²²

§ 246. **Certificate indorsed on proved will.**— The surrogate is required to "cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of a will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be."²³

¹⁷ See § 114, *ante*.

¹⁸ Co. Civ. Proc., § 2545. See, as to the rule under the former statute, *Schenck v. Dart*, 22 N. Y. 420; *Caujolle v. Ferrie*, 23 id. 90; *Robinson v. Raynor*, 28 id. 494; *Howland v. Taylor*, 53 id. 627.

¹⁹ *Burger v. Hill*, 1 Bradf. 360; *In re Welsh*, 1 Redf. 238; *Baker's Will*, 2 id. 179; *James v. Beasley*, 14 Hun, 520. See *ante*, § 220.

²⁰ *Matter of T— B—*, 27 Abb. N. C. 125; 44 St. Rep. 304; 18 N. Y. Supp. 214. The court cannot, even with the consent of all parties interested, ex-

punge from the probate any parts of the will which constitute *operative portions* of the instrument. But *offensive passages* have sometimes been allowed to be omitted from the probate, when the omission does not change the legal effect. (*In re Wortnaby*, 1 Rob. Ecc. Rep. 423.) See also *Wms. on Exrs.* (6th Am. ed.), p. 443, and 2 Redf. on Wills, 43.

²¹ See § 231, *ante*.

²² *Matter of Eckert*, 36 Misc. 610; 73 N. Y. Supp. 1122.

²³ Co. Civ. Proc., § 2629.

§ 247. **Its effect as evidence.**— “ The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence,” and with the conclusive effect, as evidence, of a decree of probate of a will of personal property, under section 2626; and with the presumptive effect of a decree of probate of a will of realty, under section 2627 — subject to the provision of section 2628, protecting a purchaser from an heir of a person who died seized of real property against a devise of the same, unless, within four years after the testator’s death, the will containing the devise is admitted to probate and recorded, or is established by action.²⁴

§ 248. **Disposition of will after probate.**— When it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another State or Territory of the United States, or in a foreign country, and that the laws of such State, Territory or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such State, Territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such State, Territory or country, or to his representative, upon such terms as he shall think proper for the protection of other parties interested in the estate.²⁵ “ Except where special provision is otherwise made by law, or where the surrogate sends a will into another State or Territory or into a foreign country, or delivers it to a party in interest, as provided in section 2620 of this act, a written will, after it has been proved and recorded, must be retained by the surrogate until the expiration of one year after it has been recorded, and, if a petition for the revocation of probate thereof is then filed, until a decree is made thereupon. It must then be returned, upon

²⁴ Co. Civ. Proc., § 2629, as amended 1882. See *Carroll v. Carroll*, 60 N. Y. 121, 125, for a construction of the original enactment. It was held, under the former statute, that in order to make the record or exemplification of the record of the will evidence, it must be accompanied with the proofs and examinations taken before the

surrogate, although the latter are not thereby made evidence in the cause in which the will was offered. See *Nichols v. Romaine*, 3 Abb. Pr. 122; *Morris v. Keys*, 1 Hill. 540; *Caw v. Robertson*, 5 N. Y. 125, 132.

²⁵ Co. Civ. Proc., § 2620, as amended 1902 (L. 1902, c. 114).

demand, to the person who delivered it, unless he is dead, or a lunatic, or has removed from the State; in which case it may, in the discretion of the surrogate, be delivered to any person named therein as devisee, or to an heir or assignee of a devisee; or, if it relates only to personal property, to the executor, or administrator with the will annexed, or to a legatee.”²⁶

§ 249. **Recording wills.**— We have already given²⁷ the provision of the Code as to the record-books to be kept by the surrogate. Besides the records of his own business, a surrogate is empowered to complete, certify, and sign in his own name all records of papers left uncompleted or unsigned by any of his predecessors in office.²⁸ When a surrogate admits a will to probate he is required to record it in his office.²⁹ But there are other circumstances when a will is entitled to be so recorded. Thus where a will has been established in a civil action brought for that purpose, the surrogate is required to record a copy; or, if the will is lost or destroyed, the substance of the will, as incorporated in the judgment of establishment, transmitted to him, must be recorded.³⁰ Where a will of real property has been proved and recorded in any court of the State, of competent jurisdiction, a transcript thereof and of all the notices, process and proofs relating thereto, must, when duly exemplified, be recorded, upon the request of any person interested therein, in the Surrogate’s Court of any county in which real property of the testator is situated.³¹

§ 250. **Recording foreign wills.**— In certain cases the exemplified copy of a foreign will of personalty, or of realty, which has been admitted to probate abroad, may become entitled to record in a surrogate’s office of this State. Where real property, situated within the State, or an interest therein, is devised or made subject to a power of disposition by a will duly executed in conformity with the laws of this State, of a person who was, at the time of his or her death, a resident elsewhere within the United States, or in a foreign country, and such will has been admitted to probate

²⁶ Co. Civ. Proc., § 2635, as amended 1902 (L. 1902, c. 114).

²⁷ See § 24, *ante*.

²⁸ Co. Civ. Proc., § 2481, subd. 9. From time to time the Legislature has passed general confirmatory acts, the latest (c. 155 of L. 1890) being as follows: “All acts hitherto of surrogates and officers acting as such in completing, by certifying in their own names, any uncertified wills, and by signing and certifying in their own names, the

unsigned and uncertified records of wills, and of other proofs and examinations taken in the proceeding of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing requirements.”

²⁹ Co. Civ. Proc., § 2623.

³⁰ Co. Civ. Proc., § 1864.

³¹ Co. Civ. Proc., § 2630.

within the State or Territory or foreign country where the decedent so resided, and is filed or recorded in the proper office, etc., a copy of such will, or of the record thereof, and of the proofs, or of the record thereof, etc., may be recorded with the surrogate of any county where the real property is situated.³² Where a will of personal property made by a nonresident at the time of the execution thereof, or at the time of his death, has been admitted to probate within a foreign country, or within the State or the Territory of the United States, where it was executed, or where the testator resided at the time of his death, the Surrogate's Court having jurisdiction of the estate must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in this article, record the will and the foreign letters and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.³³

§ 251. Filing nonresident's will with secretary of state.—Where the surrogate admits to probate the will of a person who was not a resident of the State at the time of his death, or grants original or ancillary letters testamentary upon such a will, or original or ancillary letters of administration upon the estate of such a person, he must, within ten days thereafter, transmit to the secretary of state, to be filed in his office, a certified copy of the will or letters. The surrogate's fees for making the copy, and the expenses of transmission, must be audited by the comptroller, and paid out of the treasury upon his warrant.³⁴

§ 252. Copies of record of ancient wills as evidence.—It is provided that "the exemplification of the record of a will, proved

³² Co. Civ. Proc., § 2703, as amended 1900 (L. 1900, c. 759). The production of such a record is presumptive evidence of such will and the execution thereof. (Ib.) In *Bromley v. Miller* (2 T. & C. 575), it was held that the record here of such a will and proofs is equivalent to proof of the will in this State. But see *Lockwood v. Lockwood*, 51 Hun. 337; *Matter of Langbein*, 1 Dem. 448; *Matter of Shearer*, 1 Civ. Proc. Rep. 455; *Matter of Nash*, 37 Misc. 706. The "presumptive evidence" is overcome, however, where the record shows on its face that the will was not properly admitted to probate. (*Meiggs v. Hoag-*

land, 68 App. Div. 182.) See *Taylor v. Syme*, 162 N. Y. 513; *Lockwood v. Lockwood*, *supra*. It will be observed that no provision is made for the issuance of letters testamentary on such a will. Hence, whether an executor of such a recorded will has qualified himself to exercise a power of sale in respect to land in this State must depend upon what he has done at the place of foreign probate. (*Pollock v. Hooley*, 22 N. Y. Supp. 215.)

³³ Co. Civ. Proc., § 2695. As to authentication of such wills, see Co. Civ. Proc., § 2704.

³⁴ Co. Civ. Proc., § 2503.

before the judge of the former Court of Probate, and recorded in his office before the 1st day of January, in the year 1785, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search had been made for the original will.”³⁵ “An exemplified copy of the last will and testament of any deceased person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this State, shall be admitted in evidence in any of the courts of this State, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, *when thirty years have elapsed since the will was admitted to probate and recorded.* And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction, of another State must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence, as if the original will was produced and proved, *when thirty years have elapsed since the will was proved.*”³⁶

The evidential effect of a decree granting probate will be considered hereafter, under the head of decrees generally, and their effect as adjudications.³⁷

³⁵ Co. Civ. Proc., § 2631.

³⁶ Co. Civ. Proc., § 2632, as amended 1901 (L. 1901, c. 540). The object of the originals of the foregoing provisions, relating to wills which may be termed ancient, was to make the ex-

emplifications in such cases supersede the necessity of proving anew the execution of the will on producing the exemplification. (*Ackley v. Dygert*, 33 Barb. 176.)

³⁷ See c. XXI, *post*.

CHAPTER VII.

THE VALIDITY, CONSTRUCTION, AND EFFECT OF WILLS.

§ 253. **Implied power to construe wills.**—As a necessary incident to their general powers to control executors, to direct the payment or charging of legacies and the like, Surrogates' Courts have always exercised the right and the power to look into the will and determine its true construction; and this power has always been considered to be as extensive as the power to which it is incident. As an incident to their duty to settle the accounts of executors, and to decree distribution of the estate, remaining in their hands, "to the persons entitled, according to their respective rights," they may, therefore, construe a will so far as it may be necessary to determine to whom the legacies are payable and whether any of them should abate. These questions, to some extent, at least, require the court to decide whether a legacy attempted to be made is invalid or ineffectual as being obnoxious to the rule against perpetuities,¹ or to the statute limiting charitable gifts to one-half of the estate,² or as being in violation of some statute, or settled rule of law which restrains or limits the power of testamentary alienation.³ So, in a proceeding to revoke letters testamentary, it may be necessary for the court to construe the will in order to determine whether or not the executors were guilty of the waste charged, in turning over the estate to one of their number as an absolute devisee and legatee.⁴ These cases proceed upon the principle that wherever, in any proceeding touching the administration of the estate, in which the validity of the will is pertinent to the matter in hand, the court will determine the question; as where, for example, it appears, on the accounting of an executor, that the testatrix had married subsequently to the execution of the will, the court will not hesitate

¹ *Matter of Verplanck*, 91 N. Y. 439; *Rigg v. Cragg*, 26 Hun. 89; 89 N. Y. 479; *Purdy v. Hayt*, 92 id. 446; *Matter of French*, 52 Hun. 303; 23 St. Rep. 450.

² *Stephenson v. Short*, 92 N. Y. 433.

³ *Tappen v. Methodist Church*, 3 Dem. 187; *Dubois v. Brown*, 1 id. 317; *Matter of Collyer*, 4 id. 24.

⁴ *Fernbacher v. Fernbacher*, 4 Dem. 227. Compare *Matter of Ellis*, 1 Conolly, 206; *Matter of Soule*, id. 18. So, in assessing the inheritance tax, the court may determine what estate passed under the will. (*Matter of Ullmann*, 137 N. Y. 403; *Matter of Peters*, 69 App. Div. 465; 74 N. Y. Supp. 1028.)

to declare the will revoked, and direct a distribution as in a case of intestacy.⁵

§ 254. **Express jurisdiction.**—The original statute⁶ required that, "before recording any will or admitting the same to probate, the surrogate shall be satisfied of its genuineness and validity." It was claimed that this requirement involved the necessity of examining the contents of the instrument propounded, before decreeing probate, and of summarily rejecting so much of it as the court might find illegal or ineffectual for any cause; but it was decided that the statute only required, as a condition of granting probate, that the court should be satisfied that the instrument was "valid," as a will, not that it should declare each or any of its provisions valid; in short, that the *factum* of the will was the only issue in a probate proceeding, and the court would not examine its contents except as they bore upon the question of its execution and authenticity.⁷ In 1870, the Legislature conferred power upon the Surrogate's Court of New York county, in a proceeding to prove a will, to pass upon the validity of any of its provisions or their legal effect, when called in question by any heir or next of kin of decedent, or by any legatee or devisee named in the will, to the same extent that the Supreme Court had jurisdiction to pass upon and determine the true construction, validity, and legal effect thereof.⁸ This jurisdiction,

⁵ Matter of Davis, 1 Tuck. 107. So in an accounting proceeding the court may ascertain the intention of the testator in regard to the compensation to be made to the executors. (Matter of Thompson, 5 Dem. 117.) On a motion to open a decree on a final accounting and to modify it, the court may construe the will with a view of determining whether the testator's widow had the right to a life use, only, of personal property which the executor was bound to turn over to her as trustee of the remaindermen. (Kelsey v. Van Camp, 3 Dem. 530.) See Matter of Finn, 1 Misc. 280; Matter of Havens, 8 id. 574; 29 N. Y. Supp. 1085; Matter of Metcalfe, 6 Misc. 524; 27 N. Y. Supp. 879; Matter of Young, 17 Misc. 680; s. c., as Matter of Cornell, 41 N. Y. Supp. 539; affd., 15 App. Div. 285; Matter of Perkins, 75 Hun, 129; 26 N. Y. Supp. 958; Matter of Owens, 24 Civ. Proc. Rep. 256; 33 N. Y. Supp. 422; Matter of Davenport, 37 Misc. 179; 74 N. Y. Supp. 940; Matter of Raymond, 73 App. Div. 11; Matter of Vandevort, 8 id. 341; 40

N. Y. Supp. 791; Baldwin v. Smith, 3 App. Div. 350; 38 N. Y. Supp. 299. When, however, upon an accounting, no question of distribution is before the court, any direction as to the future is not binding upon the court when the question becomes a present one. (Matter of McCahill, 29 Misc. 450; 61 N. Y. Supp. 1071.) S. P., Matter of Haight, 51 App. Div. 310; 64 N. Y. Supp. 1029.

⁶ L. 1837, c. 460, § 17.

⁷ Matter of McLaughlin, 1 Tuck. 79. The present Code (§ 2622), adopting the statute of 1837, defined the "validity" of which the court was to inquire, on a will being offered for probate, to be "the validity of its execution."

⁸ L. 1870, c. 359, § 11. It was held, under this statute, that even if some of the provisions of the will created an unlawful suspension of ownership, this was no objection to the probate of the will, and the court refused to pass upon the question before admitting the will to probate. (Wade v. Holbrook, 2 Redf. 378.)

considerably curtailed, is now enjoyed by all surrogates,⁹ though it is said that the principle of the two statutes is the same.¹⁰ The jurisdiction is confined to the cases of wills of personal property, and such a will must be that of a resident of this State, and have been executed within this State.¹¹ It is, therefore, far from conferring upon these courts the same powers and jurisdiction which the Supreme Court has in such a matter. The jurisdiction to construe wills which these courts now enjoy is only new in that it may be exercised not only, as heretofore, incidentally to some other proceeding in the course of the administration of the estate, but it may be exercised before the administration has begun, and in the same proceeding by which the *factum* of the will is sought to be established. By the same decree which admits the instrument to probate as the validly executed will of a capable testator, the surrogate "must," if required, construe the document with the view of determining its "validity" and "effect," that is, so far as they can be determined by "construction," according to the rules of law governing that subject. Where the question of the validity of the will is not material or pertinent, the court will decline to entertain it.¹²

§ 255. **Limits of jurisdiction.**—Notwithstanding this extension of their powers in this regard, the rule still is, that Surrogates' Courts have no authority to construe a will, except as it is expressly conferred by statute, or as it is a necessary incident to some other power expressly conferred.¹³ No statute expressly confers upon them any jurisdiction of a direct, independent proceeding for the construction of a will. The will having once been admitted to probate, the court has not power to entertain a new, independent proceeding for its construction.¹⁴ This object

⁹ Co. Civ. Proc., § 2624.

¹⁰ Jones v. Hamersley, 4 Dem. 427.

¹¹ The fact that the testator was a resident does not give jurisdiction, if the will was executed outside the State. (Tiers v. Tiers, 2 Dem. 209.) A "resident," as used in this section, must mean a resident at the time of the testator's death. See Co. Civ. Proc., § 2694. This limitation is confined, apparently, to cases where the question is raised *directly* in a probate proceeding, as authorized by section 2624.

¹² Whether, upon an application to require an executor to show cause why he should not be attached for failure

to file an inventory and why he should not be removed from office, the surrogate has power to construe a will was questioned in Wilde v. Smith (2 Dem. 93). The force and effect of a testamentary provision cannot be finally determined upon an application for an advance upon a legacy. (Rank v. Camp, 3 Dem. 278.)

¹³ Washbon v. Cope, 144 N. Y. 287; 63 St. Rep. 716. Jurisdiction cannot be conferred by consent. (Matter of Campbell, 88 Hun. 374; 34 N. Y. Supp. 831.)

¹⁴ Bevan v. Cooper, 72 N. Y. 317; Matter of McClouth, 9 Misc. 385; 30 N. Y. Supp. 274.

can be accomplished either as an incident to the probate proceeding, or afterward, as an incident to some other proceeding, where the due administration of the estate makes it necessary that it should be done. The authority of a Surrogate's Court to pass upon the validity of dispositions of property by will, *in a proceeding for its probate*, is limited (1) to the case of wills of residents of this State, executed within the State; and (2) to dispositions of personal property therein attempted to be made. In regard to the testator's residence and the place where he executed his will, I apprehend that the limitation applies only to probate proceedings, and that if the question of the validity or effect of a foreign will, or the will of a nonresident, necessarily arises in a proceeding affecting *the administration* of the estate under it, the court should not refuse to determine it.

The limitation, depending upon *the species of property* involved in the dispositions of the will sought to be construed, has now been defined with precision by the court of last resort, after no little uncertainty had been created through discussion in the trial courts. It is now settled that the law is now, as it has always been, that Surrogates' Courts have no jurisdiction, either direct or indirect, to determine the validity, construction, or effect of devises of real property. Although the Code declares it necessary that a petition for probate should state whether the will relates, or purports to relate, exclusively to real or personal property, or to both, and that the will must be admitted "as a will valid to pass real property or personal property or both" (§ 2623), this does not vest the surrogate with the power to determine whether the instrument, *upon its face*, is sufficient, in terms and legal effect, to convey the title to any of testator's real property. The extent of the surrogate's jurisdiction, on a probate proceeding, is to examine the will to ascertain whether it purports, or is sufficiently comprehensive, to dispose of real property, and if it does, he is then to decide that it shall be admitted to probate as a will valid for such a purpose, provided he finds it to have been executed, and the petition and citation so require; the effect of his decision goes no farther.¹⁵ Where

¹⁵ Matter of Merriam, 136 N. Y. 58; from whose decree the appeal was taken had refused, on the probate proceeding, to entertain the question whether or not the devise was void.—48 St. Rep. 897. In that case the will contained but a single paragraph by which, after the payment of his debts, testator devised and bequeathed "all my property and estate, real and personal, to the government of the United States of America." The surrogate a decision which was affirmed. See Matter of Schweigert, 17 Misc. 186; 40 N. Y. Supp. 979. The decision in Bevan v. Cooper (72 N. Y. 317) was

the dispositions relate to both kinds of property, and they are not inseparably connected, the courts may undertake to construe those which relate to personal property exclusively,¹⁶ otherwise they will not.¹⁷

The exercise of the express statutory authority of these courts to construe a will is also limited to the single proceeding, to wit: an original proceeding to probate a will. The question of the validity or effect of the will on its face cannot, therefore, be raised in a proceeding to revoke a probate on allegations filed, under section 2647 *et seq.* of the Code;¹⁸ nor upon an application for letters of administration with the will annexed.¹⁹

§ 256. **Scope of construction of will.**— If the subject is susceptible of being reduced to a general rule, it may be gathered, from the cases, that the “validity, construction, or effect” of the will which a surrogate can determine must be such as can be determined by an examination of the will itself, without resort to extrinsic evidence. The investigation must be confined to questions arising between the parties to the proceeding, as between different legatees or between heirs-at-law and legatees *growing out of the terms of the will*.²⁰ A question, for example, which involves the title of the property bequeathed, as between the estate and a third person, who claims it adversely to the will, never was triable in a Surrogate’s Court, and is not made triable by the new statute. Such a question should be reserved until a representative is appointed to defend the estate, and can then be tried only, as between him and the claimant, in a common-law court where a jury trial is guaranteed, except in cases of equitable cognizance.²¹ A tribunal engaged in proving

placed principally upon the ground that the Act of 1870, c. 359, § 11, gave the surrogate power to determine questions of construction, *only* in the proceeding for probate, though whether the court possessed jurisdiction of such a question in *any* proceeding was discussed, with the conclusion stated in the text. See *Hillis v. Hillis*, 16 Hun, 76; *Curran v. Fanning*, 13 id. 458; *Matter of French*, 52 id. 303; *Marx v. McGlynn*, 4 Redf. 485; 88 N. Y. 357; *Prive v. Foucher*, 3 Dem. 339. The cases of *Matter of Look* (22 St. Rep. 86), and *Matter of Marcial* (37 id. 569), so far as they hold that surrogates have authority to determine the validity of a devise, are overruled. The former case was affirmed (26 St.

Rep. 745; 125 N. Y. 762), but the point was not raised.

¹⁶ See *Jones v. Hamersley*, 4 Dem. 427; *Matter of Fuller*, 22 St. Rep. 352.

¹⁷ *Matter of Shrader*, 63 Hun. 36; 17 N. Y. Supp. 273; *Matter of Merriam*, *supra*; *Matter of Morganstern*, 9 Misc. 198; 30 N. Y. Supp. 215.

¹⁸ *Matter of Ellis*, 1 Connoly. 206; 22 St. Rep. 77; *Matter of Watson*, 131 N. Y. 587; 42 St. Rep. 877.

¹⁹ *Matter of Smith*, 41 St. Rep. 337; 18 N. Y. Supp. 174.

²⁰ *Matter of Walker*, 136 N. Y. 20; 48 St. Rep. 893; *Matter of Keleman*, 126 N. Y. 73; 36 St. Rep. 390.

²¹ *Matter of Walker*, 136 N. Y. 20. In that case, the will gave certain legacies which were described as *moneys*

a will is not a fit place, nor is the time appropriate, for making an inventory of the estate and adjudging its liabilities with a view of ascertaining whether or not certain charitable gifts in the will exceed in amount one-half the estate, after the payment of all just debts. The question of the *quantum* of the estate is not triable in a probate proceeding, for the reason that its solution does not require a *construction* of the will or a determination of the legal effect of its provisions under the statute. Whether or not there shall be an abatement of the charitable bequests, and if so to what extent, will be determined in the course of the administration of the estate, at the instance of the representative.²² The question whether a legacy in the will propounded was created, not by a direct or express gift, but was to be inferred from language which shows an intention to give a legacy,²³ and the question whether the will, by its terms, established any trust, and if so whether that trust is valid,²⁴ are properly cognizable by the surrogate when raised on a probate proceeding; but in neither case can the court go beyond the language of the will itself. If, in the latter case, there are any extrinsic grounds for impressing a trust *ex maleficio* in favor of heirs or next of kin upon the bequest, an action for such a purpose must be brought in equity where the power resides for granting that relief. Notwithstanding the mandatory language of the statute that "the surrogate *must* determine" the issue of validity, when raised on the probate, the court is bound to consider the limited extent of its general jurisdiction, and its inadequacy to deal with certain questions, which belong more properly to common-law courts.

§ 257. Who may invoke jurisdiction.—The mere fact that one is a party to a controversy over the probate of the instrument does not entitle him to insist that, before entry of a decree according probate, the court shall pass upon all questions which he may

deposited in certain savings banks by the testator, as trustee for the legatees, a portion of which deposits were drawn out by the testator and converted to his own use. Upon probate of the will, the beneficiaries named appeared and claimed that the moneys so deposited did not belong to the testator at his death, but to the persons designated as beneficiaries; it was also claimed that certain legacies to charitable and religious institutions exceeded one-half of the estate left by him, and so were void for the excess, as the testator left children surviving. Held, that the surrogate had no jurisdiction in proceedings for probate to determine those questions. See also *McClure v. Woolley*, 1 Dem. 574.

²² *Matter of Walker*, *supra*; *Matter of Mullen*, 25 Misc. 253; 55 N. Y. Supp. 432.

²³ *Matter of Vowers*, 113 N. Y. 569. See *Smith v. Floyd*, 71 Hun. 56; 24 N. Y. Supp. 610; *affd.*, 140 N. Y. 337.

²⁴ *Matter of Keleman*, 126 N. Y. 73.

see fit to raise respecting the validity, construction, or effect of the will, or of any of its provisions.²⁵ No person can command the exercise of such jurisdiction, unless, under the will whose provisions he seeks to have interpreted, he claims some interest in the personal estate bequeathed, or unless, on the other hand, he claims that because of the invalidity of the testator's disposition of such personalty or of some portion thereof, he is entitled to share in the same under the Statute of Distributions.²⁶ A legatee who has accepted a legacy under a will is estopped from contesting the validity of the will.²⁷ Where the circumstances of the case are such that, in accordance with its course and practice, the Supreme Court would not exercise its jurisdiction, the Surrogate's Court ought not to.²⁸ It ought not to be understood that the jurisdiction of a Surrogate's Court to interpret a will can only be invoked by the parties at whose instance a court of equity will act. For while neither an heir-at-law or next of kin claiming in hostility to a will,²⁹ nor a devisee,³⁰ or legatee,³¹ can maintain *an action* to obtain a construction thereof, they may do so, in a proper case, in these courts. The jurisdiction of courts of equity, to pass upon the interpretation of wills, is incidental to that over trusts, and where the will

²⁵ *Jones v. Hamersley*, 4 Dem. 427; 1 St. Rep. 319; 9 Civ. Proc. Rep. 293. In that case, the court refused to pass upon the validity of a power of appointment conferred upon a life tenant, pending the lifetime of the latter, notwithstanding the mandatory language of the statute, "the surrogate must determine," etc.

²⁶ *Jones v. Hamersley*, *supra*; *Matter of Campbell*, 88 Hun. 374; 34 N. Y. Supp. 831; *Matter of Robertson*, 23 Misc. 450; 51 N. Y. Supp. 502. See *Rich v. Tiffany*, 2 App. Div. 25; 37 N. Y. Supp. 330; *Fraser v. Hogue*, 65 App. Div. 192. But it is immaterial whether he seeks to maintain or to destroy its provisions. (*Simmons v. Burrell*, 8 Misc. 388; 28 N. Y. Supp. 625.)

²⁷ *Gibbins v. Campbell*, 148 N. Y. 410; 42 N. E. 1055; *Matter of Soule*, 1 Connoly, 18; *Matter of Peaslee*, 73 Hun. 113; 25 N. Y. Supp. 940; *Matter of Richardson*, 81 Hun. 425; 30 N. Y. Supp. 1008. See *Baldwin v. Palen*, 24 Misc. 170; 53 N. Y. Supp. 520; *Walker v. Taylor*, 15 App. Div. 452; 44 N. Y. Supp. 446.

²⁸ "An occasion does not arise for

the exercise by the surrogate of the power conferred by section 2624, unless, in accordance with the course and practice of the Supreme Court, that tribunal would, under similar circumstances, exercise its jurisdiction." (*Per Rollins, S.*, in *Jones v. Hamersley*, *supra*.)

²⁹ *Chipman v. Montgomery*, 63 N. Y. 221. Compare *Meserole v. Meserole*, 1 Hun. 66; *Stinde v. Ridgeway*, 55 How. Pr. 301; *Marlett v. Marlett*, 14 Hun. 313.

³⁰ *Duncan v. Duncan*, 4 Abb. N. C. 275.

³¹ *Sutherland v. Ronald*, 11 Hun. 238; *Brundage v. Brundage*, 65 Barb. 397. Although an action may be maintained by an executor in respect to personal property, or by a legatee (*Wager v. Wager*, 89 N. Y. 161), it cannot be sustained on the ground of a doubt on which it does not appear that the executor and the legatee differ, nor on the ground of a doubt in respect to which the executor is not yet called upon to act and may never be:—as in the case of a contingent gift. (*Wead v. Cantwell*, 36 Hun. 528; *affd.*, 108 N. Y. 255.)

contains no trusts, a suit will not be entertained for the sole purpose of construction, nor where legal rights only are in controversy.³²

§ 258. **Principles governing construction.**— Having defined the jurisdiction of these courts to determine, by construction, the validity and effect of a testamentary disposition of personal property (whether incidentally to the probate of the will, or to the administration of the estate, after probate), it only remains to indicate, in a general way, the grounds on which invalidity is usually predicated, and the rules which govern courts in determining the question. While it is a fundamental principle that a testator's intention must govern, such an intention must be a legal intention, that is, must not be inconsistent with rules of law, statutory or otherwise.³³ A will may disclose, on the face of it, an intention to dispose of property in an illegal manner, or for an illegal object, or to a person legally incapable of taking, or an intention to override public policy or settled rules of law. On the other hand, where there is an uncertainty, apparent upon the face of the will, as to the application of any of its provisions, or if the words of a will fail to disclose an intention, collateral or extrinsic evidence is admissible to *discover* it; and an intention being once discovered, extrinsic evidence is admissible to *explain* it. In other words, the question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply — what is the meaning of his words? But the rule is inflexible that guesses at the testator's intention will not be indulged in. Such intention is to be collected from the words of the will,³⁴ free of conjecture, under the guidance of precedents and rules of law, taking into

³² Mellen v. Mellen, 139 N. Y. 210; 54 St. Rep. 670. See Wager v. Wager, 21 Hun. 93; Bailey v. Briggs, 56 N. Y. 407; Chipman v. Montgomery, 63 id. 221; Kalish v. Kalish, 166 id. 368; Smith v. Rockefeller, 5 Sup. Ct. (T. & C.) 562; Meserole v. Meserole, 1 Hun, 66.

³³ Montignani v. Blade, 74 Hun. 297; 26 N. Y. Supp. 670; 145 N. Y. 111.

³⁴ 1 R. S. 748, § 2. See Myers v. Eddy, 47 Barb. 263; Terpening v. Skinner, 30 id. 373; Fosdick v. Delafield, 2 Redf. 392; Wager v. Wager, 96 N. Y. 164; Freeman v. Coit, id. 63; Williams v. Freeman, 83 id. 561; Underhill v. Vandervoort, 56 id. 242; Bridger v. Pierson, 45 id. 601; Morris v. Ward, 36 id. 587, 595; Williams v. Williams, 8 id. 525; Quin v. Skinner, 49 Barb. 128; Dupre v. Thompson, 5 id. 279; Tucker v. Tucker, 5 id. 103; Martin v. Ballou, 13 id. 119; Richards v. Northwest P. D. Church, 32 id. 42; Ryckman v. Gillis, 6 Lans. 79; Darling v. Rogers, 22 Wend. 489; Murray v. Bronson, 1 Dem. 217; Sweet v. Burdett, 136 N. Y. 204; 49 St. Rep. 113; Meehan v. Brennan, 16 App. Div. 395; 45 N. Y. Supp. 57; Moak v. Moak, 8 App. Div. 197; 40 N. Y. Supp. 438; Matter of Van Horne, 25 Misc. 391; 55 N. Y. Supp. 651; Gwyer v. Gwyer, 5 App. Div. 156; 38 N. Y. Supp. 1097; affd., 160 N. Y. 659; Marks v. Halligan, 61 App. Div. 179; 70 N. Y. Supp. 444.

view the circumstances under which it was made.³⁵ If the intention of the testator is evinced from language free from ambiguity, evidence concerning it is not admissible.³⁶ Where it cannot have effect to its full extent, it must have effect as far as possible.³⁷ No clause is to be rejected, or interest intended to be given sacrificed, on the ground of repugnance, when it is possible to reconcile the provisions supposed to be in conflict.³⁸ If, however, it is impossible to reconcile two inconsistent provisions, the latter must prevail.³⁹ In construing a will, the intention of the testator is to govern in preference to a general rule of construction, where they come in conflict.⁴⁰ Every expression is to be construed, if practicable, so as to give effect to all parts of the will, and not to nullify any,⁴¹ to avoid intestacy,⁴² and the disinheritance of the natural objects of the testator's bounty.⁴³

The rule of construction that the intention of the testator is to govern, although it may not be in entire harmony with the language of the will, is not to be resorted to where the language is explicit and free from doubt, even in case where the court may be of opinion that had the testator anticipated that which happened after his death, he would have made a different disposition of the remainder. (*Baylies v. Hamilton*, 36 App. Div. 133; 55 N. Y. Supp. 390; *affd.*, 165 N. Y. 641.)

³⁵ Whether a will should be construed as of the time of its execution or as of the time of testator's death is to be determined by his intention and depends upon the peculiar circumstances of each case (*Moffett v. Elmendorf*, 82 Hun. 470; 31 N. Y. Supp. 726; *affd.*, 152 N. Y. 475), and for the purpose of ascertaining that intention the court may reject words and limitations, supply or transpose them, to get at the correct meaning. (*Benjamin v. Welch*, 73 Hun. 371; 26 N. Y. Supp. 156; *Karstens v. Karstens*, 29 App. Div. 229; 51 N. Y. Supp. 795.) But the court has no power, in its construction of wills, to insert clauses made necessary by a change in the circumstances of the property subsequent to the will and for which the testator did not provide. (*Parker v. Butler*, 76 Hun. 240; 27 N. Y. Supp. 805.)

³⁶ *Wadsworth v. Murray*, 161 N. Y. 274; 55 N. E. 910; *Schmeig v. Kochersberger*, 18 Misc. 617; 43 N. Y. Supp. 748; *Bradhurst v. Field*, 45 St.

Rep. 748; 18 N. Y. Supp. 535; and cases *supra*.

³⁷ *Brown v. Lyon*, 6 N. Y. 420; *Chrystie v. Phylfe*, 19 id. 348; *Oxley v. Lane*, 35 id. 340; *Savage v. Burnham*, 17 id. 577; *Kane v. Gott*, 24 Wend. 665.

³⁸ *Taggart v. Murray*, 53 N. Y. 233; *Van Vechten v. Keator*, 63 id. 52.

³⁹ *Noble v. Thayer*, 19 App. Div. 446; 46 N. Y. Supp. 302. See *Henderson v. Merritt*, 10 App. Div. 397; 41 N. Y. Supp. 885.

⁴⁰ *Matter of James*, 146 N. Y. 78; 66 St. Rep. 246; *Matter of Brown*, 154 N. Y. 313.

⁴¹ *Hard v. Ashley*, 117 N. Y. 606; *Terry v. Wiggins*, 47 id. 512, 517. But it is not permissible to refer to a clause which is doubtful for the sole purpose of obscuring another which is clear. (*Fothergill v. Fothergill*, 80 Hun. 316; 30 N. Y. Supp. 292.)

⁴² *Vernon v. Vernon*, 53 N. Y. 351, 361; *Kalish v. Kalish*, 166 id. 368; 59 N. E. 917; *Haight v. Pine*, 3 App. Div. 434; 39 N. Y. Supp. 511; *Newcomb v. Newcomb*, 33 Misc. 191; 68 N. Y. Supp. 430; *Zone v. Zone*, 4 Misc. 559; *Meehan v. Brennan*, 16 App. Div. 395; 45 N. Y. Supp. 57; *Hughes v. Mackin*, 16 App. Div. 291; 44 N. Y. Supp. 710; *Sanford v. Goodell*, 82 Hun. 369.

⁴³ *Goodwin v. Coddington*, 154 N. Y. 283; *Matter of Miller*, 18 App. Div. 211; 45 N. Y. Supp. 956; *affd.*, 155 N. Y. 646; *Sage v. Wheeler*, 3 App. Div. 38; 37 N. Y. Supp. 1107; *Shangle v. Hallock*, 6 App. Div. 55; 39 N. Y. Supp. 619.

§ 259. **Clerical errors.**— Obvious clerical errors, patent upon the face of the instrument, may be corrected. Thus “and” may be read “or,” and conversely;⁴⁴ “as” may be read “because;”⁴⁵ “reviving” may be read “surviving;”⁴⁶ and “leave” may be read “have.”⁴⁷

§ 260. **Statutory restrictions.**— The statutes of this State restrict the power of testamentary disposition in respect to (1) the creation of trusts, (2) the creation of future estates in lands, or of future contingent interests in personal property, (3) accumulations of rents and profits of land, or of the income of personal property, and (4) in respect to benevolent, literary, and other bequests. Restrictions are also imposed in respect to the persons who may take a devise or bequest, and as to the proportion of the estate which may be devised or bequeathed for benevolent and other purposes in certain cases. The cases involving the application of these provisions to particular, and often complicated testamentary dispositions have been very numerous, and furnish many curious examples of the ingenuity of testators in their attempts to contravene the restraints upon alienation of estates, as well as the acuteness and persistence of judges in detecting and frustrating such intention. But generally, clerical errors, not thus apparent, cannot be corrected by extrinsic evidence that the testator intended otherwise than the words of the will express. Punctuation may be resorted to when no other means can be found of solving an ambiguity, but not in cases where no real ambiguity exists, except what punctuation creates itself.⁴⁸ A statement of the statutory rules on the subject will be all that the scope and purpose of this volume will permit. No mention is made here of the statutory rules and limitations regarding the creation of express trusts of real property,⁴⁹ and of

⁴⁴ *Jackson v. Blanshan*, 6 Johns. 54; *Van Vechten v. Pearson*, 5 Paige, 512; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Grim v. Dyar*, 3 Duer, 354; *Scott v. Guernsey*, 48 N. Y. 106.

⁴⁵ *Sharp v. Dimmick*, 4 Lans. 496.

⁴⁶ *Pond v. Bergh*, 10 Paige, 140.

⁴⁷ *Du Bois v. Ray*, 35 N. Y. 162. The word “sell” may be supplied before the word “and,” or the word “and” be omitted in order to carry out the evident intention of the testator. (*Hall v. Thompson*, 23 Hun. 334.) For a case where the words “as joint tenants and tenants in common” were

changed to read “as joint tenants and not as tenants in common,” see *Walter v. Ham*, 68 App. Div. 381; 75 N. Y. Supp. 185.

⁴⁸ *Arcularius v. Sweet*, 25 Barb. 403. When the punctuation accords with the sense, the use of a capital in the middle of a sentence must be regarded as accidental and should not be permitted to confuse a construction otherwise reasonably clear. (*Kinkele v. Wilson*, 151 N. Y. 269; 45 N. E. 869.)

⁴⁹ 1 R. S. 728, § 55; L. 1896, c. 547, § 76.

future estates in lands,⁵⁰ as they do not include or affect trusts or bequests of personal property, as to which alone these courts have any concern.⁵¹

§ 261. **Suspension of absolute ownership.**—As to personal property, the absolute ownership cannot be suspended longer than during the continuance, and until the termination, of not more than two lives in being at the date of the instrument containing the limitation, or, if by will, for not more than two lives in being at the death of the testator. In all other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in lands.⁵² The phrase “suspense of absolute ownership,” as used in this statute in relation to personal property, is said to mean the same thing as “suspense of the power of alienation,” as applied to real property,⁵³ and the construction of the two provisions has been to the same effect as to each. Words in a will which amount to a suspension of the power of alienation of lands will be held as sufficient to effect a suspension of the absolute ownership of personal property, and *vice versa*. That period must be measured by existing lives, or by some more proximate event which must happen during life, and the persons whose lives are to furnish the measure of the suspension must be designated or referred to, so as to be capable of ascertainment in the instrument by which the disposition is made.⁵⁴ Thus, a trust to continue for a period, or until a date, specified, is not valid.⁵⁵ The period of suspension, to which it is the purpose of the

⁵⁰ 1 R. S. 722, §§ 14–16; L. 1896, c. 547, § 27.

⁵¹ Trusts of personal property may be created for any purpose not prohibited by law. (Holmes v. Mead, 52 N. Y. 332, 343; Bucklin v. Bucklin, 1 Keyes, 141; Brown v. Harris, 25 Barb. 134; Gott v. Cook, 7 Paige, 521; Foster v. Coe, 4 Lans. 53; Roosevelt v. Roosevelt, 6 Hun. 31; Tabernacle Baptist Church v. Fifth Ave. Baptist Church, 60 App. Div. 327; 70 N. Y. Supp. 181.)

⁵² 1 R. S. 773, §§ 1, 2; L. 1897, c. 417, § 2.

⁵³ Emmons v. Cairns, 3 Barb. 243; Morton v. Morton, 8 id. 18. In Converse v. Kellogg (7 Barb. 590), a different view is taken.

⁵⁴ Everitt v. Everitt, 29 N. Y. 39; Wilber v. Wilber, 165 id. 451; 59 N. E. 264; Matter of Murray, 34

Misc. 39; Montignani v. Blade, 145 N. Y. 111; 64 St. Rep. 558; Matter of Ackermann, 36 Misc. 752; 74 N. Y. Supp. 477; Fairchild v. Edson, 154 N. Y. 199. Absolute ownership is not suspended merely because the executor may require a period of time not measured by lives in which to execute the power of sale. (Deegan v. Wade, 144 N. Y. 573; 64 St. Rep. 240.) A child *en ventre sa mere* at the testator's death is a “life in being.” (Cooper v. Heatherton, 65 App. Div. 561; 73 N. Y. Supp. 14.)

⁵⁵ Staples v. Hawes, 39 App. Div. 548; 57 N. Y. Supp. 452; Matter of Snyder, 48 St. Rep. 643; 21 N. Y. Supp. 430; Kalish v. Kalish, 166 N. Y. 368; 59 N. E. 917; Steinway v. Steinway, 10 Misc. 563; 32 N. Y. Supp. 183.

statute to limit dispositions of property, is the same as to real and as to personal property, that is, "two lives in being;" in the case of a devise of real property, the lives must be "in being at the creation of the estate;" and in the case of a bequest of personal property the lives must be "in being at the death of the testator." But "the time of the creation of the estate" is the death of the testator, so that, in both cases, the testator's death is the time from which the period of suspension is reckoned. So the statutory term, "two lives in being," applies equally, and in the same sense, to suspension occasioned by contingencies, trusts, and powers in trust; to postponement of vesting, and to suspension of the absolute ownership of personal property. As a general proposition, it may be stated that a suspension of the absolute ownership of personalty occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.⁵⁶ It, therefore, follows that if there is a present right to dispose of the entire interest, even if its exercise depends on the consent of many persons, there is no unlawful suspension.⁵⁷

§ 262. **Accumulations of income of personal property.**—Accumulations of income of personal property (except as specified in the statute) are placed on the same general footing, and are governed by the same rules, as accumulations of rents and profits of real estate.⁵⁸ The statute provides⁵⁹ that the accumulation of the income of personal property may be directed as follows: (1) If the accumulation is directed to commence from the date of the instrument or from the death of the person executing the same, it must be for the benefit of one or more minors⁶⁰ then in being,⁶¹ or in being at such death, and terminate at or before the expira-

⁵⁶ *Sawyer v. Cubby*, 146 N. Y. 192; 66 St. Rep. 582.

⁵⁷ *Williams v. Montgomery*, 148 N. Y. 519; 43 N. E. 57; *Mills v. Mills*, 50 App. Div. 221; 63 N. Y. Supp. 771. Consult, in this connection, L. 1893, c. 452, and L. 1897, c. 417, § 3, which enables the beneficiary of a life interest, with the assistance of the remainderman, to terminate a trust and dispose of the entire interest.

⁵⁸ Directions for the accumulation of rents and profits of real estate, except for the period during which the power of alienation of the estate itself can be limited, are void. (L. 1896, c. 547,

§ 51.) See *Mason v. Jones*, 2 Barb. 229; *Savage v. Burnham*, 17 N. Y. 561.

⁵⁹ L. 1897, c. 417, § 4; 1 R. S. 774, §§ 3, 4.

⁶⁰ See *Boynton v. Hoyt*, 1 Den. 53, 58; *Hawley v. James*, 16 Wend. 61. A direction to accumulate and apply income to the discharge of incumbrances is void. (*Matter of Fisher*, 4 Misc. 46; *McComb v. Title Guarantee & Trust Co.*, 36 id. 370; 73 N. Y. Supp. 554; *Matter of Snyder*, 35 Misc. 588; 72 N. Y. Supp. 61.) See *Hascall v. King*, 28 App. Div. 280; 51 N. Y. Supp. 73; 162 N. Y. 134.

⁶¹ *Gilman v. Reddington*, 24 N. Y. 19; *Kilpatrick v. Johnson*, 15 id. 322.

tion of their majority,⁶² or, (2) if the accumulation is directed to commence at any time subsequent to the above, it must commence within the time allowed for the suspension of the absolute ownership of personal property and during the minority of the beneficiaries, and terminate at or before the expiration of such minority. If, in either of these cases, the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction, whether separable or not from other provisions of the instrument,⁶³ is void only as respects the time beyond such minority.⁶⁴ In other words, a direction for an illegal accumulation does not render a legacy wholly void, but the direction may be stricken out and the legacy and the general purposes for which it was given may remain.⁶⁵

Implied directions to accumulate are as much within the prohibition of the statute as those expressly given. If, upon comparing the provisions of the will with the condition of the estate, it is apparent that the testator intended an unauthorized accumulation, this intention cannot be carried into effect, and any provision of the will which is dependent upon it is void. This, however, is never permitted to affect any portion of the will not necessarily connected with the illegal accumulation, and which can be readily executed independently of it.⁶⁶

§ 263. **Effect of illegal suspension.**—The statute⁶⁷ gives to the persons presumptively entitled to the next eventual estate, income accruing during a suspension of the absolute ownership, and

⁶² A gift of property to executors in trust to receive rents and profits and deposit the same in a savings bank for ten years and then sell and divide the proceeds and accumulations among children, all of whom were of full age, is void. (*Brandt v. Brandt*, 13 Misc. 431; 34 N. Y. Supp. 684.) So, too, a provision requiring the creation of a fund from the income of each child's share and the annual reinvestment of the surplus income until the final distribution when the youngest reaches the age of 25. (*Horndorf v. Horndorf*, 13 Misc. 343; 34 N. Y. Supp. 560.)

⁶³ See *Williams v. Williams*, 8 N. Y. 525; *Kilpatrick v. Johnson*, 15 id. 322; *King v. Rundle*, 15 Barb. 139.

⁶⁴ This statute does not apply to or affect property given in perpetuity to religious corporations incorporated under the general statute. (*Williams v.*

Williams, 8 N. Y. 525.) And see *Trustees of Theological Seminary v. Kellog*, 16 id. 83; *Wetmore v. Parker*, 52 id. 450; *Matter of Abbott*, 3 Redf. 303; *Stanton v. Miller*, 58 N. Y. 192; *Livingston v. Gordon*, 7 Abb. N. C. 53; *Matter of Wesley*, 43 St. Rep. 952; 17 N. Y. Supp. 304.

⁶⁵ *Williams v. Williams*, 8 N. Y. 525. See also *Dodge v. Pond*, 23 id. 69; *Manice v. Manice*, 43 id. 303; *Robinson v. Robinson*, 1 Lans. 117; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Craig v. Craig*, 3 id. 76; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Bonard's Will*, 16 Abb. Pr. (N. S.) 128, 208; *Matter of Roos*, 4 Misc. 232; 24 N. Y. Supp. 862.

⁶⁶ *Dodge v. Pond*, 23 N. Y. 67, 79; *Chaplin*, *Suspension, etc.*, § 430 *et seq.*

⁶⁷ L. 1896, c. 547, § 53; 1 R. S. 726, § 40.

of which no disposition or valid accumulation is directed. It is no longer doubtful that this provision applies to the case of income from personal estate;⁶⁸ but, it seems, only where such income is derived from some specific fund, or is distinguishable from that of all other property.⁶⁹

§ 264. **Trust gifts to literary institutions.**— Real and personal estate may be granted and conveyed to any incorporated college or other literary incorporated institution in this State, to be held in trust (1) to establish and maintain an observatory; (2) to found and maintain professorships and scholarships; (3) to provide and keep in repair a burial place for the dead; (4) for any other specific purpose contemplated in the general objects authorized by their respective charters.

§ 265. **Bequests to city or village corporation for certain purposes.**— Real and personal estate may be granted to the corporation of any city or village of this State, in trust for any purpose of education or the diffusion of knowledge, or for the relief of distress,⁷⁰ or for parks, gardens, or other ornamental grounds, or grounds for the purpose of military parades and exercise, or health and recreation, within or near such city or village.⁷¹ And property may also be granted to superintendents of common schools of any town, and to trustees of school districts, in trust for the benefit of the common schools of the town, or of the schools of the district.⁷²

§ 266. **Other trusts.**— Except as above, the purposes for which trusts of personal property may be created are not defined or

⁶⁸ *Cook v. Lowry*, 29 Hun. 20. See 1041; *Sanford v. Goodell*, 82 Hun. 369; 31 N. Y. Supp. 490; *Matter of Snyder*, 35 Misc. 588; 72 N. Y. Supp. 573.

⁶⁹ *Dodge v. Pond*, 23 N. Y. 69, 79; *Grant v. Grant*, 3 Redf. 283; *Thomas v. Pardee*, 12 Hun. 151. The operation and application of this statute are further illustrated in *Pray v. Hege-*
man, 92 N. Y. 508; *Barbour v. De Forest*, 95 id. 13; *Delafield v. Ship-*
man, 103 id. 463; *Delafield v. Barlow*, 107 id. 535; *Schettler v. Smith*, 41 id. 328; *Cook v. Lowry*, 95 id. 103, 107; *Williams v. Williams*, 8 id. 525; *Kil-*
patrick v. Johnson, 15 id. 322; *Potter v. McAlpine*, 3 Dem. 108; *Matter of Sands*, 20 St. Rep. 850; *Smith v. Secor*, 31 App. Div. 103; 52 N. Y. Supp. 562; *affd.*, 157 N. Y. 402; *Clark v. Clark*, 23 Misc. 272; 50 N. Y. Supp.

⁷⁰ While a bequest of personal property to a town for the support of its poor is valid, a devise of real estate for that purpose is void. (*Fosdick v. Hempstead*, 29 St. Rep. 545; 8 N. Y. Supp. 772.)

⁷¹ *Matter of Crane*, 12 App. Div. 271; 42 N. Y. Supp. 904; *affd.*, 159 N. Y. 557 (citing *Le Couteulx v. City of Buffalo*, 33 N. Y. 342; *Clements v. Babcock*, 26 Misc. 90; 56 N. Y. Supp. 527.)

⁷² L. 1840, c. 318; L. 1841, c. 261; L. 1846, c. 74; L. 1855, c. 432; L. 1890, c. 160; L. 1892, c. 25. See *Adams v. Perry*, 43 N. Y. 487; *Yates v. Yates*, 9 Barb. 324.

limited by the statute—it would be impracticable to do so,—but whatever the scheme of the trust, the purpose must be definite⁷³ and the beneficiary must be certain and entitled to enforce the trust; otherwise, there would be an indefinite continuance of the trustee's powers which would constitute a perpetuity.⁷⁴ Thus a direction that the residue of the estate be placed in the hands of the pastor of a church, to be bestowed in a manner which he may wisely direct, is void for want of a defined beneficiary.⁷⁵ For the same reason, a bequest to one, in trust for the saying of masses for the repose of testator's soul, is invalid; there is, in such a case, no defined or ascertainable living person who has, or ever could have, any temporal interest in the performance of the trust, and no incorporated church designated which would entitle it to claim any portion of the fund.⁷⁶

Presumably to secure to the public the fruits of the benevolent intentions of testators against the dangers incident to this rule,

⁷³ *Matter of Scott*, 31 Misc. 85; 64 N. Y. Supp. 577; *McComb v. Title Guarantee & Trust Co.*, 36 Misc. 370; 73 N. Y. Supp. 554.

⁷⁴ *Adams v. Perry*, 43 N. Y. 487; *Tilden v. Green*, 54 Hun. 231; 130 N. Y. 29.

⁷⁵ *Matter of Foley*, 10 N. Y. Supp. 12. Compare *Power v. Cassidy*, 79 N. Y. 602. A bequest to "my executors, to be expended by them for benevolent and charitable purposes, as they or the survivor of them shall in their or his good judgment deem wise or best for the promotion of Christianity and the welfare of mankind in the world," is void for uncertainty as to the beneficiaries. (*Matter of Jackson*, 20 N. Y. Supp. 380; *People v. Powers*, 147 N. Y. 104; 69 St. Rep. 403.) So, too, a clause in the will authorizing the executors to distribute testator's jewelry and wearing apparel among such of his friends as they see fit.—Held vague and inoperative. (*Fairbrass v. Purdy*, 44 App. Div. 636; 60 N. Y. Supp. 753.) A bequest, "to be used especially for the interest of" a person is void as a trust. (*Ramsay v. De Remer*, 65 Hun. 212; s. p., *Pell v. Folger*, 23 N. Y. Supp. 42.) A provision that all of testator's property remaining after paying his debts should be expended for a monument at his grave, is not void on the ground that there is no ascertained beneficiary. (*Matter of Boardman*, 20 N. Y. Supp. 60.) For illustrations of the rule, see *Hope v. Brewer*, 136 N. Y.

126; 48 St. Rep. 834; *Dammert v. Osborn*, 65 Hun. 585; 20 N. Y. Supp. 474; *Spencer v. De Witt C. Hay Library Assn.*, 36 Misc. 393; 73 N. Y. Supp. 712; *Matter of Botsford*, 23 Misc. 388; 52 N. Y. Supp. 238; *affd.*, 37 App. Div. 73; *Edson v. Bartow*, 10 App. Div. 104; 41 N. Y. Supp. 723 (modified in other respects in 154 N. Y. 199); *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 352; *Beecher v. Yale*, 45 N. Y. Supp. 622; *Clapp v. Byrnes*, 3 App. Div. 284; 38 N. Y. Supp. 1063; *Wyman v. Woodbury*, 86 Hun. 277; 33 N. Y. Supp. 217; 66 St. Rep. 845; *Butler v. Trustees, etc.*, 92 Hun. 96; 36 N. Y. Supp. 562.

⁷⁶ *Matter of Wright*, N. Y. Law J., Jan. 10, 1893; *Holland v. Alcock*, 108 N. Y. 312; *Power v. Cassidy*, 79 id. 602; *Prichard v. Thompson*, 95 id. 76. But see *Matter of Backes*, 9 Misc. 504; 30 N. Y. Supp. 394. In *Matter of Zimmerman* (22 Misc. 411), a gift to a priest, for which masses were to be said, was upheld as a conditional bequest. A bequest, absolute on its face, to the "sister superior or reverend mother," who should at the time of testator's death be in charge of a home for the aged, provided a bequest to the home should fail, as it did by reason of the will being executed within two months of his death,—*sustained*, as sufficiently describing the legatee. (*Matter of Mullen*, 25 Misc. 253; 55 N. Y. Supp. 432.)

the statute provides that, "No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects, be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the land or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee, then the title to such lands or property shall vest in the supreme court."⁷⁷

§ 267. **Limitations on charitable bequests.**— When the validity of a bequest depends upon whether the legatee is competent to take, or upon the proportion which the bequest bears to the value of the whole estate, or upon any other fact which the will does not disclose upon its face, but must be proved, it is obvious that no question of the *construction* of the will arises, and, therefore, the validity of the bequest cannot be determined on the application for probate. It will come up for determination during the course of the administration, as an incident to some other proceeding.⁷⁸

It is declared by statute,⁷⁹ that no person having a husband, wife, child, or parent shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation,

⁷⁷ L. 1893, c. 701, § 1; L. 1901, c. 291. This statute has no application to the will of a person who died prior to its passage. (*Butler v. Trustees, etc., supra.*) The purpose of the act was to restore the law of charitable trusts as declared in *Williams v. Williams*, 8 N. Y. 525. Hence, a residuary bequest to trustees named, for the purpose of founding a home for the aged, to be located in the city of Syracuse for the benefit of those who by misfortune have become incapable of providing for themselves, etc., the duration of the trust not being limited by lives,—Held to be valid and not subject to the objections of indefiniteness or creating a perpetuity. (*Allen v. Stevens*, 161 N. Y. 122; 55 N. E. 568.) See *Hull v. Pearson*, 36 App. Div. 224; 55 N. Y. Supp. 324; *Matter of Fitzsimons*, 29 Misc. 204. For a similar statute as to charitable devises, see L. 1896, c. 547, § 93.

⁷⁸ See *Matter of Walker*, 136 N. Y.

20; *Matter of Counrod*, 27 Misc. 475; 59 N. Y. Supp. 164; and § 256, *ante*.

⁷⁹ L. 1860, c. 360. A bequest to the pastor of a designated church for masses to be said for the repose of the soul of testatrix, is not within the operation of this statute. (*Vanderveer v. McKane*, 25 Abb. N. C. 105.) Nor does it apply to a gift to a public corporation (*Matter of Crane*, 12 App. Div. 271; 42 N. Y. Supp. 904); nor to bequests to individuals to found charities. (*Allen v. Stevens*, 161 N. Y. 122; 55 N. Y. Supp. 568.) The claim that the proposed beneficiaries are foreign corporations with no inhibition as to taking by devise or bequests in their charters or under the law of the State of their domicile, and that the statute as to them is not operative, is not relevant, the status of the testator and not that of the beneficiary being the question for consideration. (*Scott v. Ives*, 22 Misc. 749; 51 N. Y. Supp. 49.)

in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts. Such a devise or bequest is declared to be valid to the extent of one-half and no more. As to the excess over one-half, there is an intestacy, if there be no other valid disposition.⁸⁰

The intent of the statute cannot be defeated by the testator's bequeathing to two or more corporations in the aggregate more than he can give to a single object, viz., one-half of his estate.⁸¹ The proportionate value of the amount given to the corporation, as compared to that of the entire estate, is determined by ascertaining the cash value of the gift, and also of the entire estate, at the testator's death.⁸²

For the purpose of ascertaining the estate, the widow's dower,⁸³ and the debts,⁸⁴ are first to be deducted.

The restriction may be insisted on by any one who would derive a benefit from the estate,⁸⁵ or may be waived;⁸⁶ but as the obvious design of the statute is to inhibit the disherison of persons standing in near relation to testators, with natural claims upon their

⁸⁰ *Kearney v. Missionary Society*, 10 Abb. N. C. 274. See *Matter of Moderno*, 5 Dem. 288. Where the gift is to the officers, trustees, or other representatives of the corporation, and the intent to make the gift to the corporation *appears*, it will vest in the latter instead of the former. (*Manice v. Manice*, 43 N. Y. 303, 314, 387; *Chamberlain v. Chamberlain*, id. 424, 437; *Holmes v. Mead*, 52 id. 332; *New York Inst. for the Blind v. How*, 10 id. 84; *Van Deuzen v. Trustees, etc.*, 4 Abb. Ct. App. Dec. 465; *Currin v. Fanning*, 13 Hun, 458; *Matter of Isbell*, 1 App. Div. 158; 37 N. Y. Supp. 919; *Hull v. Pearson*, 36 App. Div. 224; 55 N. Y. Supp. 324; *Matter of Woods*, 33 Misc. 12; 67 N. Y. Supp. 1123; *First Presbyterian Church, etc. v. McKallor*, 35 App. Div. 98; 54 N. Y. Supp. 740; *Preston v. Howk*, 3 App. Div. 43; 37 N. Y. Supp. 1079; *affd.*, 154 N. Y. 734.) As to the applicability of the law against perpetuities to gifts under this statute, see *Wetmore v. Parker*, 52 N. Y. 450; *Holmes v. Mead*, id. 332; *Adams v. Perry*, 43 id. 487, 500, and cases in next two notes.

⁸¹ *Chamberlain v. Chamberlain*, 43 N. Y. 424; 3 Lans. 355. See also *Bascom v. Albertson*, 34 id. 584, 616; *Harris v. American Bible Soc.*, 2 Abb. Ct.

App. Dec. 316; *Matter of Leary*, 1 Tuck. 235; *Currin v. Fanning*, 13 Hun, 458; 2 Redf. 526; *Matter of Stone*, 15 Misc. 317; 37 N. Y. Supp. 583.

⁸² *Harris v. American Bible Soc.*, 2 Abb. Ct. App. Dec. 316; 4 Abb. Pr. (N. S.) 421; 46 Barb. 470; *Hollis v. Drew Theo. Sem.*, 95 N. Y. 166; *Lefevre v. Lefevre*, 59 id. 434; *McKeown v. Officer*, 25 St. Rep. 319. The surrogate will not undertake, by reference or otherwise, to ascertain the amount of the devise, until the party interested in the disputed devise is brought in, and in the meantime probate will be suspended. (*Curren v. Sears*, 2 Redf. 526; 13 Hun. 458.)

⁸³ *Chamberlain v. Chamberlain*, 43 N. Y. 424, 440.

⁸⁴ *Wetmore v. Parker*, 52 N. Y. 450. For the rule to determine proportionate values, see *Matter of Teed*, 59 Hun, 63; s. c., on later appeal, 76 id. 567; 28 N. Y. Supp. 203; *Garvey v. Union Trust Co.*, 29 App. Div. 513; 52 N. Y. Supp. 260.

⁸⁵ See *Jones v. Kelly*, 63 App. Div. 614; 72 N. Y. Supp. 24; *affd.*, 170 N. Y. 401; *Hemmje v. Meinen*, 20 N. Y. Supp. 619.

⁸⁶ *Trustees, etc. v. Ritch*, 91 Hun, 509; 36 N. Y. Supp. 576; *affd.*, 151 N. Y. 282; 45 N. E. 876.

bounty, it follows that if a testator has no relatives of the designated class, the statute does not apply.⁸⁷

By another statute,⁸⁸ no such devise or bequest is valid, unless the will was made and executed at least two months before the death of the testator. The statute applies to a bequest, executed within the prohibited period, although it is a mere re-enactment of a provision in a former will.⁸⁹ This statutory provision is applicable, however, only to corporations formed under the general law made by that statute, or those whose charters refer to it and make its provisions applicable.⁹⁰ But the statute is *not* applicable to a corporation incorporated in another State by whose laws it is authorized to take the gift.⁹¹ Hence a bequest to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid, although obnoxious to our law, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustees and the property when transmitted there.⁹² On the other hand, if the laws of the foreign State, like our own, prohibit the bequest, it will be declared void here.⁹³

⁸⁷ *Matter of Simpson*, N. Y. Law J., March 4, 1893 (N. Y. Surr. Ct.). See cases *supra*.

⁸⁸ L. 1848, c. 319, § 6. See *Vanderveer v. McKane*, 25 Abb. N. C. 105; *Lawrence v. Elliott*, 3 Redf. 236; *Currin v. Fanning*, 13 Hun. 459; *Hemmje v. Meinen*, 20 N. Y. Supp. 619; *Clements v. Babcock*, 26 Misc. 90; 56 N. Y. Supp. 527. This act was not repealed by the act of 1860 (*Lefevre v. Lefevre*, 59 N. Y. 434. See *Kerr v. Dougherty*, 79 *id.* 327); nor by L. 1881, c. 319, which extends the rights of corporations formed under the Act of 1848 to take a larger amount by devise or bequest; "subject, however, to the restrictions" contained in that act. (*Matter of Conner*, 44 Hun. 424.) See *Hollis v. Drew Theo. Sem.*, 95 N. Y. 166; *Riker v. New York Hospital*, 66 How. Pr. 246; *Wardlaw v. Home, etc.*, 4 Dem. 473.

⁸⁹ *Matter of Benedict*, 32 St. Rep. 139.

⁹⁰ *Stephenson v. Short*, 92 N. Y. 433; *Matter of Kavanagh*, 125 *id.* 420; *Hollis v. Drew Theo. Sem.*, 95 *id.* 171; *Lefevre v. American Female Guardian Soc.*, 59 *id.* 434; *Fairchild v. Edson*, 154 *id.* 199; *Peoples' Trust Co. v. Smith*, 82 Hun. 494; 31 N. Y. Supp. 519; *Matter of Brush*, 35 Misc. 689; 72 N. Y. Supp. 421; *Pritchard v. Kirsch*, 58 App. Div. 332; 68 N. Y.

Supp. 1049; *Matter of Fitzsimmons*, 29 Misc. 731; 62 N. Y. Supp. 1009; *Matter of Cornelius*, 23 Misc. 434; 51 N. Y. Supp. 877. See *Matter of Norton*, 39 App. Div. 369; 57 N. Y. Supp. 407. Thus, it does not affect membership corporations (*Spencer v. De Witt C. Hay Library Assn.*, 36 Misc. 393; 73 N. Y. Supp. 712; *Matter of Lampson*, 22 Misc. 198; 33 App. Div. 49; 161 N. Y. 511); nor religious corporations organized under special acts, in the absence of express words making them subject to them (*Matter of Hardy*, 28 Misc. 307; 59 N. Y. Supp. 912; *Matter of Foley*, 27 Misc. 77; 58 N. Y. Supp. 201); nor a public corporation (*Clements v. Babcock*, 26 Misc. 90; 56 N. Y. Supp. 527).

⁹¹ *Matter of Lampson*, 161 N. Y. 511; 56 N. E. 9.

⁹² *Hope v. Brewer*, 136 N. Y. 126; 48 St. Rep. 834; *Matter of Huss*, 126 N. Y. 537; 37 St. Rep. 789; *Doty v. Hendrix*, 16 N. Y. Supp. 284; *Cross v. United States Trust Co.*, 131 N. Y. 330; 43 St. Rep. 254; *Matter of Sturgis*, 164 N. Y. 485; *Matter of Leo-Wolf*, 25 Misc. 469; 55 N. Y. Supp. 650.

⁹³ *Kerr v. Dougherty*, 79 N. Y. 327; *Matter of Robertson*, 23 Misc. 450; 51 N. Y. Supp. 502. See *Carter v. Board of Education*, 68 Hun. 435, as to where

§ 268. **Bequests to corporations.**—A corporation cannot take by devise or bequest unless expressly authorized by its charter, or by general statute.⁹⁴ Hence a devise of lands to a corporation for charitable uses, which that corporation has not power to take, is void,⁹⁵ *e. g.*, a devise to the United States for the purposes of a general charity. The government exists under grants of power, express or implied, in a written constitution, and the functions of all the departments are definitely limited and arranged, and it is not within its express or implied powers to administer a charity.⁹⁶ So an *unincorporated society* or association is incapable of taking an immediate gift under a will as devisee or legatee. Subsequent incorporation will not enable it to take the bequest.⁹⁷ An association, though unincorporated, is,

the void bequest goes. Where the residue is given to three religious and charitable corporations to be equally divided between them, and two of such corporations are unable to take, because the will was made within two months of testator's death, the third is not entitled to the entire fund, but the lapsed shares pass to the next of kin. (*Simmons v. Burrell*, 8 Misc. 388; 28 N. Y. Supp. 625.)

⁹⁴ 1 R. S. 57, § 3. See *Hollis v. Drew Theo. Sem.*, 95 N. Y. 166; *Spencer v. De Witt C. Hay Library Assn.*, 36 Misc. 393; 73 N. Y. Supp. 712; *First Presbyterian Church, etc. v. McKallor*, 35 App. Div. 98; 54 N. Y. Supp. 740.

⁹⁵ *Boyce v. City of St. Louis*, 29 Barb. 650; *Matter of McGraw*, 45 Hun. 354. The former English law of charitable uses is not, and never was, in force in this State (*Cottman v. Grace*, 112 N. Y. 299, 306; *Holmes v. Mead*, 52 id. 332; *Holland v. Alcock*, 108 id. 312, 336); and the doctrine of *cy pres* has no place in our law. (*Beekman v. Bonsor*, 23 N. Y. 298, 310; *Levy v. Levy*, 33 id. 97, 138; *Bascom v. Albertson*, 34 id. 584.) An entirely new system has been adopted authorizing and limiting gifts to charity; and all uses and trusts, except those authorized by the statute, are abolished. (1 R. S. 727, § 45.) The English law, and the changes effected by our statutes, are reviewed in *Holland v. Alcock*, 108 N. Y. 312; *Matter of McGraw*, 111 id. 66; *Bascom v. Albertson*, 34 id. 584; *Levy v. Levy*, 33 id. 97; *Yates v. Yates*, 9 Barb. 324, 338-341; *Ayres v. Trustees*,

etc., 3 Sandf. 351. And see *Fontain v. Ravenel*, 17 How. (U. S.) 369.

⁹⁶ *Levy v. Levy*, 33 N. Y. 97; *Matter of Fox*, 52 id. 530. As to the power of a Surrogate's Court to pass on this question, see *Matter of Merriam*, 136 N. Y. 58; § 255, *ante*. The city of New York has capacity at common law and by statute to take personal property by bequest. (*Matter of Crane*, 12 App. Div. 271; 42 N. Y. Supp. 904.)

⁹⁷ *White v. Howard*, 46 N. Y. 144; *Williams v. Williams*, 8 id. 524; *Owens v. Missionary Soc.*, 14 id. 380; *Marx v. McGlynn*, 88 id. 357; *Sherwood v. American Bible Soc.*, 4 Abb. Ct. App. Dec. 227; 1 Keyes, 561; *Bonard's Will*, 16 Abb. Pr. (N. S.) 128; *Lutheran Ref. Church v. Mook*, 4 Redf. 513; *First Presbyterian Soc. v. Bowen*, 21 Hun. 389; *Riley v. Diggs*, 2 Dem. 184; *Carpenter v. Historical Soc.*, id. 574; *Matter of Y. M. C. A.*, 22 App. Div. 325; 47 N. Y. Supp. 854; *Matter of Rounds*, 25 Misc. 101; *Fairchild v. Edson*, 154 N. Y. 199. Compare *Dammert v. Osborn*, 140 id. 30. Trustees of an unincorporated educational institution under the direction and control of a quarterly meeting of the Society of Friends. — Held capable of taking a bequest. (*Underhill v. Wood*, 65 N. Y. Supp. 1105; *affd.* in 53 App. Div. 640.) A devise to an incorporated society in trust for an unincorporated association is good, if the latter is incorporated before the money is payable. (*Philson v. Moore*, 23 Hun. 152.) Under a devise, "At the death of my wife, I give and devise" to a society, not in-

however, entitled to take a legacy for a *pious use*,⁹⁸ and hence has a right to intervene and become a party to the probate proceeding.⁹⁹ An *executory* bequest, limited to the use of a corporation to be created within the period allowed for the vesting of future estates and interests, is valid;¹ and a bequest to a foreign corporation is valid if it is capable of taking under the laws of the State of its creation.²

§ 269. **Canons of interpretation.**— The following are the rules governing the construction of wills³ most likely to be applied in proceedings in the Surrogate's Court:

1. All the parts of a will are to be construed in relation to each other,⁴ and so as, if possible, to form one consistent whole;⁵ but where several parts⁶ are absolutely⁷ irreconcilable, the latter must prevail; unless the general scope of the will leads to a contrary conclusion.⁸ 2. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one

incorporated at the time of testator's death, but incorporated at the time of the death of his wife, the society can take, because the title does not vest until the death of the wife. (*Lougheed v. Dykeman's Baptist Church*, 58 Hun, 364; 12 N. Y. Supp. 207; *affd.*, 129 N. Y. 211.) Compare *People v. Simonson*, 126 id. 299; 37 St. Rep. 371.

⁹⁸ *Potter v. Chapin*, 6 Paige, 639; *De Witt v. Chandler*, 11 Abb. Pr. 459; *Owens v. Missionary Soc.*, 14 N. Y. 380, and cases cited. See *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 352; 46 N. Y. Supp. 1035; *affd.*, 166 N. Y. 593.

⁹⁹ *Carpenter v. Historical Soc.*, 1 Dem. 606.

¹ *Rose v. Rose*, 4 Abb. Ct. App. Dec. 108; *Phelps v. Pond*, 23 N. Y. 69, 77; *Cruikshank v. Home for the Friendless*, 113 id. 337; *Matter of Mayor, etc.*, of New York, 55 Hun, 204; 119 N. Y. 660; *Burrill v. Boardman*, 43 id. 254; *Lougheed v. Dykeman's Baptist Church*, 58 Hun, 364; *affd.*, 129 N. Y. 211.

² *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Riley v. Driggs*, 2 Dem. 184; *Hope v. Brewer*, 136 N. Y. 126; *Matter of Huss*, 126 id. 537; 37 St. Rep. 789; *Congregational, etc., Soc. v. Hale*, 29 App. Div. 396; 51 N. Y. Supp. 704. See § 267, *ante*.

³ Taken mostly from the Draft of Civil Code, reported in 1865.

⁴ *Arcularius v. Geisenhainer*, 3 Bradf. 64; *affd.*, 25 Barb. 403; *Eger-ton v. Conklin*, 25 Wend. 224, 338; *Covenhoven v. Shuler*, 2 Paige, 130.

⁵ *Carter v. Hunt*, 40 Barb. 89.

⁶ Whether in the same or different sentences. (*Morrall v. Suttan*, 1 Phillips, 537, 547.)

⁷ *Van Nostrand v. Moore*, 52 N. Y. 12; *Van Vechten v. Keator*, 63 id. 52; *Sweet v. Chase*, 2 id. 79; *Covenhoven v. Shuler*, 2 Paige, 123; *Trustees of Theological Seminary v. Kellogg*, 16 N. Y. 88; *Norris v. Beye*, 13 id. 284; *Campbell v. Rawdon*, 18 id. 414; *Griffen v. Ford*, 1 Bosw. 123; *Bradstreet v. Clarke*, 12 Wend. 602. Compare *Lovett v. Gillender*, 35 N. Y. 617; *Everitt v. Everitt*, 29 id. 39.

⁸ Where two clauses of a will are so inconsistent and irreconcilable that they cannot possibly stand together, the one that is posterior in position will be considered as indicating a subsequent intention, and will prevail, unless the general scope of the will leads to a contrary conclusion; and although the latter clause be invalid, it must, nevertheless, be retained, and considered for the purpose of ascertaining the intentions of the testator, and for this purpose it is as effectual, and its operation upon the preceding clause is the same, as though no legal obstacle to its being carried into execution existed. (*Van Nostrand v. Moore*, 52 N.

instrument.⁹ 3. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor,¹⁰ or by any other words not equally clear and distinct,¹¹ or by inference or argument from other parts of the will,¹² or by any inaccurate recital of or reference to its contents in another part of the will.¹³ 4. Where the meaning of any part of a will is doubtful or ambiguous, it may be explained by any reference thereto, or recital thereof, in another part of the will.¹⁴ 5. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense¹⁵ can be collected, and that other can be ascertained.¹⁶ 6. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.¹⁷ 7. Of two modes of interpreting a will, that is to be preferred which will prevent either a total or a partial intestacy.¹⁸ 8. Where there are two equally probable interpretations of the language of a will, that one is to be adopted which prefers the

Y. 12.) s. p., *Harrison v. Jewell*, 2 Dem. 37; *Matter of Manice*, 31 Hun. 119. See *Haug v. Schumacher*, 166 N. Y. 506; 60 N. E. 245.

⁹ *Howland v. Union Theo. Sem.*, 5 N. Y. 193, 214; *Haven v. Haven*, 1 Redf. 374; *Lynch v. Pendergast*, 67 Barb. 501; *Pierpont v. Patrick*, 53 N. Y. 591.

¹⁰ *Cole v. Wade*, 16 Ves. 27. See *Thompson v. Whitlock*, 5 Jur. (N. S.) 991.

¹¹ *Thornhill v. Hall*, 2 Cl. & F. 22; *Barclay v. Maskelyne*, H. R. V. Johns. 126. This rule applies equally to prior (*Greenwood v. Sutcliffe*, 14 B. & C. 226) and to subsequent words (*Arcularius v. Geisenhainer*, 3 Bradf. 75; aff'd., 25 Barb. 403; *Kiver v. Oldfield*, 4 De Gex & J. 30; *Borrell v. Haigh*, 2 Jur. 229; *Haight v. Pine*, 3 App. Div. 434; 39 N. Y. Supp. 511; *Banzer v. Banzer*, 156 N. Y. 429; 51 N. E. 291; *Clay v. Wood*, 153 N. Y. 134; 47 N. E. 274; *Matter of Peters*, 69 App. Div. 465; 74 N. Y. Supp. 1028.)

¹² *Campbell v. Harding*, 2 Russ. & M. 409; *Jennings v. Newman*, 10 Sim. 223.

¹³ *Hillersdon v. Lowe*, 2 Hare. 355, 372; *Mortimer v. Hartley*, 3 De Gex & Sm. 332. Where the meaning of the testator is apparent from the language of a will, the plain import of the language cannot be departed from, though

it result in rendering the will invalid. (*Van Nostrand v. Moore*, 52 N. Y. 12.)

¹⁴ *Hoppock v. Tucker*, 59 N. Y. 202; *Taggart v. Murray*, 53 id. 233; *Kiah v. Grenier*, 56 id. 220. See *Hyatt v. Pugsley*, 23 Barb. 285; *Marsh v. Hague*, 1 Edw. 174.

¹⁵ *Hone v. Van Schaick*, 3 N. Y. 538; *Lytle v. Beveridge*, 58 id. 592; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Abbey v. Aymar*, 3 Dem. 400; *Bullock v. Downes*, 9 H. of L. Cas. 24. As to the use of the word "money" in a will, see *Sweet v. Burnett*, 136 N. Y. 204; 49 St. Rep. 113.

¹⁶ *De Nottebeck v. Astor*, 13 N. Y. 98; *Bradhurst v. Bradhurst*, 1 Paige, 331; *Covenhoven v. Shuler*, 2 id. 122; *Rathbone v. Dyckman*, 3 id. 9; *Crosby v. Wendell*, 6 id. 548; *Staats v. Staats*, 11 Johns. 337.

¹⁷ *Griffen v. Ford*, 1 Bosw. 123, 140; *Mason v. Jones*, 2 Barb. 229; *Butler v. Butler*, 3 Barb. Ch. 304; *Pond v. Bergh*, 10 Paige, 140; *Chrystie v. Phyfe*, 19 N. Y. 348; *Dubois v. Ray*, 35 id. 162; *Post v. Hover*, 33 id. 593; *Bates v. Hillman*, 43 Barb. 645; *Corse v. Chapman*, 153 N. Y. 466; 47 N. E. 812.

¹⁸ *Vernon v. Vernon*, 53 N. Y. 351; *Kalish v. Kalish*, 166 id. 368; 59 N. E. 917.

kin of the testator to strangers.¹⁹ 9. Technical words are not necessary to give effect to any species of disposition by a will;²⁰ but, where used in a will, they are to be taken in their technical sense,²¹ unless the context clearly indicates a contrary intention.²² 10. A devise or bequest of "all the testator's real or personal property" in express terms, or in any other terms denoting his intent to dispose of all his real or personal property (except of the residue), passes all the real or personal property which he was entitled to dispose of by will at the time of his death.²³ 11. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest," or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person. These terms are to be considered used as words of donation, and not of limitation, when the property is given to the person so designated directly, and not as a qualification of the estate given to the ancestor of such person.²⁴ 12. Words in

¹⁹ *Quinn v. Hardenbrook*, 54 N. Y. 83; *Wood v. Mitcham*, 92 id. 375; *Matter of Boyce*, 37 Misc. 146; 74 N. Y. Supp. 946; *Matter of Lee*, 65 Hun. 524; 20 N. Y. Supp. 579; *affd.*, 141 N. Y. 58.

²⁰ *Jackson v. Luquere*, 5 Cow. 228; *Parks v. Parks*, 9 Paige, 117; *Bliven v. Seymour*, 88 N. Y. 469, 476.

²¹ *Moore v. Lyons*, 25 Wend. 154, 155; *Campbell v. Rawdon*, 18 N. Y. 417; *Brown v. Lyon*, 6 id. 419; *Jackson v. Luquere*, 5 Cow. 228; *Keteltas v. Keteltas*, 72 N. Y. 312.

²² *Corrigan v. Kiernan*, 1 Bradf. 208; *Sherwood v. Sherwood*, 3 id. 230; *De Kay v. Erving*, 5 Den. 646; *Parks v. Parks*, 9 Paige, 107.

²³ 2 R. S. 57, § 5. See *McNaughton v. McNaughton*, 41 Barb. 50; *Meeks v. Meeks*, 161 N. Y. 66; 55 N. E. 278; *Seibert v. Miller*, 34 App. Div. 602; 55 N. Y. Supp. 593; *Toerge v. Toerge*, 9 App. Div. 194; 41 N. Y. Supp. 244. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited. (1 R. S. 748, § 1; L. 1896, c. 547, § 210.) Real or personal property, embraced in a power to devise, passes by a will pur-

porting to devise "all the real or personal property" of the testator. (L. 1897, c. 417, § 6. See *Van Wert v. Benedict*, 1 Bradf. 114.) As to the effect of a devise of the residue of the testator's estate, see *Van Cortlandt v. Kip*, 1 Hill, 596; 7 id. 352, and *Tucker v. Tucker*, 5 N. Y. 348.

²⁴ As to "next of kin," "heirs," "issue," etc., see *Keteltas v. Keteltas*, 72 N. Y. 312; *Luce v. Dunham*, 69 id. 36; *Smith v. Scholtz*, 68 id. 42; *Ludlum v. Otis*, 15 Hun. 410; *Pinckney v. Pinckney*, 1 Bradf. 269. Compare *Bundy v. Bundy*, 38 N. Y. 410; *Heard v. Horton*, 1 Den. 165; *Kiah v. Grenier*, 56 N. Y. 220; *Cushman v. Horton*, 59 id. 149; *Soper v. Brown*, 136 id. 244; *Drake v. Drake*, 134 id. 220; *Wadsworth v. Murray*, 29 App. Div. 191; 51 N. Y. Supp. 1038; *affd.*, 161 N. Y. 274; *Canfield v. Fallon*, 26 Misc. 345; 57 N. Y. Supp. 149; *Snider v. Snider*, 160 N. Y. 151; 54 N. E. 676; *Matter of Fidelity, etc., Co.*, 57 App. Div. 532; 68 N. Y. Supp. 257; *Daly v. Greenberg*, 69 Hun. 228; 23 N. Y. Supp. 582; *Matter of U. S. Trust Co.*, 36 Misc. 378; 73 N. Y. Supp. 635; *Emmet v. Emmet*, 67 App. Div. 183; 73 N. Y. Supp. 614; *Hilliker v. Bast*, 64 App. Div. 552; 72

a will referring to death,²⁵ or survivorship,²⁶ simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.²⁷ So far as facts and circumstances are sus-

N. Y. Supp. 301; Matter of Moore, 152 N. Y. 602; Chwatal v. Schreiner, 148 id. 683; 43 N. E. 166; Newcomb v. Lush, 84 Hun, 254; 32 N. Y. Supp. 526; affd., 155 N. Y. 687; Montignani v. Blade, 145 N. Y. 111; 64 St. Rep. 558; Bodine v. Brown, 154 N. Y. 778; 49 N. E. 1093; Johnson v. Brasington, 156 N. Y. 181; 50 N. E. 859.

As to meaning of "heirs" and "issue" in a remainder limited to take effect on the death of a person without heirs or issue, see L. 1896, c. 547, § 38.

A widow is neither next of kin nor heir. (Snider v. Snider, 11 App. Div. 171; affd., 160 N. Y. 151; Matter of Devoe, 171 id. 281; Platt v. Mickle, 137 id. 106; 50 St. Rep. 91.) Compare Matter of Mesereau, 38 Misc. 208. The word "wife" means a woman who is legally married. (Miller v. Miller, 79 Hun, 197.)

A legacy to the testator's "natural heirs."—Held, to be a designation of his next of kin, in the absence of anything tending to some other interpretation as more consonant with his intention, and that his widow was not included within the description. (Matter of Sinzheimer, 5 Dem. 321.) The surrogate cited Tilman v. Davis, 95 N. Y. 17; Drake v. Pell, 3 Edw. Ch. 251; Slosson v. Lynch, 43 Barb. 147; Murdock v. Ward, 67 N. Y. 387; Keteltas v. Keteltas, 72 id. 312; and distinguished Miller v. Churchill, 78 N. C. 372; Ludlum v. Otis, 15 Hun, 410. "Relations," when used in will relating to personalty only, embraces persons within the Statute of Distributions. (Gallagher v. Crooks, 132 N. Y. 338; 44 St. Rep. 436.) So, too, of the words "lawful heirs." (Cogan v. McCabe, 23 Misc. 739; 52 N. Y. Supp. 48.) "Lawful issue" held not to include an adopted child; although it had a right to inherit. (N. Y. Life, etc., Co. v. Viele, 161 N. Y. 11; 55 N. E. 311.)

A bequest in trust for a son for life, remainder at his death to "his lawful issue then living," given by a will executed in 1886, where testator knew his son had had an illegitimate child, and that the son married the mother of the child in 1885,—Held, not to carry the

remainder to such child, notwithstanding the enactment of L. 1896, c. 272, § 18, legitimizing children whose parents married after their birth. (C. S. Trust Co. v. Maxwell, 26 Misc. 276; 57 N. Y. Supp. 53.) See Harrison v. McAdam, 38 Misc. 18.

"Descendants" does not include collaterals. (Tompkins v. Verplanck, 10 App. Div. 572; 42 N. Y. Supp. 412; 154 N. Y. 634.)

²⁵ Adams v. Beekman, 1 Paige, 631; Ive v. King, 16 Beav. 41; Howard v. Howard, 21 Beav. 550; Schenck v. Agnew, 4 Kay & J. 405. See Chapman v. Moulton, 8 App. Div. 64; Conkie v. Grisson, 24 Misc. 115; 52 N. Y. Supp. 500; Newcomb v. Lush, 84 Hun, 254; 32 N. Y. Supp. 526; affd., 155 N. Y. 687; Washbon v. Cope, 144 id. 287; 63 St. Rep. 716; Benson v. Corbin, 145 N. Y. 351; 64 St. Rep. 815; Matter of Geissler, 72 App. Div. 85; Nelson v. Russell, 135 N. Y. 137; 48 St. Rep. 64; Stokes v. Weston, 142 N. Y. 433.

²⁶ Young v. Robertson, 4 Macq. 319, 330; Young v. Davies, 9 Jur. (N. S.) 399. The contrary was held as to real property in Moore v. Lyons, 25 Wend. 119, on the supposed English rule; but that rule does not exist. (Taaffe v. Connor, 10 H. of L. Cas. 77; 22 Beav. 271.) It makes no difference that there is a postponement without any preceding life interest. (Hodgeson v. Micklethwaite, 2 Drewry, 294.) This rule is not now law where the life tenant dies before the testator. (Spurrell v. Spurrell, 11 Hare, 154.)

²⁷ The rule, that words of survivorship refer to the time of the testator's death, applies only to an absolute gift to one and, in case of his death, to another; it has no application in a case where the first devisee or legatee takes a life estate. (Mullarky v. Sullivan, 136 N. Y. 227; Matter of Denton, 137 id. 428; 51 St. Rep. 60; Lyons v. Weeks, 53 App. Div. 212; 65 N. Y. Supp. 818; affd., 167 N. Y. 135; Galway v. Bryce, 10 Misc. 255; 30 N. Y. Supp. 985.) See Matter of Cramer, 170 N. Y. 271; Cromwell v. Cromwell, 55 App. Div. 103; Ackerman v. Ackerman, 63 id. 370; Matter of Baer,

ceptible of anticipation by the testator, so as to enable him to place himself in the position in which he will be at the time of his death, relatively to his property and his family, he is presumed to speak in his will with reference to that time.²⁸ But whenever a testator refers to an actually existing state of things, his language will be held to refer to the date of the will, not to that of his death.²⁹ 13. A testamentary disposition to a class includes every person answering the description at the testator's death;³⁰ but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.³¹ 14. When

147 N. Y. 348; 69 St. Rep. 694. Compare *Stokes v. Weston*, 142 N. Y. 433.

²⁸ *De Peyster v. Clendinning*, 8 Paige, 295; 26 Wend. 21; *Doubleday v. Newton*, 27 Barb. 431. See *Collin v. Collin*, 1 Barb. Ch. 630; *Van Vechten v. Van Veghten*, 8 Paige, 104; *Lynes v. Townsend*, 33 N. Y. 558; *McNaughton v. McNaughton*, 34 id. 201; *Van Alstyne v. Van Alstyne*, 28 id. 375; *Egerton v. Conklin*, 25 Wend. 224.

²⁹ *Wetmore v. Parker*, 52 N. Y. 451; *Livingston v. Gordon*, 84 id. 136; *Rogers v. Rogers*, 153 id. 343; 47 N. E. 452. Where a devise is to one who does not take by purchase, and could not take by inheritance, and is of lands now owned by the testator, the word "now" will be construed, as against the heirs, to refer to the date of the will, not to the time of the testator's death. (*Quinn v. Hardenbrook*, 54 N. Y. 83.) See *Livingston v. Greene*, 52 id. 118.

³⁰ *Tucker v. Bishop*, 16 N. Y. 402; *Campbell v. Rawdon*, 18 id. 415. Persons who died before the testator are not included. (*Stires v. Van Rensselaer*, 2 Bradf. 172; *Roosevelt v. Porter*, 36 Misc. 441; 73 N. Y. Supp. 800; *Campbell v. Rawdon*, 18 N. Y. 414, 415.) See *Hopkins v. Hopkins*, 1 Hun, 352; *Morton v. Morton*, 8 Barb. 18; *Jenkins v. Freyer*, 4 Paige, 47; *Lawrence v. Hebbard*, 1 Bradf. 252; *Lyons v. Mahan*, 1 Dem. 180. See § 766. *post*.

A testator after making provision for his wife devised and bequeathed the remainder of his estate to his "legal heirs." None of the relatives were named in the will. Held, the testator leaving no descendants or parents, that his collateral relatives took under the residuary clause *per stirpes* and not

per capita. (*Woodward v. James*, 44 Hun, 95; 115 N. Y. 346.)

³¹ *Teed v. Morton*, 60 N. Y. 502; *Kilpatrick v. Johnson*, 15 id. 322; *Tucker v. Bishop*, 16 id. 402; *Johnson v. Valentine*, 4 Sandf. 36. Compare *Doubleday v. Newton*, 27 Barb. 444; *Hoppock v. Tucker*, 59 N. Y. 202; *Bisson v. West Shore R. Co.*, 143 id. 125; 62 St. Rep. 133; *Schwencke v. Haffner*, 22 Misc. 293; 50 N. Y. Supp. 165; *Cox v. Wisner*, 43 App. Div. 591; *affd.*, 167 N. Y. 579. There are numerous cases where the words "children," "nephews," "nieces," and other descriptive terms of classes or relations have been subjects of judicial construction. The general principle is that these words are to be taken in their primary and simple signification where that can be done. The intention of the testator will prevail, however; and where, from the construction of the whole will, it can be made to appear that the testator meant by "children" to include children and the issue of such children as were deceased, that construction will be adopted.

Thus, grandchildren and great-grandchildren will take under a bequest to children, whenever that is necessary, in order to give effect to the words of the will, or that appears to have been the evident intention of the testator. (*Marsh v. Hague*, 1 Edw. Ch. 174; *Home v. Van Schaick*, 3 N. Y. 538.) Compare *Mowatt v. Carow*, 7 Paige, 328; *Cromer v. Pinckney*, 3 Barb. Ch. 466.

Illegitimate children, unless there are no legitimate children, will not be included in the term "children," unless a different intention is apparent. (*Gardner v. Heyer*, 2 Paige, 11; *Collins v. Hoxie*, 9 id. 81; *Miller v. Mil-*

a will directs³² the conversion of real property into money, such property and all its proceeds must be deemed personal property;³³ from the time of the testator's death.³⁴

15. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.³⁵ 16. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from competent extrinsic evidence.³⁶

§ 270. **Extrinsic evidence in aid of interpretation.**—Cases must occur where the intention cannot be discovered or explained by the words of the will itself, and resort must be had to extrinsic evidence. The testator's intention, as an independent fact, cannot be proved by such evidence; but evidence of the meaning of the words used by the testator, being ancillary to the right understanding of them, is allowable.³⁷ The essence of the rule excluding extrinsic oral proof, in fixing the true force and meaning of a will, is simply this, "that the *language* used must define the import of the instrument, without the admission of any extrinsic evidence

ler, 79 Hun. 197.) The word "children" must be taken in its accustomed sense, and limited to offspring in the first degree, in the absence of indications that the testator intended to give it some other meaning. (Kirk v. Cashman, 3 Dem. 242; Matter of Sparks, 27 Misc. 350; 58 N. Y. Supp. 766.) A gift to brothers and sisters, or to the children of brothers and sisters, includes brothers and sisters of the half blood, as well as those of the whole blood. But "children" of brothers and sisters does not include descendants below that degree. (San-son v. Bushnell, 25 Misc. 268; 55 N. Y. Supp. 272.)

³² Forsyth v. Rathbone, 34 Barb. 405; Fowler v. Depau, 26 id. 239; Harris v. Clark, 7 N. Y. 260; Phelps v. Pond, 23 id. 76; Salisbury v. Slade, 160 id. 278; 54 N. E. 741; Carpenter v. Bonner, 26 App. Div. 462; 50 N. Y. Supp. 298. Otherwise as to a discretionary power. (Koezly v. Koezly, 31 Misc. 397; 65 N. Y. Supp. 613.)

³³ Meakings v. Cromwell, 5 N. Y. 136; King v. Woodhull, 3 Edw. 79; Bramhall v. Ferris, 14 N. Y. 46; Johnson v. Bennet, 39 Barb. 252; Byrnes v. Baer, 86 N. Y. 210.

³⁴ Kane v. Gott, 24 Wend. 641; Graham v. Livingston, 7 Hun. 11. But compare Shumway v. Harmon, 6 Sup. Ct. (T. & C.) 626; Trask v. Sturges, 31 Misc. 195. For the distinction between the effect of a sale under the provisions of a will and a sale had under a decree in partition, see Matter of Thomas, 1 Hun. 473.

³⁵ Jenkins v. Freyer, 4 Paige. 53; Morton v. Morton, 8 Barb. 18. Compare Lawrence v. Hebbard, 1 Bradf. 252; Phelps v. Phelps, 28 Barb. 121; Stires v. Van Rensselaer, 2 Bradf. 172.

³⁶ Roman Catholic Asylum v. Emmons, 3 Bradf. 144; Smith v. Wyckoff, 3 Sandf. Ch. 82, 88; Conolly v. Pardon, 1 Paige. 291; Smith v. Smith, 4 id. 271; Wightman v. Stoddard, 3 Bradf. 405; Hart v. Marks, 4 id. 161; Kalbfleisch v. Kalbfleisch, 67 N. Y. 354; Matter of Wehrhane, 40 Hun. 542; Betts v. Betts, 4 Abb. N. C. 317; First Presbyterian Soc. v. Bowen, 21 Hun. 389; Matter of Schweigert, 17 Misc. 186; 40 N. Y. Supp. 976; and cases in notes under § 274. *post*.

³⁷ Magee v. Magee, 67 Barb. 487; Phillips v. McCombs, 53 N. Y. 494; Stevens v. Stevens, 2 Redf. 265.

of the *intention* of the testator in the use of such terms as his will is expressed in, except in the single case of there being two objects or persons to whom the language of the will applies *with legal certainty*, so that either might be justly regarded as coming within the terms of the instrument, if it were not for the other. This is what is more commonly called a latent ambiguity, but which Lord Bacon called an *equivocation*; *i. e.*, where the terms of the will applied with equal strictness to more than one subject or object. And in every case of patent ambiguity, as well as those of latent ambiguity, with the exception of cases of equivocation before stated, direct evidence of intention must be rejected; but all other evidence, outside of the instrument, which will enable the court to understand in what sense the testator used the language found in his will, must be received and acted upon, whenever the court can thereby see what was the testator's intention in the use of the language found in his will; and, in this respect, there is no difference between patent and latent ambiguity, as to their being removable by extrinsic evidence, with the single exception of *equivocation* before stated. Whether, therefore, the will appears ambiguous or uncertain in regard to its import, upon its face, or such ambiguity or uncertainty arises out of the extrinsic evidence, there is no obstacle to receiving any kind of extrinsic evidence to remove it, with the single exception that the court cannot receive direct or even circumstantial evidence of the sense in which the testator understood the language of his will. But in either case of ambiguities, patent and latent, or more properly, uncertainties in regard to the application of the language to external facts, it is competent to receive evidence of all the surrounding circumstances, so as to place the court, as far as possible, in the position of the testator at the time he used such language."³⁸ The purposes for which extrinsic evidence may be received have been stated to be, to aid in *reading, testing, applying* and *executing* the testamentary declaration of intention.³⁹

³⁸ Redf. Am. Cas. on Wills, p. 600: is admissible as a part of the *res gestæ*, though not to contradict the will. (2) When it is doubtful as to which of two or more extrinsic objects

³⁹ Abb. Trial Ev. 129. The general rule is stated by Wharton (2 Whart. Ev., § 992) to be this: "With two exceptions, evidence of the testator's intentions is inadmissible in explanation of a will. These exceptions are as follows: (1) What is said at the time of the execution and attestation a provision, in itself unambiguous, is applicable, then evidence of the testator's declarations of intention is admissible: not indeed to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects." The following are the seven proposi-

§ 271. **Reading the will.**—As an aid to the correct reading of the will, the instrument, if written in a foreign language, or in shorthand or cipher, may be translated by a competent witness. Where the testator uses terms peculiar to his trade or calling, or which he habitually used in a peculiar sense, or according to local

tions applicable to the exposition of wills, as laid down in Wigram on Extrinsic Evidence, etc.:

“*Proposition I.* A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptance, unless from the context of the will it appears that he used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

“*II.* Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular and secondary sense be tendered.

“*III.* Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

“*IV.* Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing or who understood the language in which the will is written is admissible to declare what the char-

acters are, or to inform the court of the proper meaning of the words.

“*V.* For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made auxiliary to the right interpretation of a testator's words.

“*VI.* Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases,—see Proposition VII) will be void for uncertainty.

“*VII.* Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the person or things intended, where the description in the will is insufficient for that purpose. These cases may be thus defined: when the object of the testator's bounty, or the subject of disposition (*i. e.*, the person or thing intended) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.”

usage, they may be defined by competent evidence.⁴⁰ The testator's habitual use of nicknames, sobriquets, or any designation to distinguish persons or things may be shown. But the meaning of technical legal terms cannot be varied by parol,⁴¹ and it cannot be shown by such evidence, what the testator intended to express by initials or ciphers in a bequest, as distinguished from what was his common habit in their use in speaking and writing.⁴²

§ 272. **Testing the will.**— In testing the validity or legality of a will, or any clause of it, parol evidence is always admissible; such evidence is not received to influence the construction of the will, but to impeach it as a valid testamentary disposition, as being by its terms in contravention of a statutory limitation, or as having been made by mistake or induced by fraud or undue influence.

§ 273. **Applying the will.**— As an aid in applying the will, the court may inquire into the testator's circumstances and situation, the nature of his property,⁴³ the number of his family,⁴⁴ the claims upon him of a legatee whose legacy is ambiguous,⁴⁵ the state of former wills and other circumstances, the object being to place the court, as nearly as possible, in the position of the testator, so as to enable it to see how the uncertainty arose.

§ 274. **Designation of beneficiary.**— It is essential to the validity of a bequest, that the beneficiary should be designated with reasonable certainty, or that it should be possible to identify him with certainty.⁴⁶ If there is no person in existence who exactly

⁴⁰ *Ryerss v. Wheeler*, 22 Wend. 152. See 1 Jarman on Wills, 421.

⁴¹ See *ante*, § 269.

⁴² *Clayton v. Lord Nugent*, 13 Mees. & Wels. 200.

⁴³ *Doe v. Provoost*, 4 Johns. 61; *Shulters v. Johnson*, 38 Barb. 80; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144; *White v. Hicks*, 43 Barb. 65; *affd.*, 33 N. Y. 383.

The date of a will may be established or corrected by parol evidence showing the real date of its execution. (*Matter of Haviland*, 17 Misc. 193; 40 N. Y. Supp. 973.)

⁴⁴ *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Pierrepoint v. Edwards*, 25 N. Y. 128. Where a gift to children speaks of them as a specified number, which is less than the number in existence at the date of the will, the specified number will be rejected on the assumption

of a mistake; and all the children so in existence be held entitled, unless it can be inferred who were the particular children intended; and a like principle will be applied where the number spoken of is greater than all the children in existence. (*Kalbfleisch v. Kalbfleisch*, 67 N. Y. 354.) See *Naylor v. Brown*, 32 Misc. 298.

⁴⁵ *Terpening v. Skinner*, 30 Barb. 373; 29 N. Y. 505; *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214. The motive of the testator is not to be regarded in giving effect to his intention. (*Howland v. Union Theo. Sem.*, 5 N. Y. 193.)

⁴⁶ *Holmes v. Mead*, 52 N. Y. 332; *Prichard v. Thompson*, 95 id. 76; *O'Hara v. Dudley*, 14 Abb. N. C. 71; *Preston v. Howk*, 3 App. Div. 43; 37 N. Y. Supp. 1079; *affd.*, 154 N. Y. 734. See *Beekman v. Bonsor*, 23 id. 298. A bequest to a person, when he

answers the description, extrinsic evidence is admissible to ascertain to whom the designation points. A mere misdescription of the legatee or of the subject of the gift, does not avoid the legacy, unless the ambiguity is such as to render it impossible to ascertain, either from the will or by extrinsic evidence, who, or what, was intended. The maxim *falsa demonstratio non nocet* is well established, and means, practically, that however erroneous the description, either of the object or the subject of the gift, it will not avoid the bequest, provided enough remains to show, with reasonable certainty, what was intended.⁴⁷ Thus, a legacy to Mary, "wife of Nathaniel S.," when Mary's husband was Abraham S., and Nathaniel's wife was Sarah, was upheld as a legacy to Mary.⁴⁸ So a bequest to Cornelia Thompson was held a good bequest to Caroline Thomas.⁴⁹ A legacy to the testator's cousin Paris, he having no cousin of that name, was sustained, on parol proof, as a legacy to his cousin Priscilla.⁵⁰ And a legacy to "James, son of my brother Frederick," was sustained as a legacy to Frederick, son of the testator's brother James, on proof that the brother James had no son Frederick, and that the names were transposed by a mistake of the draughtsman.⁵¹ It is not essential that a corporation to whom a legacy is given should be designated by its legal corporate name. If not designated by its corporate title, a corporation claiming the legacy may show, by extrinsic evidence, that it is the body intended by the testator, as distinguished from

shall die, is not void for incongruity, but is ascertained on his decease, and is transmissible to his legal representative. (Terrill v. Public Adm'r, 4 Bradf. 245.) Compare Riley v. Diggs, 2 Dem. 184; Shipman v. Rollins, 98 N. Y. 311.

The use of the words "the widow of my said son," held, not to refer to the widow of a second marriage of the son. (Davis v. Kerr, 3 App. Div. 322; 38 N. Y. Supp. 387.)

⁴⁷ Jackson v. Sill, 11 Johns. 201, 218; Mann v. Mann, 1 Johns. Ch. 231; Conolly v. Pardon, 1 Paige, 291; Smith v. Smith, 4 id. 271; Wightman v. Stoddard, 3 Bradf. 393; Hart v. Marks, 4 id. 161; Roman Catholic Orphan Asylum v. Emmons, 3 id. 144; Smith v. Wyckoff, 3 Sandf. Ch. 82; Matter of Woods, 33 Misc. 12; 67 N. Y. Supp. 1123; Dodin v. Dodin, 16 App. Div. 42; 44 N. Y. Supp. 800; aff'd., 162 N. Y. 635; Matter of Lang, 9 Misc. 521; 30 N. Y. Supp. 388.

⁴⁸ Smith v. Smith, 4 Paige, 271.

⁴⁹ Thomas v. Stevens, 4 Johns. Ch. 607.

⁵⁰ Hart v. Marks, 4 Bradf. 161.

⁵¹ *Ex p.* Hornby, 2 Bradf. 420. For other illustrations, see Wright v. Methodist Episcopal Church, Hoffman, 202; N. Y. Inst. for the Blind v. How, 10 N. Y. 84; Hornbeck v. Am. Bible Society, 2 Sandf. Ch. 133; De Witt v. Chandler, 11 Abb. Pr. 459; Attorney-General v. Reformed D. Church, 33 Barb. 303; Attorney-General v. The Minister, etc., 36 N. Y. 452; Matter of Cahan, 3 Redf. 31. In the last case, extrinsic evidence was admitted to show that by the term "my daughter Elizabeth," used in a will, where the testator had no such daughter, the testator intended to describe one whom he had adopted as his daughter, although he had not formally adopted her in accordance with the provisions of the statute.

all other corporations.⁵² The amount of evidence requisite to prove identity in the case of a description of the legatee, depends much upon whether there are two or more claimants to the legacy, or only one.⁵³

§ 275. **Description of subject-matter of legacy.**— There are many cases of misdescription of the property sought to be devised or bequeathed, giving rise to uncertainty as to the identity of the property, the nature of the estate given, etc. Such questions are determined upon the same principles as are ambiguities in the designation of persons, and extrinsic evidence may be resorted to as an aid in applying the language of the will to the property, as it is in applying the language to the person.⁵⁴ It also frequently becomes necessary to resort to extrinsic evidence as an aid in executing the will, that is, in carrying its provisions into effect. This subject is so fully treated in standard treatises that an enumeration of the cases need not be attempted here.

⁵² *Lefevre v. Lefevre*, 59 N. Y. 434; 2 Sup. Ct. (T. & C.) 330; *Riker v. N. Y. Hospital*, 66 How. Pr. 246. See *Abb. Trial Ev.* 142, and cases cited. A legacy to "the ladies of the Ursuline Order, residing in Charleston," was sustained as a legacy to "The Ladies' Ursuline Community of the city of Charleston." (*Banks v. Phelan*, 4 Barb. 80.) See *Kearney v. Missionary Society*, 10 Abb. N. C. 274. The will directed two-fourths of the residue "to be divided equally between the home and foreign missions." Held, that, upon the evidence, the legacies belonged to the Boards of Home and Foreign Missions, respectively, of the Presbyterian church in the United States of America. (*Board of Missions v. Scovell*, 3 Dem. 516.) See *Matter of Tobey*, N. Y. Law J., Feb. 9, 1892 (N. Y. Surr. Ct.).

⁵³ In the case of adverse claimants of the same gift, *Mr. Abbott* (*Trial Ev.* 140) gives the following rules as applying: "1. If one (being competent to take) alone precisely answers the whole description of the will, or is identified by the context, extrinsic evidence that the other was intended is incompetent. 2. If both precisely answer the whole designation and indications of the will, a latent ambiguity or 'equivocation' is presented, and extrinsic evidence is competent; and in this class of cases, direct evidence of the testator's intention, even by proving his declarations of purpose, is admissible. (*Matter of Wheeler*, 32 App.

Div. 183; 52 N. Y. Supp. 943; *affd.*, 161 N. Y. 652.) 3. If neither precisely answers the description and indications of the will, but both do so approximately, this is also a case of latent ambiguity, admitting extrinsic evidence; and in this class of cases, too, according to the better opinion, the testator's declaration of intent may be proved."

But as to this, see *St. Luke's Home v. Assoc. of Indig. Females*, 52 N. Y. 191, in which case it was held, that where a devise or bequest is made to a corporation, and there are two corporations, neither of which can claim under the precise name used by the testator, it is for the court to determine which of the two is best or most nearly described by the name, or which will best and most closely answer the delineation used by the testator; and if with a knowledge of the names and general character and purposes of the two corporations, as disclosed by their charters, there is no latent ambiguity, and the court can thus determine which of the two was intended, other evidence to aid the interpretation cannot be resorted to.

⁵⁴ See *Jackson v. Sill*, 11 Johns. 201; *Mann v. Mann*, 14 id. 1; *Ryerss v. Wheeler*, 22 Wend. 148; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. 144; *Doe v. Roe*, 1 Wend. 541; *Waugh v. Waugh*, 28 N. Y. 94; *Hunter v. Hunter*, 17 Barb. 25; *Woods v. Moore*, 4 Sandf. 579; *Jones v. Jones*, 1 How. Pr. (N. S.) 510.

CHAPTER VIII.

CONTESTING WILL ON ALLEGATIONS AFTER PROBATE.

§ 276. **Revoking probate on motion.**—As we have seen,¹ the Surrogate's Court has power to relieve a party from the conclusive effect of a probate, on motion in a proper case,—as where the decree was taken by default, or in consequence of a mistake,² or where it was improperly obtained upon a false suggestion of fact, without notice to the party entitled to administration,³ or upon a fraudulent concealment of the truth with respect to any material fact.⁴ A motion for a citation to vacate the decree, rather than a direct proceeding by petition to revoke the probate, is the proper practice, where a later will than the one probated has been discovered, the citation being directed not only to the heirs and next of kin, but also to the legatees under the first will.⁵ Indeed, whenever the decree is void for want of jurisdiction to grant it, as where the proper parties were not before the court, it will be opened on motion, leaving the parties to initiate a new proceeding for probate, instead of continuing a proceeding to revoke probate on allegations.⁶ So a decree admitting a will to probate may be opened, at the instance of a former contestant, to enable him to apply for a judicial construction of a codicil.⁷ A party, who was not cited upon the application for probate, may come in and ask to be heard; and the court has the power to open the decree, on motion, and hear the matter anew, on the merits.⁸ In that case, the executor must re-prove the requisite formalities of execution.

¹ See *ante*, § 54, and c. XIV. *post*.

² *Pew v. Hastings*, 1 Barb. Ch. 452; *Skidmore v. Davies*, 10 Paige, 316.

³ *Proctor v. Wanmaker*, 1 Barb. Ch. 302.

⁴ *Dobke v. McClaran*, 41 Barb. 491; *Bailey v. Hilton*, 14 Hun. 3. As to the power of the Supreme Court to relieve against the effect of a surrogate's decree granting probate, see *De Bussierre v. Holladay*, 4 Abb. N. C. 111. Where, after probate of a foreign will, it is declared void by a competent court of the State where testator was

domiciled at the time of his death on the ground that it had been revoked according to the law of that State, the will must be regarded here as void, as a will of personality; but not necessarily so as to the real estate. (*Bloomer v. Bloomer*, 2 Bradf. 339.)

⁵ *Matter of Hamilton*, 2 Connolly, 268. See *Matter of Daily*, 25 St. Rep. 1020; 7 N. Y. Supp. 259.

⁶ *Matter of Hughes*, N. Y. Law J., Jan. 17, 1891.

⁷ *Matter of Keeler*, 5 Dem. 218.

⁸ *Booth v. Kitchen*, 7 Hun. 255.

publication, etc.⁹ But, on an application of this kind, the court has a discretion, to be exercised according to the circumstances of the case and with a just regard for the interest of all the parties. He may, therefore, refuse the application to open the decree, where doing so would seriously embarrass many and important interests, and where the remedy of the party, by action, is ample.¹⁰ As a rule, probate on default will not be set aside in the absence of any claim of fraud, incapacity, or undue influence.¹¹

§ 277. **Revoking probate by direct proceeding.**— But besides this remedy by motion, provision is made for a direct proceeding, after probate, to contest a will of personalty, and thus necessarily annul the probate. This proceeding is a matter of right, and the court is bound to entertain it in a proper case. Previous to the adoption of the Revised Statutes, in 1830, this practice and procedure of the English prerogative courts prevailed, by which wills were allowed to be probated *ex parte*, or in the common form, except where a *caveat* was filed, or objection was made by a party in interest; and revocation of a probate could be effected only by a suit brought directly for that purpose.¹² This is still the practice in some of the States. By the Revised Statutes, the Legislature, in effect, abolished probate in the common form, and substituted the proceeding known as solemn form. In other words, the statute required that in every proceeding for the proof of a will, the heirs and next of kin of the decedent should be cited in the first instance, so that they might then and there present their objections, if any. One feature of the old probate practice was, however, retained, to wit, the permitting of an interested party to come in, *after* probate, to contest the validity of the will. The revisers had reported a provision which limited this right to those who had not been cited to appear upon the probate, but the Legislature went a step further, and provided that *any* of the next of kin might come in, at any time, within one year after the probate, and file allegations against the validity of the will, notwithstanding

⁹ Matter of Odell, 1 Misc. 390; 23 N. Y. Supp. 143.

¹⁰ Bailey v. Hilton, *supra*. In that case the applicant was interested in the real property alone, and as the decree granting probate was not conclusive as to such property, and the remedy by action was open to the moving party, the surrogate was upheld in the exercise of his discretion in deny-

ing the motion. See Matter of Tilden, 56 App. Div. 277; 67 N. Y. Supp. 879, where it was intimated that the power to open the decree should be exercised only on behalf of one who was a party to the proceeding, as the decree was not binding on those not brought in.

¹¹ Matter of Gillies, 28 St. Rep. 630; 7 N. Y. Supp. 909.

¹² See 1 Rev. Laws, p. 446, § 9.

ing the probate and its otherwise conclusive effect.¹³ It is not difficult to perceive that such a remedy is greatly in furtherance of justice, for it may well happen that a party, though duly cited in the original probate proceeding, was unable, by reason of sickness, or absence, or oversight, or by reason of ignorance of any grounds of opposition, to assert his claim at the time. The remedy given by the Revised Statutes is substantially the same now existing under the Code.¹⁴

§ 278. Remedy as to wills of personalty only.— The remedy is only applicable to the probate of wills of personal property; and where the probate is of a will of both real and personal property, the probate can be revoked only so far as the will affects the personal property, leaving the probate unimpaired so far as it relates to real property.¹⁵

§ 279. Remedy, when to be availed of.— The petition must be presented "within one year after the recording of the decree admitting the will to probate,"¹⁶ except that, when the person entitled to present it is then a minor, or insane, or is imprisoned on a criminal charge, or in execution upon a conviction of a criminal offense for a term less than for life, the time of such disability is not part of the year limited for taking the proceeding, unless such person shall have appeared by general or special guardian or otherwise, on the probate.¹⁷ It is enough to file the petition within

¹³ In *Collier v. Idley* (1 Bradf. 94), Surrogate Bradford has given a full account of the English practice, and the history of our own legislation on the subject.

¹⁴ Co. Civ. Proc., § 2647; 2 R. S. 61, § 30. The article of the Code, providing for, and regulating, this proceeding is entitled "Revocation of Probate," but we prefer to retain the appellation of "Contesting Will on Allegations, etc." by which the proceeding has been known, as it distinguishes it from the proceeding by motion to revoke probate.

¹⁵ *Matter of Kellum*, 50 N. Y. 301. In that case it was held that this statutory remedy was not taken away by the statute (L. 1837, c. 460, §§ 18, 19), which required the same proof for the probate of wills of personal property as of real property, and which dispensed with the separate recording of the instrument as a will of personal property after it had been recorded as a will of real property. See *Matter*

of *Donlon*, 66 Hun, 199; 21 N. Y. Supp. 114.

¹⁶ The limitation of one year, where the issues on probate were tried by jury, begins to run from the entry of the decree on the findings, and not from its filing in Surrogate's Court. (*Matter of Ruppaner*, 9 App. Div. 422; 41 N. Y. Supp. 212.)

¹⁷ Co. Civ. Proc., § 2648, as amended 1881. The pendency of an appeal from so much of a decree of the surrogate as construes a will in reference to the destination of lapsed legacies, does not bar an application for the revocation of the probate of the will upon the grounds that the testator had not testamentary capacity, and was unduly influenced. (*Matter of Bonnett*, 1 Connolly, 294; 9 N. Y. Supp. 459.)

But in *Matter of De Haas* (24 Misc. 420), after the validity of the will had been passed on by Supreme Court, the contestant subsequently filed a petition for a revocation of the probate in the Surrogate's Court, the object be-

the year, though the citation was issued *after* that time.¹⁸ This limitation of one year does not affect the remedy *by motion* to revoke the decree, above mentioned, as to which the court has a discretion whether or not it will hear it after that time; though laches may defeat it.¹⁹

§ 280. **Who may maintain the proceeding.**— Before the present Code, only the next of kin of the decedent could avail of this remedy, but it is now extended to any “person interested in the estate,”²⁰—that is, any person entitled, either absolutely or contingently, to share in the personal estate, except a creditor. If a particular clause of the instrument is sought to be declared invalid, then such issue can be raised only by a party having an interest under the will in the event that clause should be so declared.²¹ It was held, under the former statute, that one who, being a party to the original probate proceeding, filed his objec-

ing to procure a construction of the will which she believed would result in its being declared invalid.—Held, that such petition could not be entertained.

¹⁸ Matter of Gouraud, 95 N. Y. 256; Matter of Bradley, 70 Hun. 104; 23 N. Y. Supp. 1127; Matter of Laytin, 15 Misc. 660; 37 N. Y. Supp. 1125.

¹⁹ It was the obvious intent of the final sentence of Co. Civ. Proc., § 2648—excluding from the one year's limitation of proceedings to revoke probate of a will, an application to vacate, etc., a decree pursuant to section 2481, subd. 6—to soften the rigor of the remainder of the first-named section by extending the surrogate's general power of setting aside, etc., to decrees or probate after a year from their rendition. After the year, the application is in the surrogate's discretion. Accordingly, where a petition for the revocation of a probate decree rendered in 1873 was presented after the lapse of more than seven years, by a daughter of testator, who, though then an infant, was not represented by guardian on the probate, she claiming that, by reason of the provisions of the Code mentioned, her time to apply was unlimited—it appearing that she became of age in 1874—it was held, that her absolute right to contest the probate ceased at the end of a year after the decree was rendered; that she had been guilty of laches by delay; and that the application should be denied. (Becker v. Boehus, 5 Redf. 488; affd., 28 Hun, 207.)

²⁰ Hence, formerly, a legatee, as such, could not institute the proceeding. (Booth v. Kitchen, 7 Hun, 260.) But a legatee who has accepted a legacy under a decree admitting a will to probate, is thereby estopped from contesting the validity of the will; and a tender of the amount of such legacy with interest, but without costs, into court, after the filing of a petition to set aside the probate does not remove the estoppel of the legatee. (Matter of Soule, 1 Connoly, 18; 22 Abb. N. C. 236; Matter of Peaslee, 73 Hun, 113; 25 N. Y. Supp. 940; Matter of Richardson, 81 Hun, 425; 30 N. Y. Supp. 1008.) See *ante*, § 257.

Where the petitioner is estopped or disqualified from maintaining the proceeding, it cannot be continued by a respondent who could not have instituted it. (Matter of Ruppenner, 15 Misc. 654; 37 N. Y. Supp. 429; affd., 9 App. Div. 422.) One who was a party and appeared in an action to determine the validity of a will is estopped by the judgment in favor of its validity from maintaining an action to revoke probate. (Ib.)

A residuary legatee has a sufficient interest to maintain a proceeding to revoke probate of provisions of the will in favor of another, alleged to have been procured by fraud. (Matter of Janes, 87 Hun, 57; 33 N. Y. Supp. 968.)

²¹ Jones v. Hamersley, 4 Dem. 427; Matter of Havemeyer, N. Y. Law J., April 15, 1890.

tions, and actually contested the probate, could, in the event of an adverse decision, renew the same objections by a petition in this proceeding;²² and this is undoubtedly the rule in a proceeding under the Code.²³

§ 281. **The petition.**—The petition, besides showing “the interest” of the petitioner, should allege the grounds on which the validity of the will, or its proof, is sought to be contested. It should state the names of the executor or the administrator with the will annexed, as the case may be; also the names of the devisees and legatees named in the will, and “of all other persons who were parties” to the original probate proceeding.²⁴ The facts upon which the allegations are founded should be stated with sufficient certainty to enable the court to determine whether they constitute, if true, good grounds for entertaining the proceeding.²⁵ The relief prayed for is, that the probate may be revoked and that a citation may issue to the persons named.

§ 282. **Persons to be cited.**—Under the former statute, only the executor, or the administrator with the will annexed, as the case might be, and the legatees residing within the State, were entitled to notice, but now, not only they, but “all other persons who were parties” to the original proceeding, without limitation as to residence, are required to be cited. If a legatee is dead, his executor or administrator must be cited, if one has been appointed; if not, such persons must be cited as representing him, as the surrogate designates for the purpose.²⁶

§ 283. **Service and return of citation.**—The surrogate is required to issue a citation, upon the presentation of the petition.

²² *Matter of Gouraud*, 95 N. Y. 256.

²³ See *Matter of Bonnett*, 1 Connoly, 294; 9 N. Y. Supp. 459. In *Matter of Bradley* (70 Hun. 104; 23 N. Y. Supp. 1127), the petitioner, who had filed objections in the original proceeding, but had failed to appear and substantiate them, was held entitled to maintain the proceeding, as if no adjudication had been had. So, too, though the petitioner had waived the issue of a citation upon the original proceeding and consented that the will be admitted to probate. (*Matter of Albert*, 38 Misc. 61.)

²⁴ A petition for the revocation of probate of a will should not differ essentially, in its statement of the grounds of objection, from an answer

to a petition for probate. Averments of matters of evidence are generally out of place in a petition for such revocation, and may be stricken out, on motion. (*Henry v. Henry*, 3 Dem. 322.) See *Matter of Hopkins*, 19 St. Rep. 528.

²⁵ Where it nowhere appears by the petition, or allegation, that the alleged will proceeded against has been admitted to probate, the surrogate is without jurisdiction. (*Neergaard's Estate*, 20 Daily Reg. No. 151.)

²⁶ Co. Civ. Proc., § 2649. The surrogate may order supplementary citations on revocation proceedings where the same were actually begun within one year. (*Matter of Phalen*, 51 Hun, 208.)

It seems that it is the duty of the surrogate to issue the citation *at once* upon the presentation of the petition, and it must be served within sixty days after its issue.²⁷ If all the parties are not served in time, the surrogate may issue a supplemental citation.²⁸

§ 284. **Suspension of executor's proceedings.**—A citation having been served upon the executor, or the administrator with the will annexed, as the case may be, he “must suspend, until a decree is made upon the petition, all proceedings relating to the estate; except for the recovery or preservation of property, the collection and payment of debts, and such other acts as he is expressly allowed to perform, by an order of the surrogate, made upon notice to the petitioner.”²⁹ This was intended to restrict the powers of the executor, and not to enlarge those of the surrogate. Hence the latter cannot order a portion of the estate paid over to, and distributed among, the legatees, even though they would, as next of kin, be entitled to distributive shares of the estate, in case the probate was revoked. “Such a power would be extremely dangerous, and might be the subject of great abuses.”³⁰

§ 285. **Proceedings on return of citation.**—In this proceeding, the probate of the will already made is regarded as a mere nullity, and not even *prima facie* evidence of its due execution. The burden of proof is on the proponents of the will, in the same manner as it was on the former application, and they must prove the will *de novo* in the same way.³¹ The evidence to sustain the probate must be taken anew. The testimony which was taken on the original probate cannot be given in evidence, except that of witnesses who may be dead, or out of the State, or who, since their testimony was taken, have become lunatic or otherwise incompetent; the testimony of such witnesses is expressly allowed to be received.³²

§ 286. **Issues triable.**—It has been loosely remarked that *any* question, which might have been raised by objection to the probate originally, may be raised in this proceeding. This is only

27 Matter of Bradley, 70 Hun, 104; 23 N. Y. Supp. 1127, citing Matter of Phalen, 51 Hun, 208; Matter of Liddington, 20 St. Rep. 610; and overruling Fountain v. Carter, 2 Dem. 313; Pryer v. Clapp, 1 id. 387; Matter of Bonnett, 1 Connoly, 294. Where the petitioner wilfully refrains from serving the citation on some of the parties, the proceeding may be dismissed. (Matter of Friedell, 20 App. Div. 382; 46 N. Y. Supp. 787.)

28 Matter of Bradley, *supra*.

29 Co. Civ. Proc., § 2650.

30 Matter of McGowan, 28 Hun, 246; La Bau v. Vanderbilt, 3 Redf. 386, 414. Compare Hoyt v. Jackson, 1 Dem. 553.

31 Collier v. Idley, 1 Bradf. 94; Matter of Soule, 1 Connoly, 18; 22 Abb. N. C. 236; Hoyt v. Hoyt, 9 St. Rep. 731; *affd.*, 112 N. Y. 493.

32 Co. Civ. Proc., § 2651.

true to the extent that any question involving the *factum* of the will, including, besides the facts of due execution, publication, and attestation, the testator's mental capacity,³³ his freedom from undue influence,³⁴ the existence of a later will,³⁵ and similar facts; as to which, the whole case is opened for retrial and determination, upon the same, or upon additional, evidence, as that produced on the original proceeding. But the right of a contestant, to put in issue the "validity, construction and effect" of the provisions of the will, does not extend to this proceeding, which is provided for under a different title of the Code from that which confers that special jurisdiction on Surrogates' Courts. In a proceeding to revoke probate, on allegations, the court will not, therefore, determine the legality of a direction to accumulate interest,³⁶ or other such questions.³⁷ As the proceeding itself necessarily concedes the court's jurisdiction to render the original decree, the contestant cannot raise that question in this proceeding.³⁸ In short, no question can properly be passed upon, either by the surrogate, or by the appellate court, except as to the legal execution of the will, and whether its probate should stand. The extent of the court's authority is to render a decree either revoking or confirming the probate, especially, where no question of construction, if allowable at all, was involved.³⁹

§ 287. **Decision and decree.**— If the surrogate decides that the will is not sufficiently proved to be the last will of the testator, he must make a decree revoking the probate thereof; otherwise, he must make a decree confirming the probate.⁴⁰ The record of the will remains, however, and if the instrument has also been proved as a will of real estate, the effect of that probate is not impaired by the revocation of the probate as a will of personal property. The revocation simply divests the probate of its quality as that of a will of personalty;⁴¹ although the proceeding is important and useful in facilitating any subsequent controversy over the will as a disposition of real property.⁴²

³³ Matter of Liddington, 20 St. Rep. 610.

³⁴ Matter of Lowman, 1 Misc. 43; Matter of Blair, 16 Daly, 540; 16 N. Y. Supp. 874.

³⁵ Where it was sought to revoke the probate on the ground of the existence of a later will which was propounded accordingly, it appearing that the latter instrument was a codicil to the former, the petition for revocation was denied, and the codicil was admitted as such. (Canfield v. Crandall, 4 Dem. 111.)

³⁶ Matter of Soule, 1 Connolly, 18; 22 Abb. N. C. 236.

³⁷ Matter of Ellis, 1 Connolly, 206.

³⁸ Hoyt v. Hoyt, 112 N. Y. 493; 9 St. Rep. 731. Relief against the decree, as being void for want of jurisdiction, may be had by motion to set it aside, under Co. Civ. Proc., § 2481.

³⁹ Matter of Watson, 131 N. Y. 587.
⁴⁰ Co. Civ. Proc., § 2652; Matter of Watson, 131 N. Y. 587.

⁴¹ Matter of Kellum, 50 N. Y. 300.

⁴² Hoyt v. Hoyt, 112 N. Y. 493.

§ 288. **Notice of decree of revocation.**— If the decree revokes the probate, the surrogate must cause notice of the revocation to be immediately published, for three successive weeks, in a newspaper published in his county.⁴³ The former statute also required that personal notice should be served upon the executor, or administrator with the will annexed, and further provided that, upon such notice being served upon the executor or administrator, his powers and authority ceased, and he must account to the representatives of the deceased person, whose alleged will was contested, for all moneys and effects received; but he was not liable for any act so done in the collection of moneys or the payment of debts, after the service of the citation, and previous to the service of the notice of revocation.⁴⁴ But under the Code,⁴⁵ the cessation of the powers of the executor is made dependent upon the entry of the decree, instead of service of notice of the entry.

§ 289. **Appeal from decree.**— From the surrogate's decision on such a contest, an appeal lies to the Supreme Court in the same manner as if the decision had been made on the original application for probate.⁴⁶ But the appeal does not stay the execution of the decree.⁴⁷

⁴³ Co. Civ. Proc., § 2653.

⁴⁴ 2 R. S. 62, §§ 37, 38.

⁴⁵ §§ 2603, 2684. A removed or superseded representative, as long as he is liable for assets that have come into his hands, is amenable to process from the surrogate, calling him to account. (Gerould v. Wilson, 81 N. Y. 573.)

⁴⁶ Co. Civ. Proc., § 2570. See *Alston v. Jones*, 10 Paige, 98, as to appeal from such decree under the Revised Statutes.

⁴⁷ Co. Civ. Proc., § 2583. See *Halsey v. Halsey*, 3 Dem. 196; *Matter of Fernbacher*, 5 id. 219; 8 Civ. Proc. Rep. 349.

CHAPTER IX.

LETTERS TESTAMENTARY.

TITLE FIRST.

WHEN AND TO WHOM LETTERS ISSUE.

§ 290. **The probate and letters testamentary.**—The terms “probate” and “letters testamentary” are sometimes used as convertible, and pains have been taken to point out the differences between them.¹ No doubt can exist that they are essentially distinct under the Code of Civil Procedure, in which—to mention only a single provision—it is enacted that a decree granting or revoking probate of a will must also revoke the letters issued thereupon;² and under which the prescribed and only effect of the latter revocation is the cessation of the executor’s powers,³ the probate remaining unaffected. In attempting to exhibit the difference between these terms, under the Code, embarrassment is occasioned by the slender degree of resemblance. Letters testamentary are tangible written authorization to the executors, duly tested, signed by an officer, and sealed with the seal of the court.⁴ Probate is uniformly employed in an abstract sense, more or less closely allied to its etymological equivalent “proof,”⁵ viewed either as a process or as a result, and cannot be identified with any paper, record, or adjudication.⁶

§ 291. **Nomination of executor.**—The executor⁷ is the person named by the testator in his will to whom he confides the power

¹ See Wms. on Exrs. 255; Kirtland’s Surrogate, 46; Dayton on Surrogates (3d ed.), 212.

² Co. Civ. Proc., § 2684.

³ Co. Civ. Proc., § 2603.

⁴ Co. Civ. Proc., § 2590.

⁵ See Co. Civ. Proc., § 2476.

⁶ See “to admit to probate,” Co. Civ. Proc., § 2472, subd. 1; “to attend the probate,” § 2614; “presenting for probate,” § 2622; “contested probate,” § 2623.

⁷ The word “executor,” as used in a will, is a word of description of all the persons appointed by the will to the duty of executing its provisions. It, therefore, includes “executrix,” unless a contrary intention appears on the face of the will. The word “executrix” does not appear in the Revised Statutes. In *Mohe v. Norrie* (14 Hun. 138), the testator appointed his wife “executrix,” and his father-in-law and other males “executors of this my last

and authority to execute the provisions of the will, and the administration of his estate, or of some portion of it. Such person, if competent, is entitled, upon qualifying, to receive letters testamentary, as evidence of such authority. He is so entitled (1) when he is expressly named as executor in the will;⁸ or (2) when, although not expressly named as executor, the will shows the testator's intention that he should have the administration of the estate, or some portion of it; in which case he is called executor *by the tenor*;⁹ or (3) when he is named as executor by some person other than the testator under a power of appointment contained in the will.¹⁰ Where a will has been admitted to probate, letters testamentary will not be withheld from the person named in such will as executor on the ground that a paper purporting to be a codicil to such will, the validity of which is contested, has been offered for probate, by the terms of which another person is nominated as executor, the nomination of the original will not being expressly revoked.¹¹

will, etc., and trustees thereunder of my estate." In another place, he conferred certain powers upon his "executors," and appointed his "executors" guardians of his children, and conveyed property to them in trust. Held, that the testator, by the word "executors," intended to include therein the "executrix," who was, therefore, entitled to act as trustee and guardian.

8 "Unless testator has designated as executors of his will the persons asking to be appointed such, they cannot be appointed executors." (Matter of Schuyler, N. Y. Law J., Apr. 14, 1890.) In Matter of Cornell (17 Misc. 468, 41 N. Y. Supp. 255), testator's will provided that in case of the death of his executor, another person named should be his successor. Upon that event taking place the surrogate issued letters testamentary to such appointee.

9 Bayeaux v. Bayeaux, 8 Paige, 333; *Ex p. McDonnell*, 2 Brad. 32; *Ex p. McCormick*, id. 169; Hubbard v. Hubbard, 8 N. Y. 203. It is not necessary that the appointment of an executor should be made in so many words. Any provision in the will showing that the testator intended that the duties of an executor should be discharged by the person named is sufficient to constitute him an executor. Hence, where, by a will executed under the

French law, the testatrix constituted her husband her "general and universal legatee," and dispensed with his giving security—it appearing that by the law of France all the rights and duties of an executor devolve on such a legatee—held, that the husband must be deemed executor of the will, although not specifically named as such, and was entitled to letters testamentary. (Matter of Blanceau, 4 Redf. 151.)

As to the effect of the appointment of "the trustees for the time being" of a specified society, see Matter of Hardy, 2 Dem. 91.

10 Hartnett v. Wandell, 60 N. Y. 346; affg. s. c., *sub nom.* Alexander's Will, 16 Abb. Pr. (N. S.) 9, and overruling Bronson's Estate, 1 Tuck. 464. In Hartnett v. Wandell (*supra*), the words of the will were: "I nominate and appoint my wife executrix of this, my will, and request that such male friend as she may desire shall be appointed with her as coexecutor." Held, that letters should issue to the wife's appointee, though, *it seems*, the wife could not designate the coexecutor until she had herself qualified as executrix. See Rogers v. Rogers, 4 Redf. 521.

11 Stolzel v. Cruikshank, 4 Dem. 352. The pendency of a proceeding for the revocation of probate of a will, will not prevent the issue of letters testamentary.

§ 292. **Number of executors.**— There is no limitation of the number of persons who may be nominated executors, but, whatever the number, those who qualify and enter upon the discharge of their trust are regarded in law as one individual, except where each is appointed to take charge of particular property, or property situated in different States.¹² Different executors may be appointed for different States or countries.¹³ Executors may be appointed with separate functions, or to succeed each other in the event that the one first named shall die, become incapacitated, or unwilling longer to serve; or two persons may be appointed to act for a definite period, or during the minority, or during the absence from the country, of one appointed executor.¹⁴

§ 293. **Grant of letters by the court.**— The executor derives his appointment and his title to the estate from the will, but he is without substantial power until the surrogate grants him authenticated evidence of his title in the form of letters testamentary, upon the proof of the will. The surrogate is authorized to grant letters testamentary in three classes of cases, viz.: 1. Where the will has been proved before him.¹⁵ 2. Where it has been established by a final judgment in an action, and an exemplified copy thereof filed in his office.¹⁶ 3. Where a will of personal property has been proved in a foreign jurisdiction and letters have been

ary to the executor; but the executor will possess, pending the controversy, only limited powers similar to those specified in Co. Civ. Proc., § 2582. (*Bible Society v. Oakley*, 4 Dem. 450.)

¹² *Sherman v. Page*, 21 Hun, 59; *affd.*, 85 N. Y. 124. In that case, the testatrix appointed H. P. "my executor for carrying out the provisions of my last will and testament so far as they relate to parties and properties in this State (New York), and C. G. and D. J., my executors for everything so far as they relate to parties and property in the State of Michigan and elsewhere." H. P. never having taken out letters in Michigan, was held not accountable as executor appointed here, for property of the decedent situated without the State.

¹³ *Despard v. Churchill*, 53 N. Y. 192; *Sherman v. Page*, *supra*.

¹⁴ 3 Redf. on Wills, 53; 1 Wms. on Exrs. (6th Am. ed.) 280; *Re Langford*, L. R., 1 P. & D. 448. In *Fosdick v. Delafield* (2 Redf. 392), the will, after

naming two brothers of the testatrix as executors, added, "and in case both of my said brothers herein lastly above named, shall depart this life prior to my decease, or in case they shall both decline to act as such executors, then I hereby nominate and appoint"—here naming a son of each of the brothers. Both brothers survived the testatrix. One declined to act. The other qualified as executor, and both subsequently died. Held, that, there being nothing in the will to evince a controlling intention to keep the administration in the family, the court could not, on extrinsic evidence that both testatrix's brothers were advanced in age at the time the will was made, disregard the words "prior to my decease," and grant letters to a son of one of the brothers. Such words constitute a condition.

¹⁵ Co. Civ. Proc., § 2636.

¹⁶ Co. Civ. Proc., § 1863. See *ante*, § 134.

granted there, and an exemplified copy of the will, and also of the foreign letters, if any, are produced here.¹⁷

§ 294. **Selection of an executor under a power.**— Where the will contains a power, authorizing the selection of an executor, not named therein, the selection must be made, by the person appointed for that purpose, within thirty days after making the decree admitting the will to probate; in default whereof, the power of selection is deemed to have been renounced. Such selection must be made by an instrument in writing, designating the person selected, signed by the proper person, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or proved to the satisfaction of the surrogate, and filed in the surrogate's office. Where the will authorizes the person, so to be selected, to act with the executor or executors named therein, the issuing of letters must be delayed for thirty days, for the exercise of the power of selection, and, if the selection is so made, for five days thereafter,¹⁸ to enable any person interested to file objections to him; and if letters are not issued to the person so selected, the power of selection is deemed to be exhausted.¹⁹

TITLE SECOND.

RENUNCIATION AND ACCEPTANCE OF APPOINTMENT.

§ 295. **Right to renounce.**— Of course, any person named as executor in a will may refuse to enter upon the duties of the office. He cannot be compelled to take a grant of letters; but before letters will be issued to any other person than the one named executor, he must formally renounce his appointment, or be declared disqualified, though he may afterward, in certain cases, retract his renunciation.²⁰ The right to renounce the appointment is absolute, and the surrogate has no discretion or privilege to grant or refuse acceptance of it.²¹ *The right to resign* is another matter.

¹⁷ Co. Civ. Proc., § 2695, as amended 1888. See *post*, tit. 4 of this chapter.

¹⁸ Co. Civ. Proc., § 2640.

¹⁹ Co. Civ. Proc., § 2641. Testator appointed his son and wife executor and executrix respectively—adding that if the son died in the wife's lifetime, she might appoint another. The son died before testator, who made a codicil appointing another son as executor, and declared that the codicil should not alter the will further than as expressed. Held, that the codicil

did not impair the right of the widow to appoint, on the death of the second son during her lifetime. (Cuthbert v. Babcock, 2 Dem. 96.) See Hartnett v. Wandell, *ante*, § 291, note 10.

²⁰ Robertson v. McGeoch, 11 Paige, 640; Codding v. Newman, 63 N. Y. 639; Judson v. Gibbons, 5 Wend. 227; Bodle v. Hulse, id. 313; Dempsey's Estate, 1 Tuck. 51.

²¹ Casey v. Gardiner, 4 Bradf. 13. An agreement to renounce, made, though for a valuable consideration,

At common law, an executor having once accepted the office, could not resign it.²² The statute now confers upon the Surrogate's Court the power to accept the resignation of an executor or administrator, and to discharge him from the further execution of his trust, but the right to resign is not absolute.²³

§ 296. **Renunciation, how effected.**—A voluntary renunciation must be by an instrument in writing, signed by the executor, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or attested by one or more witnesses, and proved to the satisfaction of the surrogate, and filed and recorded in the surrogate's office.²⁴

§ 297. **Retraction of renunciation.**—At any time before letters have been issued to any other person, or, after they have been issued, if they have been revoked, or the person to whom they were issued has died or become a lunatic, and there is no other acting executor or administrator,—the person who renounced his appointment may retract, by an instrument signed, acknowledged, and filed, in like manner as the renunciation. But it is provided that the surrogate has a discretion in the granting of letters to the person so retracting his renunciation.²⁵ One who, beside being named executor, is also a devisee in trust under the will, having renounced, and letters having been issued to the other executors alone, cannot, on his subsequent retraction of his renunciation, be restored as a trustee, the trust having already vested in the executors who proved the will.²⁶

§ 298. **Exclusion on failure to qualify or renounce.**—Where the person named as executor does not qualify or renounce within

before the testator's death, and contrary to his expressed wishes, is void as being against public policy. (*Staunton v. Parker*, 19 Hun, 55.)

²² See *Flinn v. Chase*, 4 Den. 85.

²³ *Matter of Bernstein*, 3 Redf. 20. Where he has been permitted to resign, and has been discharged by the court, he cannot thereafter retract that resignation. (*Matter of Beakes*, 5 Dem. 128.)

²⁴ Co. Civ. Proc., § 2639, adopting 2 R. S. 70, § 8, except that under the Revised Statutes two witnesses were required. Having once become invested with the office, the executor may resign, but he cannot renounce the appointment under this section. (*Matter of Suarez*, 3 Dem. 164.) A declaration made in open court by an exec-

utor that he would renounce as executor, if objections to probate of the will were withdrawn, and consent to the issue of letters of administration to himself and another, which proposition was accepted and acted upon.—Held as effective as the execution of a formal renunciation. (*Matter of Baldwin*, 27 App. Div. 506; 50 N. Y. Supp. 872; 158 N. Y. 713.)

²⁵ Co. Civ. Proc., § 2639. See *Coddington v. Newman*, 63 N. Y. 639; *Matter of Cornell*, 17 Misc. 468; 41 N. Y. Supp. 255; *Matter of Clute*, 37 Misc. 710.

²⁶ *Matter of Stevenson*, 3 Paige, 420; *Matter of Van Schoonhoven*, 5 id. 559. See *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497.

thirty days after probate; or where a person, chosen by virtue of a power in the will, does not qualify or renounce within thirty days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce within five days after they are determined in his favor, or, where the objection can be obviated by giving a bond, within five days after the objection has been established,—the surrogate must, upon the application of any other executor, or any creditor or person interested in the estate, make an order requiring him to qualify within a time therein specified; and directing that, in default of so doing, he be deemed to have renounced his appointment.²⁷ Such order should be served personally, but if it cannot, with due diligence, be so served within the State, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person does not qualify within the time fixed, an order must be made and recorded reciting the facts, and declaring that he has renounced his appointment as executor.²⁸ The person thus failing to qualify or renounce may afterward apply for, and the surrogate may, in his discretion, grant, letters to him, unless letters have been already issued to another person, or, if issued, have been revoked, or the person taking them has died or become a lunatic, and there is no other acting executor or administrator.²⁹

§ 299. Only the executor named in letters can act.—Only the executor named in the letters issued by the court has any power or authority to act in that capacity. A person named in the will as an executor, and not named as such in the letters testamentary or in letters of administration with the will annexed, is deemed to be superseded by such letters, and consequently has no power or authority whatever as executor until he appears and qualifies.³⁰ Hence, in an action or special proceeding in favor of or against the executors in their representative capacity, the one to whom letters testamentary have not been issued is not a necessary party.³¹

§ 300. Acceptance and oath of office.—In case there is no objection to the competency of the executor, he should appear and take the oath of office forthwith upon the entry of the probate decree.

²⁷ Co. Civ. Proc., § 2642.

²⁸ Co. Civ. Proc., § 2642, as amended 1883.

²⁹ Co. Civ. Proc., §§ 2639, 2642.

³⁰ Co. Civ. Proc., § 2613, as amended 1893, adopting 2 R. S. 71, § 15.

³¹ Co. Civ. Proc., § 1818. See *Matter of Stevenson*, 3 Paige, 420; *Matter of Van Schoonhoven*, 5 id. 559; *Leggett v. Hunter*, 19 N. Y. 445; *Wever v. Marvin*, 14 Barb. 376.

The oath, which must be in writing, and to the effect that he will faithfully discharge the duties of his office, should be filed in the surrogate's office. The oath may be taken before any officer, within or without the State, who is authorized to take an affidavit. Where it is taken without the State, it must be certified as required by law, with respect to an affidavit to be used in the Supreme Court.³²

§ 301. Form of letters and their record.— Letters testamentary, like letters of administration and letters of guardianship, must be in the name of the People of the State. Where they are granted by a surrogate, or by an officer or person temporarily acting as surrogate, they must be tested in the name of the officer granting them, signed by him or by the clerk of the Surrogate's Court, and sealed with the seal of that court. Where they are issued out of another court, they must be tested in the name of the judge holding the court, signed by the clerk thereof, and sealed with his seal.³³ They must in all cases be recorded in a book kept for that purpose in the surrogate's office.³⁴

§ 302. When bond required of executor.— Unlike an administrator, an executor is not, in general, required to give a bond for the faithful discharge of the duties of his office. The will may, however, make the appointment of the executor conditional upon his giving a bond, and in that case the condition must be complied with before letters will issue. In such a case, the bond given should run to the legatees and not to the people, as ordinarily.³⁵ A *nonresident* executor is not required to give a bond, unless objection is raised on the ground of his nonresidence. If there is no objection to him, except his nonresidence, he is entitled to letters without giving a bond, "if he has an office within the State, for the regular transaction of business in person; and the will contains an express provision, to the effect that he may act without giving security."³⁶ The subject of official bonds is discussed in a subsequent chapter.

³² Co. Civ. Proc., § 2594. The officers who are authorized to administer the oath, either within or without the State, are enumerated in the Code, §§ 842, 844.

³³ Co. Civ. Proc., § 2590.

³⁴ Co. Civ. Proc., § 2498, subd. 2.

³⁵ Sullivan's Estate, 1 Tuck. 94.

³⁶ See Co Civ. Proc., § 2638. It is held in New York county that, in the absence of objections thereto by a

creditor or person interested in the estate, a nonresident executor is entitled to letters without giving security. (Matter of Vernon, 1 Civ. Proc. Rep. 304, note.) In Kings county it has been held both ways. (Matter of Demarest, 1 Civ. Proc. Rep. 302; Matter of Emery, 18 id. 365.) Upon the removal of an executor from this State, the surrogate must, upon application, revoke the letters testamentary—no

TITLE THIRD.

NECESSARY QUALIFICATIONS OF EXECUTOR.

§ 303. **Statutory disqualifications.**— The statute declares that “no person is competent to serve as an executor who, at the time the will is proved, is (1) incapable in law of making a contract; (2) under the age of twenty-one years; (3) an alien, not an inhabitant of this State; (4) who shall have been convicted of an infamous crime; (5) who, on proof, is found by the surrogate to be incompetent to execute the duties of such trust, by reason of drunkenness, dishonesty, improvidence, or want of understanding.”³⁷ And, in his discretion, the surrogate may refuse to grant letters to a person unable to read and write the English language.³⁸ The statutory disqualifications of administrators are similar, though not expressed in identical language; and the convenience of the reader will be consulted by referring here to the cases which have settled the construction of either statute.

§ 304. **Letters may issue to married women.**— Under the Revised Statutes,³⁹ a married woman could not be appointed an administratrix or guardian, and she could not act as an executrix and as such receive letters testamentary, unless her husband filed a written consent with the surrogate, thereby becoming responsible for her acts jointly with her. In 1863,⁴⁰ a married woman was permitted to receive letters of administration, on the same condition on which letters testamentary might issue to her, to wit,

bond having been given. (John's Estate, 20 Daily Reg., No. 136.) The will of testator nominated as two of its executors two residents of another State, expressly providing that they might act as such without giving security. The nominees were respectively the treasurer and cashier of a foreign manufacturing corporation, having its principal office in the city of New York, and attended daily thereat in such capacities during business hours. He'd, that they had “an office within the State for the regular transaction of business in person.” (Postley v. Cheyne, 4 Dem. 492; s. c. as Estate of Sterling, 9 Civ. Proc. Rep. 448; 1 St. Rep. 139.)

³⁷ 2 R. S. 69, § 3, as amended L. 1830, c. 230, § 17; L. 1873, c. 79, and by L. 1893, c. 686, made, with verbal

changes, a part of section 2612 of Co. Civ. Proc.

³⁸ L. 1867, c. 782, § 5; now incorporated in Co. Civ. Proc., § 2612. Before the passage of this statute, it was held that mere illiteracy did not authorize the surrogate to supersede the letters testamentary. (Emerson v. Bowers, 14 N. Y. 449.) The fact that the executor has but slight knowledge of the English language does not furnish sufficient ground for the revocation of his letters, it not appearing that the estate has suffered, or is likely to suffer, evil results from that cause. (Hassey v. Keller, 1 Dem. 577.) See Matter of Haley, 21 Misc. 777; 49 N. Y. Supp. 397.

³⁹ 2 R. S. 69, § 4.

⁴⁰ L. 1863, c. 362, § 4.

the written consent of her husband. It was not until 1867⁴¹ that she was declared capable of acting, without the consent of her husband, as executrix, administratrix, and guardian, and of receiving letters as such, as though she were a single woman.

§ 305. **Nonresident aliens.**— Only those are excluded on the ground of alienage and noninhabitaney who are both aliens — *i. e.*, not citizens of the United States — and nonresidents of this State, although named in the will as a legatee.⁴² “Aliens,” as used in the statute, means those born out of the jurisdiction of the United States, and who have not been naturalized; not citizens resident of another State.⁴³

§ 306. **Removal of disability.**— Where the disability of a person under age, or an alien, is removed before the complete execution of the will, — *i. e.*, the complete administration of the estate, — he is entitled to apply for, and receive, *supplementary* letters in the same manner as the original letters, and is authorized to join in the execution of the will, with the persons previously appointed.⁴⁴

§ 307. **Drunkenness, dishonesty, improvidence, etc.**— Drunkenness, when not so gross as to justify a finding that the person is an habitual drunkard, under the statute, will not preclude the issue of letters.⁴⁵ The “infamous crime” must be one punishable with death, or by imprisonment in a State prison, and the *conviction* must have been had in a court of this State, for an offense against the laws thereof. A conviction in a court of another State, of the crime of larceny, is not evidence of *improvidence* on the part of the convict, which would justify an adjudication, by the surrogate, of incompetence to execute the duties of an administrator.⁴⁶ Before “dishonesty” was made a disqualification, by the amendment of 1873,⁴⁷ no degree of legal or moral guilt or delinquency rendered a person *incompetent*, unless

⁴¹ L. 1867, c. 782, § 2. See *Bunce v. Vandergrift*, 8 Paige, 37; *Matter of Elgin*, 1 Tuck, 97; *Whitney v. Coapman*, 39 Barb. 482. After the Act of 1867, the provision of L. 1837, c. 460, § 34, that the surrogate might revoke the appointment of an executrix marrying after her appointment, became obsolete, and has been repealed. (L. 1880, c. 245.) See *Woodruff v. Cox* (2 Bradf. 153), as to effect of marriage after letters.

⁴² *Walsh's Estate*, 20 Daily Reg., No. 151; *Matter of Burk*, 1 St. Rep. 316.

⁴³ *McGregor v. McGregor*, 3 Abb. Ct. App. Dec. 92; 1 Keyes, 133.

⁴⁴ Co. Civ. Proc., § 2613, as amended 1893.

⁴⁵ *Elmer v. Keehele*, 1 Redf. 472; 1 Tuck, 52. See *Matter of Cady*, 36 Hun, 122; *Matter of Manley*, 12 Misc. 472; 34 N. Y. Supp. 258; *Matter of Reichert*, 34 Misc. 288; 69 N. Y. Supp. 644.

⁴⁶ *O'Brien v. Neubert*, 3 Dem. 156.

⁴⁷ L. 1873, c. 79, § 1.

he had been actually convicted of an infamous crime, upon indictment or other criminal proceeding;⁴⁸ nor did immoral habits or offenses of moral turpitude disqualify.⁴⁹ As commonly understood, dishonesty may be predicated of many acts not punishable under the criminal law. A crime is not necessary to disqualify a person. On the other hand, dishonest conduct, such as breaking a contract, pirating a trademark, making a false claim to property and the like, would not disqualify. But the term would include, we think, the case of a debt fraudulently contracted or incurred in a fiduciary relation for which the party was held to bail in a civil action. So it might include an assignment of property adjudged to have been made with intent to cheat and defraud creditors. It would seem to mean a "dishonesty" in money matters. Mere lying or even perjury, of itself, would not, we think, be held to be such disqualifying dishonesty. It may be properly remarked here that general reputation for dishonesty ought not to be considered sufficient proof of the fact, but particular acts should be shown, from which the court may draw its conclusion. The "improvidence" contemplated by the statute is that want of care or foresight in the management of property which is likely to endanger the estate or diminish its value,⁵⁰ and refers to such habits of mind and body as render a man generally, and under all ordinary circumstances, unfit to serve.⁵¹ The fact that a man is a professional gambler is presumptive evidence of such improvidence,⁵² but mere insolvency is not,⁵³ nor the fact that he is a debtor to the estate.⁵⁴ A "want of understanding" is something more than a lack of information on legal subjects or business matters;⁵⁵ and it has been held that an ill regulated temper and a want of self control, even though excessive, are not a good objection to a grant of letters.⁵⁶ We shall revert to this subject in speaking of proceedings to revoke letters for the incompetence of the executor.

48 Coope v. Lowerre, 1 Barb. Ch. 45. See Matter of Cutting, 5 Dem. 456. The only admissible evidence of the conviction of a crime is the record of the conviction. (Harrison v. McMahon, 1 Bradf. 289.)

49 See McGregor v. McGregor, 3 Abb. Ct. App. Dec. 92; 1 Keyes, 133.

50 Coope v. Lowerre, 1 Barb. Ch. 45; Coggs v. Green, 9 Hun. 471.

51 Emerson v. Bowers, 14 N. Y. 449; Matter of Manley, *supra*.

52 McMahon v. Harrison, 6 N. Y. 443.

53 Matter of Post, Dayt. on Surr. (1st ed.), Appendix, 1. See Shields v. Shields, 60 Barb. 59; Senior v. Ackerman, 2 Redf. 302; Martin v. Duke, 5 id. 597; Grubb v. Hamilton, 2 Dem. 414.

54 Churchill v. Prescott, 2 Bradf. 304; Matter of Morgan, 2 How. Pr. (N. S.) 194.

55 Shilton's Estate, 1 Tuck. 73. See Matter of Berrien, 3 Dem. 263.

56 McGregor v. McGregor, 3 Abb. Ct. App. Dec. 92; 1 Keyes, 133.

§ 308. **Adversity of interest.**—The grounds of disqualification given in the statute, and those only, can be successfully urged against the appointment of one who is entitled to priority under the statute. Adverse and conflicting interests are not statutory disqualifications.⁵⁷

§ 309. **Staying issue of letters.**—The executor may demand, upon his appearing and qualifying, the immediate issue of letters to him, on the entry of the decree admitting the will to probate.⁵⁸ No special application in writing or order for the letters is required. Before, however, the letters are actually issued, any person interested in the estate, including a creditor, may procure a stay of their issue by filing an affidavit. The affidavit should set forth, in addition to a statement of his interest, the legal objections to the competency of the executor, or that the affiant is advised and believes that sufficient objections exist, and that he intends to file a specific statement of the same. Thereupon the surrogate is required to stay the grant of letters for at least thirty days, or until the matter is sooner disposed of.⁵⁹ The specification or statement, duly verified by the objector, or his attorney, may, of course, be made in the first instance, dispensing with the affidavit. No time is specified for the filing of the specification, after the affidavit, but if not filed before the stay expires, letters will issue of course. If the objections are directed to the competency of only one of several executors, the issue of letters to the others, not objected to, will not be stayed.⁶⁰

§ 310. **Disposition of objections.**—The surrogate must inquire into an objection duly filed, for which purpose he may receive proof, by affidavit or otherwise, in his discretion; and if it appears that there is a legal and sufficient objection to any person “named as executor in the will,” the letters will not be issued

⁵⁷ *O'Brien v. Neubert*, 3 Dem. 161; *Matter of Shipman*, 25 St. Rep. 5; *Matter of Cutting*, 5 Dem. 457; *Matter of Place*, 4 id. 487; 105 N. Y. 629. In *Matter of Cumming* (N. Y. Law J., Dec. 12, 1891), objection was made to the executrix and testamentary trustee that she claimed the whole estate by virtue of an alleged assignment made to her by the testator. She alleged that it was not, and never was, her intention to take the estate under the assignment; that she intended to respect the wishes of testator as indicated in his will, and that her claim

under the assignment was only insisted on because of the threat of a son to contest the will. The objection was overruled. Executors are not precluded from acting as trustees upon other trusts for other beneficiaries, if the transaction is not inconsistent with the duties they owe as executors. (*Barry v. Lambert*, 98 N. Y. 300.)

⁵⁸ Co. Civ. Proc., § 2636.

⁵⁹ Co. Civ. Proc., § 2636.

⁶⁰ It was otherwise under the former statute. (*McGregor v. Buel*, 24 N. Y. 167.)

to him, except in certain cases hereinafter mentioned.⁶¹ The statute does not define “a legal and sufficient objection;” but it evidently includes not only cases of absolute disqualification as above mentioned, but others; such as precarious circumstances, or nonresidence, which are made grounds for the revocation of letters testamentary.⁶²

§ 311. **Obviating objections by giving a bond.**—Although an objection against an executor has been established to the satisfaction of the surrogate, he may entitle himself to letters by giving the usual bond, in the following cases: “1. Where the objection is, that his circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate. 2. Where the objection is, that he is not a resident of the State; and he is a citizen of the United States.”⁶³ Where objection is made under the first head, it is not material to inquire whether the testator was aware of the want of responsibility in the executor at the time of making the will. If he has been so improvident as to commit the administration of his estate to one whose circumstances are such as not to afford adequate security for the faithful discharge of his trust, the court must interfere for the protection of the estate.⁶⁴ The executor from whom a bond is required, must qualify, and his sureties must justify, as in the case of an administrator giving bonds. In fixing the penalty of the bond, the surrogate must take into consideration the value of the real property or the proceeds thereof, which may come into the executor’s hands under the will.⁶⁵

TITLE FOURTH.

ANCILLARY LETTERS ON FOREIGN PROBATE.

§ 312. **When granted.**—It has always been the practice of our probate courts, independently of any statutory authority, to acknowledge the foreign probate of a will, so far at least as to follow the decree of the foreign court, in the grant of probate, and to issue letters testamentary here. This was done upon the production of a duly exemplified copy of the probate granted by

⁶¹ Co. Civ. Proc., § 2637. If objection can be made only to an executor named in the will, the section does not apply to an executor who is not named, but only constructively appointed.

⁶² See c. XIV, *post*.

⁶³ Co. Civ. Proc., § 2638. See *Montfort v. Montfort*, 24 Hun, 120.

⁶⁴ *Wood v. Wood*, 4 Paige, 299.

⁶⁵ Co. Civ. Proc., § 2645. See c. XV.

the proper court of the testator's domicile. Precedents of this practice are found in the records of the colonial government of this State of a remote date.⁶⁶ The practice has been confirmed by statute. The Code of Civil Procedure, revising and amending the former statutes on this subject, provides, that where a will of personal property, made by a person who resided without the State⁶⁷ at the time of the execution thereof, or at the time of his death, has been admitted to probate by a competent court, within the foreign country, or within the State or Territory of the United States, where it was executed,⁶⁸ or where the testator resided at the time of his death, the Surrogate's Court having jurisdiction of the estate must, upon an application duly made, accompanied by a copy of the will, and of the foreign letters, if any had been issued, duly authenticated, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.⁶⁹ The application must be made upon an exemplified copy of the will, not on the original will itself.⁷⁰

It will be noticed that the Code (§ 2695) gives the surrogate jurisdiction, in a proper case, to grant not only ancillary letters testamentary, but also ancillary letters of administration with the will annexed, as the case requires. A foreign administrator with the will annexed may, therefore, apply here for ancillary letters; if the letters testamentary issued in another State, on which ancillary letters testamentary have been granted here,

⁶⁶ See *Isham v. Gibbons*, 1 Bradf. 69. As to the powers of a foreign executor or administrator to take charge of the estate here, to collect and release debts, etc., consult *Vroom v. Van Horne*, 10 Paige, 549; *Brown v. Brown*, 1 Barb. Ch. 189; *Lawrence v. Lawrence*, 3 id. 71; *Williams v. Storrs*, 6 Johns. Ch. 353; *Doolittle v. Lewis*, 7 id. 49; *Chapman v. Fish*, 6 Hill, 554. See § 518, *post*.

⁶⁷ See *Matter of Thompson*, 1 Civ. Proc. Rep. 264. The court must be satisfied that the testatrix, at the time of her death or of the execution of the will, resided without the State; the motion will not be granted on affidavits, but a reference should be had to ascertain the facts. (*Matter of Cavin*, 1 Connolly, 117.)

⁶⁸ A Surrogate's Court of this State has no power to grant ancillary letters upon a foreign probate of a will, made by a nonresident of the State in

which it was admitted to probate and not executed within that State. (*Taylor v. Syme*, 162 N. Y. 513; 31 Civ. Proc. Rep. 1.)

⁶⁹ Co. Civ. Proc., § 2695, as amended 1888. As to manner of authentication, see § 2704, as amended 1888. Co. Civ. Proc., § 2705, was repealed by L. 1888, c. 495. Ancillary letters may be issued on a will admitted to probate by the court of a United States consulate-general. (*Matter of Taintor*, 5 Redf. 79.) Before the amendment of 1888, besides a copy of the will and copy of the letters, the judgment or decree admitting it to probate had to be produced. (*Brown v. London*, 4 Civ. Proc. Rep. 11.) The effect of the amendment is to supersede, among other cases, *Matter of Hudson*, 5 Redf. 333; and, in part, *Matter of Thompson*, 1 Civ. Proc. Rep. 264.

⁷⁰ *Matter of Thompson*, 1 Civ. Proc. Rep. 264.

have been revoked, the latter fall with the revocation of the foreign letters; and the administrator with the will annexed appointed by the foreign tribunal, on the removal of the executors, is entitled to letters here without notice to the deposed executors.⁷¹

§ 313. **Application, where made.**—The application must be made to “the Surrogate’s Court having jurisdiction.” Jurisdiction is acquired by the existence of assets in the county of the surrogate.⁷² The word “assets” is defined to signify “personal property applicable to the payment of the debts of the decedent.” It is the actual existence or location of such personal property in the county which determines the question of jurisdiction; and where the asset consists of a bond belonging to the estate, the county in which the instrument actually is, and not the county where the obligor resides, is the proper county in which to apply in such a case. Where, therefore, a resident of another State died there, leaving a will which was admitted to probate there, and owning a bond in a county of this State, the Surrogate’s Court of that county was held to be the “court having jurisdiction of the estate,” for the purpose of issuing letters, under the original of the foregoing provision.⁷³ As the statute which relates to the grant of ancillary letters on foreign probate applies only to wills of personal property, it is not necessary upon an application to show that the will in question was executed according to the laws of this State, nor is it necessary that letters should have been granted upon the will, in the State where it was admitted, but the petition must show that the surrogate has jurisdiction.⁷⁴ The petition should set forth the names of, and (if known) the indebtedness due, or claimed to be due, to creditors residing in this State; a failure to do so being fatal to the application.⁷⁵ The statute relating to taxable transfers⁷⁶ provides that every petition for ancillary letters, whether testa-

⁷¹ *Matter of Gilleran*, 50 Hun. 399. *Matter of Langbein*, 1 Dem. 448. The fact that the petition states that the will was executed in the State where probate was granted, will not confer jurisdiction, where the transcript of the record which accompanied it showed the fact to be otherwise. (Taylor v. Syme, 162 N. Y. 513; 31 Civ. Proc. Rep. 1.)

⁷² *Evans v. Schoonmaker*, 2 Dem. 249; *Hendrickson v. Ladd*, id. 402. An appointment is proper, though the only asset is a claim against the applicant’s husband then in litigation, which had resulted in a judgment in his favor from which an appeal was pending. (*Matter of Place*, 4 St. Rep. 533.)

⁷³ *Beers v. Shannon*, 73 N. Y. 292. *Estate of Winnington*, 1 Civ. Proc. Rep. 267.

Place, *supra*.

⁷⁴ For requisite facts to give jurisdiction, see Co. Civ. Proc., § 2476;

⁷⁵ *Hendrickson v. Ladd*, 2 Dem. 402; L. 1896, c. 908, § 229, as amended by L. 1901, c. 173.

mentary or of administration, shall set forth the name of the county treasurer or the State comptroller (according as the office of appraiser is salaried or otherwise), and a true and correct statement of all the decedent's property in the State and the value thereof.

§ 314. **The hearing; citation, etc.**—As the chief object of the statute authorizing ancillary administration is to protect the claims of domestic creditors,⁷⁷ the surrogate is required, upon the presentation of a petition for ancillary letters upon a foreign probate, to ascertain, to his satisfaction, whether any creditors, or persons claiming to be creditors, of the decedent, reside within the State; and if so, the name and residence of each creditor, or person claiming to be a creditor, so far as the same can be ascertained. Unless such creditors shall file duly acknowledged waivers of the issuance and service of citation, he must thereupon issue a citation, directed to each person whose name and residence have been so ascertained; and also directed generally to all creditors, or persons claiming to be creditors, of the decedent. Any such person, although not cited by his name, may appear and contest the application, and thus make himself a party to the special proceeding.⁷⁸ The citation should, under the Transfer Tax Law, also be issued to, and served upon, the county treasurer in counties in which the office of appraiser is not salaried, and in other counties, the State comptroller.⁷⁹ The personal names and residences of the creditors, not the names of the firms of which they are members, must be given.⁸⁰

§ 315. **To whom letters will be granted.**—Where the will specially appoints one or more executors, with respect to personal property situated within this State, the ancillary letters testamentary must be directed to the person so appointed, or to those who are competent to act and qualify. If all are incompetent, or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, will be "directed to the person named in the foreign letters; or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files, with his petition, an instrument, executed by the foreign executor, or administrator, or other person entitled as aforesaid; or, if they are two or more, by all who have quali-

⁷⁷ *Moyer v. Weil*, 1 Dem. 71.

⁷⁹ L. 1896, c. 908, § 229, as amended

⁷⁸ Co. Civ. Proc., § 2698, as amended by L. 1901, c. 173.

⁸⁰ *Matter of Thompson*, 1 Civ. Proc. Rep. 264.

fied and are acting; and also acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters.”⁸¹ In that case the surrogate must, if the petitioner is a fit and competent person, issue such letters to him. Where two or more persons are named in the foreign letters, or in an instrument executed as above prescribed, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate’s satisfaction, the decree so directs.⁸²

§ 316. **Penalty of the bond required.**—The names of creditors are required to be ascertained *before* the issue of citation, so that the same when issued may be served on them; after the return of the citation, duly served, the *amount of debts* due or claimed to be due from decedent to resident creditors are then to be ascertained, as nearly as possible, by the court, with a view of fixing the penalty of the bond to be given by the ancillary administrator. The policy of our statute in respect to the security to be exacted of an ancillary administrator, is directed to insuring the distribution to the creditors of the intestate, residing here, of their ratable share of his estate. Such being the case, it has been thought that a bond “in a sum not exceeding twice the amount which appears to be due from the decedent to residents of this State,”⁸³ was all that the court could require of an ancillary executor or administrator;⁸⁴ but it is now settled that the surrogate’s power is not limited to requiring a bond in that penalty, but he may require a bond in a penalty of double the value of the personal property in this State, the statute intending to give a discretion to modify the general rule with regard to the amount of the penalty of an administrator’s bond.⁸⁵

§ 317. **Assets here, how disposed of.**—It is made the ancillary executor’s duty, “unless he is otherwise” directed, to transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the State or Territory where the principal letters were

⁸¹ Co. Civ. Proc., § 2697.

⁸² The power of the courts here, over the person to whom the ancillary letters are issued, and his rights, powers, duties, and liabilities, will be considered hereafter. We shall also have occasion to speak of the rights, etc., of foreign executors, etc., who have not

taken out ancillary letters here. See c. XVII, *post*.

⁸³ Co. Civ. Proc., § 2699.

⁸⁴ Matter of McEvoy, 3 Law Bul. 31; Matter of Musgrave, 5 Dem. 427.

⁸⁵ Matter of Prout, 128 N. Y. 70; 38 St. Rep. 257.

granted, to be disposed of pursuant to the laws thereof. He may be directed otherwise to dispose of such property, either in the decree awarding the letters, or in a decree made upon an accounting, or by an order of the surrogate made during the administration of the estate, or by the judgment or order of a court of record in an action to which the administrator is a party; and money or other property transmitted to the intestate's domicile, at any time before he is so directed to retain it, must be allowed to him upon an accounting.⁸⁶ It is discretionary whether the court will direct administration upon local assets, or will order their transmission to the foreign jurisdiction.⁸⁷

§ 318. **Rights, powers, etc.**— The rights, powers, duties, and liabilities of an ancillary executor or administrator, where not specially regulated, are governed by the rules contained in the Code applying to a domestic executor or administrator in chief,⁸⁸ unless a different intent is therein expressed or implied; except that he has no power or duty in respect to the disposition of his intestate's real property situated here, for the payment of debts or funeral expenses.⁸⁹ While it is true that the administration of the decedent's domicile is the principal one, and others ancillary only, yet, where the former administration has been completed by the distribution of the assets, and the principal administration has been discharged, it may be said, we think, that the ancillary administrator here becomes, to the extent of the assets in his hands, a principal administrator, with full powers as such. The Surrogate's Court, or any court of this State, which has jurisdiction of an action to procure an accounting, may, in a proper case, by its judgment or decree, direct the ancillary executor or administrator to pay, out of the money or the avails of the property received by him under the ancillary letters, and with which he is chargeable under his accounting, the debts of the decedent due to creditors, residing within the State; or, if the amount of all the decedent's debts, here and elsewhere, exceed the amount of all the decedent's personal property applicable thereto, to pay such a

⁸⁶ Co. Civ. Proc., § 2700. See Matter of Conkling, 15 St. Rep. 748.

⁸⁸ Smith v. Second Nat. Bank, 169 N. Y. 467; 62 N. E. 577. In that case

⁸⁷ Despard v. Churchill, 53 N. Y. 192; Matter of Hughes, 95 id. 55; Matter of Hegemann, 22 Daily Reg., 192.

⁸⁹ Co. Civ. Proc., § 2702. Ancillary letters do not authorize the sale of real property. (Hendrickson v. Ladd, 2 Barb. 602; Cummins v. Banks, 2 Barb. 602; Trimble v. Dzieduzyki, 57 How. Pr. 208. See Matter of Dunn, 39 App. Dem. 402.)

Div. 510. Sorzano v. Coudert, 28 Misc. 677.

sum to each creditor, residing within this State, as equals that creditor's share of all the distributive assets, or to distribute the same among next of kin, or otherwise dispose of the same, as justice requires.⁹⁰

The office pertains to personal property only. Hence an ancillary executor of a will, containing a power of sale of real estate, which he executed, is not entitled, on his accounting, to commissions on the proceeds, inasmuch as he made the sale as the donee of a power in trust, and not by virtue of his office as ancillary executor.⁹¹

TITLE FIFTH.

LETTERS TO TESTAMENTARY TRUSTEES.

§ 319. **Executor's and trustee's functions distinguished.**—The office of an executor, and that of a testamentary trustee, are essentially distinct, although not unfrequently the same person is appointed both executor and trustee. In the former capacity, it is his duty to collect the property and pay the debts and legacies; in the latter, he is called upon to invest and manage a particular fund or trust estate, in accordance with the directions of the will. Where the will indicates the intention of the testator to give his trustees a distinct and independent character, the probate of the will does not make the executors trustees also, unless they accept the trust as such and qualify accordingly.⁹² But where the will appoints a person executor, and then imposes upon him, as such, the execution of a trust, then the appointee, by proving the will and qualifying as executor, will be deemed to have accepted the trust; and he is accountable in each capacity separately. It is as if two different persons had been appointed to the two offices. But there is nothing to prevent a person who is named both executor and trustee from accepting one office and renouncing or disclaiming the other.⁹³ The presumption of an acceptance of a trust, arising from the acceptance of the office of executor may be overcome by proof that

⁹⁰ Co. Civ. Proc., § 2701. See *Suarez v. The Mayor*, 2 Sandf. Ch. 173; *Parsons v. Lyman*, 20 N. Y. 103; *Despard v. Churchill*, 53 id. 192.

⁹¹ *Matter of Deitsch*, N. Y. Law J., June 25, 1890.

⁹² *De Peyster v. Clendining*, 8 Paige, 295. As used in the Code, a "testamentary trustee" includes every person except an executor, an administrator with the will annexed, or a

guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will. It also includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator. (Co. Civ. Proc., § 2514, subd. 6.)

⁹³ *Wms. on Exrs.* (6th Am. ed.) 1894, note 1.

the trust was declined, and one may do this as effectually by words or acts, without deed, as by a deed.⁹⁴

Until 1850, Surrogates' Courts did not possess jurisdiction, by statutory provision at least, over testamentary trustees as such. The jurisdiction has been extended from time to time since that date, and is greatly enlarged by the Code of Civil Procedure. A statement of the nature and limits of this new jurisdiction is reserved for future consideration.⁹⁵ It is proper, however, to speak in this place of the authority of the court to make a grant of letters to testamentary trustees.

§ 320. Executor need not separately qualify as trustee.—As was said, above, a person who accepts the office of executor by qualifying and receiving letters will be deemed by that act to have accepted the duty of executing any trusts which the will has confided to him. He is not required to take any additional oath of office; nor is it necessary that the letters testamentary directed to him, should designate his character or function as trustee, as distinguished from that of executor. So also his bond as executor, where one is required of, and given by him, will be held as security for the faithful performance of his duties as trustee. In case, however, the will contemplates that the executor *as such* is to perform only the ordinary duties of an executor, and that when the estate is settled by him, another duty is to arise, to be performed either by him or by another, then, it is said, the bond of the executor is not security for those further duties.⁹⁶ The designation of persons named to execute a will as “trustees” does not constitute them such, unless the will creates trusts for them to execute, but in order to ascertain the intention of the testator, the whole will and all its parts must be taken into consideration. A provision in a will for qualification by persons therein designated “executors and trustees,” negatives the infer-

⁹⁴ In *Green v. Green* (4 Redf. 357), A., B., and C. were appointed executors of a will, and A. and B. were also appointed therein trustees of a fund, to pay the interest thereof to D. for life, with power to make advances to him out of the principal. A. alone qualified as executor. D. objected to A.'s acting as trustee, and the fund was, at D.'s request, held and managed by B., who paid D. the interest and part of the principal. Upon B.'s death, A. advanced, out of his own funds, money for the support of D. Upon a motion to compel A. to pay

the interest of the fund to D., and to account, it was held that A., by accepting the office of executor, had not, under the circumstances of this case, assumed the duties of trustee; and never having received or intermeddled with the trust fund, he was not liable therefor to the beneficiary: that the payment by A., out of his own pocket, of money to D., for his support, was immaterial.

⁹⁵ See c. XVII. *post*.

⁹⁶ *Perry on Trusts*, § 262, and cases cited.

ence of an intention to constitute a trust, in the technical sense of that word.⁹⁷

§ 321. **Letters of trusteeship not necessary.**—A different question arises in case the office of trustee is conferred by the will upon a person other than the executor. The will may specifically devise or bequeath a part of the estate to one person, in trust for particular objects, and confide the remainder of the estate to another, as executor, for general administration; or it may confide the whole estate to the executor, to collect the same, and, after paying debts and legacies, to hand over the residuum or a part of it, to another person, in trust, to invest and manage. In the latter case, the trustee does not require, as evidence of his authority to receive it, any formal grant of letters by the surrogate. The executor, before paying over the fund, will, for his own protection, see to it that the trustee is competent and qualified to accept the trust. Having once accepted it, he thenceforth becomes subject to the direction and control of the Surrogate's Court, and may be required, in a proper case, to furnish security and to render an account of his proceedings as trustee. The statute nowhere confers upon Surrogates' Courts any authority to issue letters to a testamentary trustee, nor to appoint such a trustee, except in the cases of the resignation, death, lunacy, or removal of a testamentary trustee, when the trust has not been fully executed. They may, in such cases, "appoint his successor."⁹⁸ We believe there is no precedent of a grant of letters of trusteeship, upon the probate of a will, to a person other than the executor; nor of any proceeding in the Surrogate's Court, similar to those in the case of executors, to compel a person, named trustee in a will, to appear and qualify within a time stated, or be superseded. The remedy of the *cestuis que trust*, in such a case, is in the law courts. Nor, it would seem, has the Surrogate's Court any authority to accept the renunciation or disclaimer of a person named trustee, and appoint another in his stead; nor, to appoint one to fill the place of a nominated trustee who died before the probate of the will. The court can appoint only "a successor" of a person who has once been trustee.⁹⁹

⁹⁷ Bacon v. Bacon, 4 Dem. 5.

5 Redf. 466; Matter of Post, 30 St.

⁹⁸ Co. Civ. Proc., § 2818. As to appointment of a successor to a deceased sole trustee of an *express trust*, see L. 1882, c. 185. See also Matter of Clark,

Rep. 217.

⁹⁹ Under L. 1882, c. 185, entitled "An act in relation to trustees of personal estates," and L. 1884, c. 408,

§ 322. **On appointing a successor.**—The decree appointing the successor to carry out the unexecuted trusts of the will is, of itself, a sufficient warrant of authority to the trustee to act, and vests the trust estate in him, without the issue of formal letters, which are merely evidence of his authority, and not the source of it. Without doubt, however, the surrogate may, and in some cases it may be desirable that he should, upon application, issue formal letters to the successor thus appointed, upon his acceptance of the appointment, and qualifying. A bond may be required of such appointee in cases where an executor would be required to furnish security;¹ and he may be required to subscribe and file an oath of office, although the statute is silent on the subject.

TITLE SIXTH.

FORCE AND EFFECT OF LETTERS.

§ 323. **Reckoning time upon successive letters.**—Where it is prescribed that any act, with respect to the estate of a decedent, must or may be done within a specified time after letters are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, under section 2684 of the Code, or by reason of the want of power in the Surrogate's Court to issue them for any cause.²

§ 324. **Priority among different letters.**—The person or persons to whom letters testamentary, or letters of administration, are first issued, have sole and exclusive authority, as executors or administrators, pursuant to the letters, until the letters are regularly revoked. They are entitled to demand and recover from any person, to whom letters upon the same estate are afterward issued by any other Surrogate's Court, the decedent's property in his hands. But the acts of a person, to whom letters were afterward issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding, com-

re-enacting Co. Civ. Proc., § 2818, the Supreme Court and Surrogates' Courts have concurrent jurisdiction over the appointment of a successor to a deceased sole testamentary trustee. (Matter of Valentine, 3 Dem. 563.)

¹ Co. Civ. Proc., § 2815; Matter of

Burke, 1 St. Rep. 316; Matter of Sistar, N. Y. Law J., Oct. 25, 1890. The proceedings for the removal of a testamentary trustee are detailed in c. XIV. tit. 4. *post*.

² Co. Civ. Proc., § 2593. See Slocum v. English, 62 N. Y. 494.

menced by him, may be continued by and in the name of the person or persons to whom the letters were first issued.³

§ 325. **Effect of letters as evidence.**—The subject of the conclusive effect of a judicial determination of a Surrogate's Court, in matters of probate and administration, has already been discussed.⁴ In regard to the effect of the letters, as evidence of the authority of those to whom they are issued, the statute declares that, except in the case of different letters, as above provided for, letters testamentary are, like letters of administration, and letters of guardianship, when granted by a court or officer having jurisdiction to grant them, "conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked."⁵

³ Co. Civ. Proc., § 2592.

Crozier v. Cornell Steamboat Co., 27

⁴ See *ante*, § 247 *et seq.*

Hun. 215; Brown v. Landon, 30 id. 57;

⁵ Co. Civ. Proc., § 2591; Abbott v. Sullivan v. Tioga R. R. Co., 7 St. Rep. Curran, 98 N. Y. 665; Lombard v. 627; 12 Civ. Proc. Rep. 301. Columbia Steam Nav. Co., 84 id. 48;

CHAPTER X.

ADMINISTRATION WITH THE WILL ANNEXED.

§ 326. **In general.**— In the preceding chapter, we considered the case of a decedent leaving a will which authorizes the selection of, or nominates, as executor, a person who is competent and willing to serve, and does serve, in that capacity. But cases may arise where the will fails to appoint an executor, or where the appointment fails to take effect, or where the executorship becomes vacant before the personal estate of the testator is completely administered. The administration of the estate, under the directions of the will, is not affected by the omission to appoint an executor, or by the failure of the appointment to take effect,¹ or by the office of executor becoming vacant.² In such a case, however, it becomes necessary for the surrogate to appoint a suitable person to perform the will of the testator, so far as it properly can be done by one to whom he has not confided the trust. The person so appointed receives letters of administration with the will annexed,³ and thereupon proceeds

¹ In each case the deceased, in the language of the books, is said to die *quasi intestatus* (Wms. on Exrs. 461), but that phrase does not imply that the testator did not make a valid disposition of all his property. The technical distinction between a will and a testament was that the appointment of an executor was essential to the latter, and it was anciently even held that, without the appointment of an executor, a will was void. (Ib.)

² Where the estate of a decedent has been brought under the jurisdiction of the Supreme Court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court, in relation to the estate, a receiver so appointed is

the successor in interest of the surviving executor; and has, subject to the direction of the court, the like power as an administrator with the will annexed. (Co. Civ. Proc., § 1869, as amended 1895; revising L. 1863, c. 466, § 1.)

The original act was held not to supersede the power or duty of the surrogate to appoint an administrator with the will annexed, even after the appointment, by the Supreme Court, of a receiver of the same estate. (De Pau's Estate, 1 Tuck. 290.)

³ Where an administrator of the estate of an intestate dies before he has administered all the effects, the grant of letters is entitled "administration *de bonis non*," — i. e., administration of the goods, etc., left unadministered. This phrase should not be used with respect to a person appointed to succeed either an executor, or an administrator with the will annexed, as the latter term is the proper appellation of such an officer. (See Co. Civ. Proc., § 2643.)

to administer the personal estate. Administration with the will annexed is frequently distinguished, in the statutes, from an ordinary administration in case of intestacy; but the term "administrator," when used in the statute, unless a different meaning is expressly or impliedly indicated, is to be considered as including an administrator with the will annexed, especially where this construction is necessary to secure the control of the surrogate, and the just and proper responsibility of the administrator.⁴ For this purpose, he has the ordinary powers of an administrator appointed in a case of intestacy, so far as they do not conflict with the directions of the will; but he does not, by his appointment, acquire, in every instance, the rights and powers conferred by the will on the person who is nominated, or whose selection is authorized thereby.⁵

§ 327. **When letters are issuable.**—The cases in which the surrogate has power to appoint an administrator with the will annexed are specified in the Code. He is authorized, and, upon proper application, is required, to make such an appointment, if no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time, by reason of death,⁶ incompetency adjudged by the surrogate,⁷ express renunciation,⁸ or renunciation implied from failure to qualify, or to

⁴ *Ex p. Brown*, 2 Bradf. 22.

⁵ The principal distinction is in regard to his power over real property, which is explained *post*, § 335.

⁶ Formerly the executor of a deceased executor succeeded to his duties, but the rule was changed by statute (2 R. S. 71, § 17), and although the section cited was repealed in 1880 (L. 1880, c. 245, § 1, subd. 2), without a formal substitute, its policy is continued by Co. Civ. Proc., § 2643. "The designation in the will of the deceased executrix of two of the respondents as her successors in office would not, even if her will was admitted to probate, be operative, as the power to make it appertained solely to the office of the executrix, and she, having ceased to be such previously to her death, her right to select her successor then terminated." (Per Ransom, S., in *Matter of Pinekney*, N. Y. Law J., Oct. 23, 1890.)

⁷ It is not a ground for application for letters *c. t. a.* that the nominated

executor (to whom letters had not yet been issued) had become insane. This "incompetency" must be first "adjudged by the surrogate," before he will entertain the application. In such case the appropriate practice is that provided by Co. Civ. Proc., § 2642 (§ 298, *ante*). (*Matter of Van Pelt*, N. Y. Law J., Mar. 28, 1890.)

⁸ For the mode of express renunciation, see Co. Civ. Proc., § 2639; *ante*, § 296. Where a sister of the testator renounced her prior right to letters on the application of the son of testator's brother, but intervened in a proceeding to revoke letters issued to him,—Held, that the renunciation not being general could be retracted, and that she was entitled to letters. (*Matter of Haug*, 29 Misc. 36.) But a retraction of the renunciation cannot be made without permission of the surrogate. (*Matter of Clute*, 37 Misc. 710.) In that case the sole legatee, executing the renunciation, had assigned his entire interest in the estate.

expressly renounce,⁹ or revocation of letters,¹⁰ there is no executor, or administrator with the will annexed, qualified to act.¹¹

§ 328. **Who are entitled to letters.**—Under the Revised Statutes there was room for doubt, and a conflict of authority existed, as to who were entitled to letters of administration with the will annexed, owing chiefly to the fact that a rule was deducible only from several distinct provisions, whose relations to each other were obscure.¹² These statutes also excluded heirs and devisees from the list of persons capable of receiving such letters, and made no provision for the contingency of a refusal to accept the letters, on the part of all the qualified persons entitled; while the reference, in one of the sections cited, to the "regulations and restrictions" applicable to "letters of administration in case of intestacy" rendered it necessary to examine and apply the statutory rules upon that subject.¹³ These regulations and restrictions are no longer applicable in granting letters of administration with the will annexed, *e. g.*, the preference given to males over females.¹⁴ These defects are remedied, and the omissions supplied, by the Code of Civil Procedure, which establishes a uniform and explicit rule for all cases, and directs¹⁵ that when letters of administration with the will annexed are granted, they must be issued to the following persons, in the order of priority indicated: 1. To one or more of the residuary legatees, who are qualified to act as administrators.¹⁶ If any one of such legatees

⁹ See, as to implied renunciation, Co. Civ. Proc., § 2642; *ante*, § 298.

¹⁰ For the various grounds and modes of revocation of letters testamentary, see c. XIV. *post*.

¹¹ Co. Civ. Proc., § 2643. The death may occur before letters testamentary issue, or afterward, and before the estate is completely administered. The incompetency of the executor may prevent the issue of such letters, or occasion their revocation. See Co. Civ. Proc., §§ 2636, 2685. The revocation of letters may follow the acceptance of the executor's resignation (*Id.*, § 2639), or be for cause. But in case of the resignation of an executor and trustee, where the amount of the residuary estate has been fixed for the purposes of the trust, an administrator *c. t. a.* should not be appointed. (Matter of Curtiss, 15 Misc. 545; 37 N. Y. Supp. 586.)

¹² 2 R. S. 71, §§ 14, 17; *id.* 75, § 29; *id.* 78, § 45. See Matter of Ward, 1

Redf. 254; *Ex p.* Brown, 2 Bradf. 22; Bradley v. Bradley, 3 Redf. 512; Spinning's Estate, 1 Tuck. 78.

¹³ 2 R. S. 71, § 14.

¹⁴ Matter of Wood, 27 Abb. N. C. 329; 17 N. Y. Supp. 354.

¹⁵ Co. Civ. Proc., § 2643, as amended 1901 (L. 1901, c. 141).

¹⁶ Matter of Manley, 12 Misc. 472; 34 N. Y. Supp. 258. The residuary legatee, it is said, is the testator's choice; he is the next person in his election to the executor. (Atkinson v. Barnard, 2 Phillim. 318.) A residuary legatee is entitled, although there is no present prospect of any residue (Wms. on Exrs. 464), and though he is only residuary legatee in trust. (*Ib.*) The English rule is that where a residuary legatee survives the testator, and has a *beneficial* interest, his representative has the same right to letters as the residuary legatee himself, in preference to next of kin. (*Id.* 465.) But this is not the rule in this

who would otherwise be so entitled is a minor, administration shall be granted to his guardian, if competent. 2. If there is no such residuary legatee, or guardian, or none who will accept; then to one or more of the principal or specified legatees so qualified.¹⁷ If any one of such legatees who would be otherwise so entitled is a minor, administration shall be granted to his guardian, if competent. 3. If there is no such legatee, or guardian, or none who will accept, then to the husband or wife,¹⁸ or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.¹⁹ 4. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to one or more of the creditors who are so qualified; except that, in the counties of New York and Kings, the public administrator has

State. See *Kircheis v. Scheig*, 3 Redf. 277; *Matter of Thompson*, 28 How. Pr. 581. The executor of a sole legatee has, however, a right to receive letters as against the son of a brother of the testator who died after the testator, since the son is not entitled in his own right to share in the unbequeathed residue of the estate. (*Matter of Haug*, 29 Misc. 36.) Where a testator's residuary estate is held in trust, the beneficiary of the trust is entitled to letters in preference to the trustee. (*Matter of Roux*, 5 Dem. 523.) See *Matter of Drowne*, 18 St. Rep. 981. Even before the amendment of 1901 the right of the guardian of an infant residuary legatee to preference in granting letters, was sustained. (*Matter of Lasak*, 30 St. Rep. 356; 8 N. Y. Supp. 740.) And see *Matter of Tyler*, 19 St. Rep. 897; *Blanck v. Morrison*, 4 Dem. 297.

A person not mentioned by name in a will, but who is entitled to take under it as "heir" and "issue" of a person named as legatee, is a "principal or specific legatee," and is equally entitled to apply for letters of administration with the will annexed,—as a person whom the will designated by name as a legatee. (*Matter of Wood*, 27 Abb. N. C. 329.)

¹⁷ In England, the next of kin are entitled, next after a residuary legatee, to letters with the will annexed; and if the next of kin decline, letters will issue to a legatee or a creditor, but on notice to the next of kin. The word "principal" in this clause has the force and effect of the word "general," and is meant to be descriptive

of all legatees who are neither specific nor residuary. (*Quintard v. Morgan*, 4 Dem. 168.) A general legatee is entitled to preference in the issue of letters, over a trust company, guardian of an infant legatee who is the only next of kin of the testator. (*Matter of Milhau*, 28 Misc. 366; 59 N. Y. Supp. 910.)

For a case of an application by one claiming under a void devise, see *Matter of Owens*, 24 Civ. Proc. Rep. 256; 33 N. Y. Supp. 422.

¹⁸ Upon the death of a sole executor, the residuary legatee is first entitled to letters, as against the widow of the decedent, in like manner as if the executor has renounced or neglected to qualify. (*Bradley v. Bradley*, 3 Redf. 512.)

¹⁹ Where there were neither residuary, principal, nor specific legatees of a testatrix, who could receive letters testamentary and accept administration with the will annexed, and sisters of the half blood, who were not beneficiaries under the will, were the only next of kin,—Held, that the issue of letters to one of them was proper, and that they could not be revoked on the petition of one who claimed as the principal beneficiary under the will of the sole legatee of the testatrix. (*Kircheis v. Scheig*, 3 Redf. 277.)

A brother of the testator is to be preferred to the administrator *c. t. a.* of the sole legatee, who was named sole executor and who died after testator and before probate. (*Matter of Brown*, 33 St. Rep. 582; 11 N. Y. Supp. 785.)

preference, after the next of kin, over creditors and all other persons.²⁰ 5. If there is no qualified creditor who will accept, then to any proper person designated by the surrogate.²¹

§ 329. **Priority among applicants of the same class.**—Where a number of applicants for letters of administration with the will annexed all come within the one subdivision of the section relating to priorities of right to letters, the surrogate in his discretion will select from their number, having regard to the nature of their respective interests.²² The statute makes no discrimination between males and females, although, it seems, the court would, other things being equal, prefer a male, in the case of opposing claims.²³ The next of kin are entitled, in the order of priority in which they are entitled to administration in cases of intestacy, thus: (1) to the children, (2) to the father, (3) to the brothers, (4) to the sisters, (5) to the grandchildren, (6) to any other of the next of kin who would be entitled to share in the distribution. As between creditors, the first one applying has priority. It is reasonable to suppose that in a case where the surrogate is called upon to designate “a proper person,” under the above fifth subdivision, he would be likely to designate the public administrator or the county treasurer, as the case may be. In selecting an administrator with the will annexed from among several persons having equal rights, the surrogate may consider the testator’s preference, expressed in his lifetime, as to one of the persons applying having the management of his estate.²⁴

§ 330. **Application for letters generally.**—The application must, of course, be made to the surrogate of the proper county,—that is, the surrogate who, by the provisions of the Code, has jurisdiction over the estate of the decedent.²⁵ Ordinarily the appli-

²⁰ This last clause was added in 1881, thus restoring the old statute. By a rule of the English Probate Court, no person who renounces probate of a will is to be allowed to take representation in another character—such as letters of administration with the will annexed. This rule was followed in *Matter of Suarez*, 3 Dem. 164.

²¹ In *Matter of Clute* 637 Misc. 710, the assignee of a sole legatee was appointed, the next of kin consenting.

As to appointment of banking corporations, see L. 1900, c. 552.

²² *Matter of Beakes*, 5 Dem. 128, citing *Cottle v. Vanderheyden*, 11 Abb.

(N. S.) 17; *Estate of Morgan*, 8 Civ. Proc. Rep. 77; *Hulse v. Reeves*, 3 Dem. 486.

²³ *Matter of Wood*, 17 N. Y. Supp. 354; 27 Abb. N. C. 329.

²⁴ *Matter of Powell*, 5 Dem. 281; citing *Quintard v. Morgan*, 4 Dem. 168; *Underhill v. Dennis*, 9 Paige, 203; *Cozine v. Horn*, 1 Bradf. 143.

²⁵ See, on this point, Co. Civ. Proc., § 2476. Hence it must appear that decedent was an inhabitant of the county at, or immediately before, his death. Letters will not be granted on the ground that testator died within the county, having assets therein, it not appearing that he was a noninhab-

cant will be the person claiming to be entitled to the letters, and one of the few sections of the Code especially applicable to such letters was evidently framed upon that presumption.²⁶ Provision has now been made, however, for an application by a person "having a lien upon any real property upon which the decedent's estate has a lien."²⁷ Of course, in such case, the petitioner should apply for the issue of letters to some person having a right thereto, as provided by the statute.

§ 331. Where the applicant has not a prior right to letters.—In that event he should apply, as in the case of a petition for letters of administration in intestacy, for letters to issue "either to him or to such other person or persons having a prior right, as may be entitled thereto, or in the alternative," at his election,²⁸ and for a citation to those having a prior right, to show cause against such appointment. The application must be made by petition, unless a written renunciation of every person having such a prior right is filed with the surrogate, and the execution thereof is proved to his satisfaction;²⁹ and a citation to show cause must be addressed to, and served upon, those having such right, who have not renounced.³⁰ The proceedings thereupon are the same as upon application for administration upon an intestate's estate. In every other case, the surrogate must issue the letters, *upon the application* of the creditor or person interested, or a

itant of the State. (Van Giesen v. Bridgford, 18 Hun, 73.) See also this case on appeal, 83 N. Y. 348, where it was held that where there are no assets, or the presumption arises from lapse of time that there are no assets of the testator in existence, which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, and no other reason appears, the granting of letters cannot be claimed as a matter of right. Where the application is made upon the ground that the office of executor, etc., is vacant, leaving assets of the testator unadministered, *prima facie* evidence that there are such assets is sufficient: and a general allegation that the executor named in the will died leaving certain assets unadministered, followed by a statement of the value thereof, confers jurisdiction. (Pumpelly v. Tinkham, 23 Barb. 321.)

The surrogate cannot, on such an application, determine the question

whether the Statute of Limitations has barred the remedy to recover the alleged unadministered assets, or whether the proposed administrator with the will annexed would have any legal or equitable cause of action for the benefit of the estate; such questions being properly raised, if at all, only in subsequent proceedings. (Ib.)

²⁶ Co. Civ. Proc., § 2644.

²⁷ Co. Civ. Proc., § 2643, as amended 1895 (L. 1895, c. 734).

²⁸ Popham v. Spencer, 4 Redf. 399. In that case, it was also held that a petition by an executrix of an executor for an accounting, under section 2606 of the Code, could not include an application under section 2693, for the appointment of an administrator with the will annexed, in the place of petitioner's testator. The proceedings in each case are separate and distinct.

²⁹ Co. Civ. Proc., § 2644. See Batchelor v. Batchelor, 1 Dem. 209; 64 How. Pr. 350.

³⁰ Batchelor v. Batchelor, *supra*.

person having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper.³¹ It is not customary to require notice, where there are no persons entitled to priority of appointment; *e. g.*, where there are two or more of a class equally entitled to letters, each is at liberty to apply without notice to the other.³² A competent person, although not entitled to letters, may be joined with the person so entitled, upon the latter's consent, in the administration with the will annexed.³³

§ 332. **Oath and bond.**—The official oath or affirmation of an administrator with the will annexed must be filed with the surrogate before letters are issued to him. It is required to be to the same effect, and may be taken before the same officers, as that of an executor, or an administrator in case of intestacy.³⁴ His official bond is the same, and is governed by like provisions as that required by law of an administrator upon the estate of an intestate; except that in fixing the penalty, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the administrator, by virtue of any provision contained in the will.³⁵

§ 333. **Letters upon proof of foreign will.**—The term "foreign will" is manifestly ambiguous. Certain wills which may with propriety be so designated are, as has been seen, admissible to probate in a Surrogate's Court of this State; and when that course is pursued, the issue of letters thereupon is governed by the

³¹ Co. Civ. Proc., § 2643, as amended 1895. In the case of the renunciation or death of a person named in the will propounded for probate, the practice in New York county is to proceed with the proof of the will to a decree. If admitted to probate, a new proceeding must then be instituted for letters with the will annexed.

³² Matter of Wood, 17 N. Y. Supp. 354; 27 Abb. N. C. 329. The applicant must bring himself within the terms of section 2643, prescribing the order of priority among the persons entitled to such letters. (Matter of Allen, 2 Dem. 203.) See Matter of Drowne, 18 St. Rep. 981.

³³ Quintard v. Morgan, 4 Dem. 168; Matter of Moehring, 24 Misc. 418; 53 N. Y. Supp. 730.

³⁴ Co. Civ. Proc., § 2594.

³⁵ Co. Civ. Proc., § 2645. It is not essential to the validity of the bond that his special character should be recited therein; a bond in the ordinary form required of general administrators by the statute is sufficient. (Casoni v. Jerome, 58 N. Y. 315.) As to the amount of penalty required, see Sutton v. Weeks, 5 Redf. 353; 1 Civ. Proc. Rep. 164; Matter of Nesmith, 6 Dem. 333. Section 2645, enacted in 1880, and section 2667, which was enacted in the same year, and prescribes the requisites of the bond of an administrator in intestacy, which was amended in 1882, by adding a provision that, "in cases where all the next of kin to the intestate consent thereto," the penalty of the bond may be limited in a manner specified, are to be construed together, as if enacted

same rules as in case of domestic wills.³⁵ A second class of foreign wills, relating to personal property, can be established in this State only by means of a judgment rendered in a civil action, whereupon letters testamentary or of administration with the will annexed may, under specified conditions, be issued from a Surrogate's Court of this State, in like manner and with like effect as upon a will duly proved in his court.³⁷ In respect to a third description of foreign wills, also relating to personal property, which includes all of the second class, and certain of the first class, above mentioned, the statute contemplates the issue of letters from a Surrogate's Court of this State, upon proof of the foreign probate, without probate or establishment here. In such cases, before the matter was regulated by statute, it was the usage, when letters were granted, to grant them to the attorney in fact of the foreign executor, if he applied and produced a power of attorney authorizing him to receive such letters on behalf of the executor. If no sufficient application, however, was made by such an attorney, the court would grant administration, under the statute, to the legatees or to other persons entitled.³⁸ But the subject is now fully provided for by the Code, as noticed in a previous chapter, where ancillary letters of administration with the will annexed are discussed in connection with ancillary letters testamentary.³⁹

§ 334. Duties and powers under letters.—In regard to the general administration of the personalty, an administrator with the will annexed has the same powers as an ordinary administrator in case of intestacy, except that he is to be guided by the will of the testator. He is not confined to the property disposed of by the will, but it is his duty to collect and administer the entire personal estate within his jurisdiction.⁴⁰ Where he is appointed to succeed to an executor who has received letters, but has died or has been removed, he succeeds, in general, to the powers and to the duties of his predecessor; and if a decree has previously been obtained against his predecessor for a payment due from

simultaneously;—Held, therefore, that an administrator with the will annexed may avail himself of the provisions contained in the amendment of 1882, upon obtaining the consent of the next of kin, although they may have no interest in the decedent's estate. The existing statutory rule on this subject is criticised in *Curtis v. Williams*, 3 Dem. 63. The section

2667 referred to is now section 2664. See *post*, c. XV.

³⁵ See Co. Civ. Proc., § 2611; and § 140, *ante*.

³⁷ Co. Civ. Proc., §§ 1861, 1863. See § 134, *ante*.

³⁸ *Texidor's Estate*, 2 Bradf. 105. And see 2 R. S. 75, § 31, now repealed.

³⁹ See *ante*, § 312.

⁴⁰ *Sullivan v. Fosdick*, 10 Hun, 174.

the estate, the administrator with the will annexed should satisfy the decree by payment, and the surrogate may enforce this duty.⁴¹ He may enforce, also, the obligations of the deceased, and of his removed predecessor to the estate; and for this purpose may compel an accounting;⁴² and may maintain an action for an accounting against such predecessor, or against his personal representative after his death, for assets left unadministered by such predecessor.⁴³ He may continue an action for a specific performance of a contract made by the executor.⁴⁴ He may petition for a judicial settlement of his account and a distribution of the estate within a year from the date of his letters.⁴⁵

§ 335. **Performing the will.**—The statute provides, that “where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, as if they had been named executors in the will.”⁴⁶ This provision has been the subject of much controversy. There is eminent authority for regarding it as only declaratory of the common law, and applicable neither to

⁴¹ *Bowers v. Emerson*, 14 Barb. 652.

⁴² *Clapp v. Meserole*, 1 Abb. Ct. App. Dec. 362.

⁴³ *Matter of Richmond*, 63 App. Div. 488; *Walton v. Walton*, 4 Abb. Ct. App. Dec. 512. An administrator with the will annexed, appointed in this State, cannot maintain an action against the agent of the deceased executor, to compel him to account for money collected as rents or lands in another State, nor for money collected as rents of lands in this State, in respect of which there is a devise in trust or power of sale to such deceased executor. Nor is the agent of the executor liable to such administrator in an ordinary action of account, *at law*, for proceeds of personal property belonging to the estate in his hands. The agent is liable to the executor and his personal representatives; the executor is liable to the estate, and the remedy of the administrator *at law* is against his personal representatives. If he has a remedy against the agent, it is in equity. (*Smith v. Edmonds*, 10 N. Y. Leg. Obs. 185.) The administrator, and not the legatees under the will, is the proper person to recover from the representatives of the deceased executor the un-

administered assets. (*Squire v. Bugbee*, 65 App. Div. 429.)

An administrator is not entitled to recover assets from the personal representatives of the deceased executor and residuary legatee under the will of his decedent where the legacies given by such will are fully secured and it is not shown that there are unpaid creditors or unpaid expenses of administration. (*Toeh v. Toeh*, 81 Hun, 410; 30 N. Y. Supp. 1003.) But where he has incurred expense, he is entitled upon an accounting by the representatives of the deceased executor to have the balance of the estate paid over to him and an opportunity to have his expenses allowed therefrom, although all claims except a single legacy represented by such balance have been paid. (*Matter of McDougall*, 141 N. Y. 21; 56 St. Rep. 579.)

In an action against a removed absconding executor the administrator is entitled to an attachment. (*Van Camp v. Searle*, 147 N. Y. 150.)

⁴⁴ *Farmers' Loan and Trust Co. v. Eno*, 21 Abb. N. C. 219.

⁴⁵ *Matter of Burling*, 5 Dem. 47.

⁴⁶ Co. Civ. Proc., § 2613, as amended 1893, incorporating 2 R. S. 72, § 22.

real property in any case, nor to discretionary powers, nor to gifts in trust, nor to powers inseparably connected therewith.⁴⁷ It is well settled that devises to the executors, and discretionary powers, relating to real property at least, do not pass to the administrator with the will annexed.⁴⁸ The rule is stated to be, that "an administrator with the will annexed in all respects takes the powers of a renouncing or deceased executor, unless a personal confidence, in the discretion of the *person* who is named as executor, is plainly expressed or to be implied. Where the power or trust appears to be annexed to the office of executor, it may be executed by an administrator with the will annexed."⁴⁹ Thus a power to an executor to sell land and personalty in trust for the payment of debts and legacies, is so connected with the office of executor that it can be executed after his death only by an administrator with will annexed, and not by a new trustee appointed by the court.⁵⁰ But a devise to the executor named, in trust, does not annex the trust duty to the office of executor, but to the *person*; and hence an administrator with the will annexed does not succeed to any rights concerning the trust estate, unless in case it be ordered sold for the payment of the testator's debts.⁵¹ Where, however, an administrator with the will annexed

⁴⁷ *Dominick v. Michael*, 4 Sandf. 374; *Conklin v. Egerton*, 25 Wend. 224.

⁴⁸ *Beekman v. Bonsor*, 23 N. Y. 298; affg. 27 Barb. 260; *Fay v. Taylor*, 31 Misc. 32; 63 N. Y. Supp. 572; *Simmons v. Taylor*, 19 App. Div. 499; 46 N. Y. Supp. 730. Compare *Roome v. Philips*, 27 N. Y. 357, 363; *De Peyster v. Clendining*, 8 Paige, 310; *Gilchrist v. Rea*, 9 id. 72; *Judson v. Gibbons*, 5 Wend. 225. A discretionary power of sale vested in executors cannot be executed by an administrator with the will annexed. (*Cooke v. Platt*, 98 N. Y. 35.) But otherwise, where no executor was named in the will. (*Matter of Kick*, 11 St. Rep. 688.)

⁴⁹ Per Commissioner Reynolds, in *Bain v. Matteson*, 54 N. Y. 667; s. p., *Merritt v. Merritt*, 32 App. Div. 442; 161 N. Y. 634, citing *Greenland v. Waddell*, 116 id. 234; *Campbell v. Jennings*, 22 Misc. 406; *Carpenter v. Bonner*, 26 App. Div. 462. This doctrine is substantially that of Chancellor Walworth in *De Peyster v. Clendining*, 8 Paige, 310. Compare *Matter of Clark*, 5 Redf. 466; *Kilburn v. See*, 1 Dem. 353. He is entitled to the

commissions of a trustee. (*Orphan Asylum v. White*, 6 Dem. 201.)

⁵⁰ *Matter of Christie*, 59 Hun, 153; 36 St. Rep. 99; affd., 133 N. Y. 473. An administratrix with will annexed was held, under a peculiar will, entitled to execute a power to sell lands given by will to executor, in *Hickey v. Peterson*, 30 St. Rep. 155; 9 N. Y. Supp. 917. A provision for investing a sum in trust for the benefit of testatrix's husband, during life, and on his death, principal to go to designated legatees, creates a trust which vests in an administrator with the will annexed. (*Matter of Post*, 30 St. Rep. 217; 9 N. Y. Supp. 449.) See *Squire v. Bugbee*, 65 App. Div. 429.

⁵¹ *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497. Hence he might accept and execute the trust without proving the will or taking out letters testamentary. He becomes trustee, and is vested with the trust estate by virtue of the will alone. (*Ib.*) For a case where an administrator with the will annexed was held to have power to sell and convey real estate, see *Fish v. Coster*, 28 Hun, 64, and also *Bingham v. Jones*, 25 id. 6.

assumes to act as trustee of the real property under the will, he may be held to account therefor as such trustee.⁵²

§ 336. **Liabilities.**— An administrator with the will annexed is liable upon his own contract, to the same extent as an ordinary administrator,⁵³ but he is not liable for any misapplication of funds by his predecessor.⁵⁴

⁵² *Le Fort v. Delafield*, 3 Edw. 32.

⁵³ An administrator with the will annexed, who, in pursuance of the provisions thereof, purchases a monument for the tomb of the testator, is personally liable to pay for the same, if the estate does not yield enough, above the debts and expenses of administration, to pay for the monument. (*Hoe-*

tor v. Lavery, 51 App. Div. 74; 64 N. Y. Supp. 518, citing *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 id. 360; *New v. Nicoll*, 73 id. 127; *Wetmore v. Porter*, 92 id. 76; *Parker v. Day*, 155 id. 383.)

⁵⁴ *Matter of Lamb*, 10 Misc. 638; 32 N. Y. Supp. 225.

CHAPTER XI.

LETTERS OF ADMINISTRATION IN INTESTACY.

TITLE FIRST.

JURISDICTION IN CASES OF INTESTACY.

§ 337. **In general.**— Where the administration of an estate — that is, the collection and preservation of the personal effects of a deceased person, and their final disposition according to law — is not conferred upon any particular person by the will of the deceased himself, or where such person, if appointed, is incapable of performing that function, the duty devolves upon the surrogate of appointing one who can. The last chapter was devoted to the consideration of the surrogate's power of appointment in cases where the will of a deceased failed to appoint, or where its appointee was either incapacitated or ceased to act, for any cause. We now come to consider the subject of administration in cases of intestacy.

§ 338. **Nature and extent of jurisdiction.**— The word “intestate” signifies a person who dies without leaving a valid will; but where it is used with respect to particular property, it signifies a person who dies without effectually disposing of that property by will, whether he leaves a will or not.¹ The jurisdiction of surrogates was formerly more restricted in the matter of the administration of intestates' estates than in matters of probate; since jurisdiction to grant probate of a noninhabitant's will might be based upon the situation of real estate of the testator in the surrogate's county,² whereas, to authorize the grant of administration in a similar case, the existence of assets was indispensable.³ But this difference has been substantially removed by the present Code. The Code of Civil Procedure consolidates certain of the former statutes specially relating to surrogates' jurisdiction to

¹ Co. Civ. Proc., § 2514, subd. 1.

² 22 R. S. 220, § 1, subd. 1; L. 1837,

c. 460, § 1, subd. 5.

³ See *Hollister v. Hollister*, 10 How.

Pr. 532; *Roe v. Swezey*, 10 Barb. 247; *Hart v. Coltrain*, 19 Wend. 378.

take proof of wills, and to issue letters of administration in case of intestacy, respectively; and the resulting provisions have been discussed, in their application to the subject of probate, in the sixth chapter of this work, to which reference may be had for such remarks, concerning the phraseology of, and the changes presumed to be effected by, the Code, as are also pertinent to the subject of administration upon the estate of an intestate. It will be convenient to repeat the jurisdictional sections in this place, in order to examine them with special reference to the topics of this chapter. It is declared that the Surrogate's Court of each county has jurisdiction, exclusive of every other Surrogate's Court, to grant letters of administration upon the estate of an intestate, in either of the following cases: "1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere. 2. Where the decedent, not being a resident of the State, died within that county, leaving personal property within the State, or leaving personal property which has, since his death, come into the State; and remains unadministered. 3. Where the decedent, not being a resident of the State, died without the State, leaving personal property within that county,⁴ and no other; or leaving personal property which has, since his death, come into that county, and no other, and remains unadministered. 4. Where the decedent was not, at the time of his death, a resident of the State, and a petition for probate of his will, or for a grant of letters of administration under subdivision second or third of this section, has not been filed in any Surrogate's Court; but real property of the decedent, to which the will relates, or which is subject to disposition by a surrogate's order for the payment of debts or funeral expenses, is situated within that county and no other."⁵

It may be stated generally, therefore, that the surrogate of the proper county may grant administration in all cases where the intestate, at the time of his death, was domiciled in the State; and in either of the following cases where he was not so domiciled, viz.: (1) where he left personal property situated in the State, or coming into the State after his death, and remaining unadministered, and (2) where he left real property in the State, liable to be sold, etc., by order of a surrogate, for the payment of debts or funeral expenses.

⁴It is, therefore, immaterial whether of Davis, N. Y. Law J., Jan. 28, decedent was or was not a resident, 1890.)
provided he left assets here. (Matter ⁵Co. Civ. Proc., § 2476.

§ 339. **Exclusive and concurrent jurisdiction.**—In determining which is the proper county, the first question is as to the residence of the intestate at the time of his death. If he then resided in the State, the surrogate of the county of his decease has exclusive jurisdiction to entertain the application.⁶ If he was not then a resident of the State, an analysis of the various possible cases, similar to that made in the chapter on probate, will indicate in what county the petition should be presented. The intestate may have left (1) personal property situated in, or coming into, the State as above mentioned, or (2) real property situated in the State, and liable to judicial sale, etc., as specified, or (3) both.

1. In the first class of cases, the place of death is material. If that occurred within the State, the surrogate of the county of the intestate's decease has exclusive jurisdiction. If the death occurred without the State, the application must be made in the county⁷ where property was left or into which it has since come.

2. Where the existence of real property of the nonresident intestate furnishes the sole basis of jurisdiction, the latter belongs exclusively to the surrogate of the county where that property is situated, independently of the place of the owner's death.

3. Where real property of such an intestate exists in one county, and personal property in another, under the circumstances specified in the statute, the surrogate of the former county has jurisdiction, unless a petition, either for probate or for administration, has been filed in the latter; but, as was intimated in treating of the subject of probate, we do not discover in the Code any rule forbidding an application to one surrogate, based on the existence of personalty, after the filing, in another Surrogate's Court, of a petition for letters alleging the existence of real property.

A race of diligence is thus apparently rendered possible. But no serious conflict is likely to occur, for, doubtless, the filing of a petition would be immediately followed by some act of the surrogate constituting an exercise of jurisdiction; and another section provides that "jurisdiction, once duly exercised over any matter, by a Surrogate's Court, excludes the subsequent

⁶ *Matter of Taylor*, 6 Dem. 158; 13 St. Rep. 176; *James v. Adams*, 22 How. Pr. 409. wise it would be a case of concurrent jurisdiction, which is hereafter discussed. See *Duffy's Estate*, 3 Civ. Proc. Rep. 229.

⁷ It is assumed for the present that there is only one such county; other-

exercise of jurisdiction by another Surrogate's Court, over the same matter, and all its incidents, except as otherwise specially prescribed by law."⁸ Where the special proceeding has reached the stage of the issuing of letters, the case comes within another provision of the same section, to the effect that where letters of administration have been duly issued from a Surrogate's Court having jurisdiction, all further proceedings to be taken in a Surrogate's Court, with respect to the same estate or matter, must be taken in the same court.⁹ But besides a case of the equal claim of right of different surrogates to supervise the administration of the estate of a nonresident intestate, by reason of the existence of real property in one county, and personal property in another, it may also happen that such an intestate may leave personal property located in, or afterward coming into, more than one county; and the decedent's realty may be situated in more than one county. With respect to such contingencies, it is provided that where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the section above cited,¹⁰ or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of that section, the Surrogates' Courts of those counties have concurrent jurisdiction, exclusive of every other Surrogate's Court, to grant letters of administration. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.¹¹

§ 340. **Personal property and assets defined.**— The term "personal property," in the present statute, replaces the word "assets," occurring in the original jurisdictional provisions, in order to correspond to a definition, contained in another section of the Code,¹² confining the latter word to such property as is applicable to the payment of debts. The rule as to what is to be deemed the *locality* of certain species of intangible personal property, for the purpose of conferring jurisdiction in cases of intestacy, is the same as in matters of probate.¹³

⁸ Co. Civ. Proc., § 2475. And see *Id.*, § 2516.

⁹ Co. Civ. Proc., § 2475.

¹⁰ See Co. Civ. Proc., § 2476.

¹¹ Co. Civ. Proc., § 2477.

¹² Co. Civ. Proc., § 2514, subd. 2. The proceeds of a partition sale are not "assets." (*Lynch's Estate*, 19 Daily Reg., No. 108.)

¹³ See § 144, *ante*.

§ 341. **Residence defined.**—The term “resident,” in the foregoing statutory provisions, like the word “inhabitant,” in the former statute,¹⁴ is believed to refer to the place of permanent residence,¹⁵ *i. e.*, the domicile—a word not occurring in the Code of Civil Procedure. The members of certain tribes of Indians, however, *e. g.*, the Senecas and others, although they may be said to be domiciled within the State, being by statute¹⁶ not amenable to actions on contract in the State courts, are, as a consequence of this freedom of their property from the control of our courts, not subject, as intestates, to the jurisdiction of the surrogate. The disposition of such a deceased Indian’s personal estate is regulated by the customs of the tribe to which he belongs, and a distribution according to that custom conveys a good title.¹⁷ Where the intestate was an infant, proof of its father’s residence in the surrogate’s county is sufficient *prima facie* evidence of domicile to give the surrogate jurisdiction.¹⁸

§ 342. **Jurisdiction, when acquired.**—In the matter of granting administration in intestacy, as in other special proceedings, “the existence of the jurisdictional facts prescribed by statute” is made a condition of the acquirement of jurisdiction by a Surrogate’s Court.¹⁹ The facts of death and intestacy, in all cases, and those of the place of death, place of residence and existence

¹⁴ *Isham v. Gibbons*, 1 Bradf. 84.

¹⁵ See § 143*a*, *ante*.

¹⁶ L. 1813, c. 92, § 2.

¹⁷ *Dole v. Irish*, 2 Barb. 639.

¹⁸ *Kennedy v. Ryall*, 67 N. Y. 380; 40 N. Y. Supr. Ct. 347. In that case, it appeared that intestate’s father came to the city of New York as an emigrant, and resided there for seven months, when he was joined by his wife and children, except one, the intestate, an infant, who died on the voyage; and he and his family continuously resided in that city for five years. He’d, that the intestate was an inhabitant of New York. In *Von Hoffman v. Ward* (4 Redf. 244), it was held that the rule, that an infant’s domicile is that of his father, is not overcome by the mere separation of the parents (there being no legal dissolution of the marriage), and the departure of the mother, with the infant, from the country in which the father resides. In that case, while decedent was a minor, his parents separated, and the mother went abroad with decedent, for economy of living

and to educate her son. They so-journed at different places in Europe, the mother sometimes living apart from her son while he was away at school. The mother derived her income from a house and lot in the city of New York, which had been settled on her by her husband. The mother stated to her brother-in-law, a banker of New York, during several visits made by him to Europe, that she intended to send her son, when he was properly educated, to him, to enter and continue in his employ; and in a letter addressed by the mother to her brother-in-law, written shortly before her death, she bequeathed her son to him, stating that she left him without support, to his guidance and protection. The son, at the time of his death, was above twenty-one years old. The father continued to reside in the State of New York. Held, that the evidence did not establish an intention on the part of decedent to adopt a foreign domicile.

¹⁹ Co. Civ. Proc., § 2474.

of property of the decedent, in some cases, are jurisdictional in their character. By the rules of the common law, however, the fact of death, as a test or basis of the jurisdiction, was assigned a superior rank to that of the other facts enumerated. The general subject-matter of the surrogate's jurisdiction being to grant administration upon the estate of deceased persons, if the person upon whose estate letters were issued was actually dead, an error as to inhabitancy or intestacy only rendered the surrogate's decision voidable and liable to be reversed or revoked; while, if he was alive, it was null and void and could be collaterally impeached.²⁰ "Death" means actual death; civil death, as where a person has been convicted of murder in the second degree and sentenced to the State prison for life, and is in prison under the sentence, does not give the Surrogate's Court jurisdiction to grant letters of administration upon his estate.²¹ As an application for letters of administration rests upon intestacy, where the surrogate finds that there was a will, he will dismiss the proceeding;²² his jurisdiction is terminated, so as to permit an application in another county, claimed to be the residence of the testator, for the probate of the will.²³

ARTICLE SECOND.

WHO ARE ENTITLED TO LETTERS.

§ 343. **Order of preference among relatives.**— The general intent of the statute which prescribes the order of priority among the relatives of an intestate entitled to administer his personal property is to secure the right to those who, in other respects being

²⁰ See *Roderigas v. East Riv. Sav. Inst.*, 76 N. Y. 316.

²¹ *Matter of Zeph.* 50 Hun. 523; 20 St. Rep. 382. See *Avery v. Everett*, 36 Hun. 6; 110 N. Y. 317. As to presumptions of death from prolonged absence, etc., see § 186, *ante*.

²² The surrogate has no power to appoint an administrator to dispose of the undistributed residuum of an estate not disposed of by the will, the executor under the will having absolute power. (*Matter of Haughian*, 37 Misc. 457; 75 N. Y. Supp. 932.)

²³ *Matter of Gould*, 30 St. Rep. 949; 9 N. Y. Supp. 603. Where it is shown that decedent left an instrument purporting to be a will, letters of administration cannot be granted to a creditor, until the question of its validity

is disposed of, notwithstanding the declared purpose of the next of kin not to offer it for probate. (*Matter of Taggart*, 40 St. Rep. 368; 16 N. Y. Supp. 514.) In such case the creditor can bring proceedings for the probate of the will, under Co. Civ. Proc., § 2614, in order to determine its validity. (*Ib.*) But see *Matter of Cameron*, 47 App. Div. 120; 62 N. Y. Supp. 187; *affd.*, 166 N. Y. 610. In that case, upon an application for the issue of letters of administration upon the estate of a decedent, as intestate, it was sought to prove the existence of a will, without offering it for probate here, by the production of an exemplified copy of the decree of a court of the State of Illinois, where the executor resided

proper persons, have the greatest interest in the distribution of the personal estate, without reference to their interests in the real property, and to those directly interested, as distinguished from strangers.²⁴ The statute declares that "administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property, who will accept the same in the following order: (1) To the surviving husband or wife. (2) To the children. (3) To the father. (4) To the mother. (5) To the brother. (6) To the sisters. (7) To the grandchildren. (8) To any other next of kin entitled to share in the distribution of the estate."²⁵

Although the statute provides that administration shall be granted to the relatives of the deceased, "entitled to succeed to his personal estate," this does not change the order of preference subsequently laid down in detail; *e. g.*, if the only relatives be father and brother, and the father renounce, the brother is entitled to administration, in preference to a creditor, or the public administrator, although the father would be entitled to the whole personal estate.²⁶ But a relative who would not, under any circumstances, be entitled to a distributive share in decedent's estate would not be entitled to letters.²⁷ A relative who

and assets existed, with photographic copies of the original instruments and a transcript of testimony relating to the execution of the will and codicil taken here under a commission from the Illinois court, and evidence that the originals were on file in its office from which the statute prohibited their removal.—Held, that while the striking out of the copies and the evidence of their authenticity was erroneous, an adjudication of intestacy should be sustained, since the admission of the evidence would not have changed the finding, the evidence not satisfying the surrogate of the genuineness of the original instruments, or the validity of their execution under the laws of New York, where the will was executed.

²⁴ *Sweezy v. Willis*, 1 Bradf. 495.

²⁵ Co. Civ. Proc., § 2660, as amended 1893; adopting 2 R. S. 74, § 27, as amended L. 1867, c. 782, § 6.

²⁶ *Lathrop v. Smith*, 24 N. Y. 417; overruling *Public Adm'r v. Peters*, 1 Bradf. 100. After the decision in *Lathrop v. Smith* (*supra*), in June, 1862, the section (2 R. S. 74, § 27) was amended by L. 1863, c. 362, § 3, by adding thereto the following:

"This section shall not be construed to authorize the granting of letters to any relative not entitled to succeed to the personal estate of the deceased, as next of kin, at the time of his decease;" thus superseding the last-named decision, and adopting the construction given to the statute in *Public Adm'r v. Peters*. But by L. 1867, c. 782, the words so added were expunged. So that now, the right to letters of *any* person of the blood of the intestate, not disqualified, is superior to that of the public administrator. (*Butler v. Perrott*, 1 Dem. 9.)

²⁷ Thus, where the intestate was illegitimate, and unmarried, and died domiciled in a country by the law of which he could have no legal kindred, except lineal descendants, a lawful son of the mother of the intestate has no right to a distributive share in the estate of the decedent, and consequently is not entitled to letters of administration here. (*Ferrie v. Public Adm'r*, 3 Bradf. 51, 249.) See *Public Adm'r v. Hughes*, 1 id. 125; *Peters v. Public Adm'r*, id. 200. Where an unmarried woman, having a living child, marries a man who is not the child's father, the child has no right

is entitled to a share in his own right is preferred to one who takes by representation. Thus where the intestate leaves no wife or descendant, parent, sister, or brother, but leaves an aunt and the children of deceased uncles and aunts, the aunt is solely entitled to letters of administration, and no citation need issue to the cousins.²⁸ On a contest for preference between relatives whose priority is not designated by the statute, the single point to be ascertained is, who will be entitled to the surplus of what is confessedly personal estate.²⁹ The withholding of letters of administration from one who, if not by some cause incapacitated, would be entitled in priority, under the statute, is never justifiable, except in cases where his disqualification is declared by the statute itself.³⁰ Hence the mere fact of nonresidence does not incapacitate; a nonresident who has priority of right over a resident relative is entitled to letters.³¹ The fact that the claimant is a nearer relative of the intestate than any other person within the United States, does not entitle him to administer, if there are elsewhere next of kin of a prior class. If the next of kin, entitled under the statute, is not here, or is not legally competent, the public administrator, or creditors, are entitled.³² If a person entitled is a minor, administration must be granted to his guardian, if competent, in preference to creditors or other persons.³³

§ 344. **Preference among others than relatives.**—If no relative, or guardian of a minor relative, will accept the same, the letters must be granted to an executor or administrator of a sole legatee named in a will, whereby the whole estate is devised to such deceased sole legatee,³⁴ otherwise to the creditors of the deceased;

to administer upon the man's estate upon his death intestate: that right passes to his next of kin, because the marriage of the man and woman cannot legitimize the child of the woman by another man. (Matter of Pfarr, 38 Misc. 223.) The father of an intestate whose death was followed first by the death of his child, and then by that of his wife, is not entitled to letters of administration on his estate, since not he but the legal representatives of the wife succeed to the personalty. (Matter of Seymour, 33 Misc. 271; 68 N. Y. Supp. 638.)

²⁸ Matter of Gooseberry, 52 How. Pr. 310. And see Adey v. Campbell, 79 N. Y. 52.

²⁹ Sweezy v. Willis, 1 Bradf. 495.

³⁰ O'Brien v. Neubert, 3 Dem. 156.

³¹ Libbey v. Mason, 112 N. Y. 525;

Matter of Williams, 44 Hun. 67; affd., 111 N. Y. 680. Hence, a son who resides in another State has, in spite of that fact, a priority of right over a daughter resident here. (Lussen v. Timmerman, 4 Dem. 250.) See Weed v. Waterbury, 5 Redf. 114.

³² Public Adm'r v. Watts, 1 Paige, 347; reversed, on other grounds, in 4 Wend. 168.

³³ Co. Civ. Proc., § 2660, as amended 1893. See Blanck v. Morrison, 4 Dem. 297; s. c., as Estate of Blanck, 3 How. Pr. (N. S.) 58. The guardian of a minor son of decedent has a preference over the public administrator. (Matter of Hudson, 37 Misc. 539; 75 N. Y. Supp. 1053.)

³⁴ Co. Civ. Proc., § 2660, as amended 1894 (L. 1894, c. 503).

the creditor first applying, if competent, to be entitled to preference. If no creditor applies, the letters must be granted to any other person or persons legally competent. The public administrator in the city of New York has preference, after the next of kin and after an executor or administrator of a sole legatee, over creditors and all other persons. In other counties the county treasurer shall have preference next after creditors over all other persons.”³⁵ It is also provided that where no relative, guardian of a minor relative, creditor, county treasurer, or public administrator consents to administration, any party to an action brought or about to be brought, and interested in the subject thereof, in which the intestate, if living, would be a proper party, may apply.³⁶ And in the case of an alien intestate, letters of administration may issue to the consul-general of his country,³⁷ or to his nearest friend.³⁸

§ 345. Preference of persons in same class.—As the statute enumerates the persons having a right to administration in classes, it becomes necessary to distinguish between several persons of the same class, and provision is made for cases of this character. “If several persons of the same degree of kindred to the intestate are entitled to administration, they must be preferred in the following order: first, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married.”³⁹ “If there are several persons equally entitled

³⁵ Co. Civ. Proc., § 2660, as amended 1894. As to the preference of the public administrator in Kings county, see Co. Civ. Proc., § 2669, as amended 1893. It was held, under the original statute, now incorporated in section 2669, that the public administrator of Kings county had priority over an infant next of kin in that county; an infant not being “competent,” within the meaning of that statute. (*Spreckles v. Public Adm’r*, 1 Dem. 475.) Relatives of an intestate, though not entitled to share in his estate, have the preference in the issue of letters of administration over the public administrator, and on a petition in his behalf must be cited to appear. (*Matter of Lowenstein*, 29 Misc. 722; 62 N. Y. Supp. 819.)

³⁶ Co. Civ. Proc., § 2660, as amended 1897 (L. 1897, c. 177).

³⁷ *Matter of Fattosini*, 33 Misc. 18; 67 N. Y. Supp. 1119; *Matter of Lo-brasciano*, 38 Misc. 415. In those cases

the application was granted without security being required, on the ground that the treaty with Italy provided for it; and that the State statute should give way to the obligations of the Federal government under its treaties with foreign nations. In *Matter of Logiorato* (34 Misc. 31), the surrogate of New York refused to follow that precedent, and granted letters to the consul-general only because the local law warranted it, and because the public administrator refused to serve. The usual security was also required.

³⁸ *Matter of Paola*, 36 Misc. 514; 73 N. Y. Supp. 1062.

³⁹ Co. Civ. Proc., § 2660, as amended 1893. The original statute, which gave a preference to unmarried, over married, women, was not repealed, impliedly, by L. 1867, c. 782, § 2, which declares married women to be capable of acting as “administratrixes,” etc., as though they were single. The Act

to administration, the surrogate may grant letters to one or more of such persons.”⁴⁰ This discretion is not an arbitrary or capricious one, but one which must be exercised in view of the particular circumstances of the case, and the peculiar claims and qualifications of the applicants.⁴¹ The English rule is that where there are several claimants for administration, between whom the court must choose according to its discretion, the court will, other things being equal, decree administration to the one who has the greatest interest.⁴²

§ 346. **Surviving husband's preference.**—The Revised Statutes did not mention the husband, in its order of preference, but only “his widow.” Another section provided that, “in case of a married woman dying intestate, her husband shall be entitled to administration in preference to any other person, as hereinafter provided;”⁴³ and another, that “a husband, as such, if otherwise competent according to law, shall be solely entitled to administration on the estate of his wife.”⁴⁴ The substance of these enactments were brought into the Code in 1893, the words “surviving husband or wife” being substituted for “his widow,” in the order of preference.⁴⁵ These statutory provisions are a declaration and affirmation of the right which the common law gave to a surviving husband.⁴⁶ The only alteration of the com-

of 1867 merely freed married women from pre-existing disabilities, without disturbing the order of appointment, and hence the appointment of an unmarried woman as administratrix, without notice to her married sister, was valid, the latter not having an equal right to letters. (Matter of Curser, 89 N. Y. 401; overruling West v. Mapes, 4 Redf. 496.) Before the statute of 1867, giving males a preference, it was held that as between an adult daughter and the guardian of a minor son, the former was to be preferred. (Cottle v. Vanderheyden, 11 Abb. [N. S.] 17.) In Wickwire v. Chapman (15 Barb. 302), a resident adult female was preferred to non-resident male relatives, who were under age. The words quoted in the text do not mean that if both claimants belong to the eighth class of the section — “To any other next of kin entitled to share in the distribution of the estate” — men of the class are to be preferred to women of the class in all cases but, on the contrary, intend that where members of the class are of different degrees of kindred the

nearest shall be preferred. Hence, a niece is preferred in administration to a grandnephew because nearer of kin to the intestate. (Matter of Hawley, 37 Misc. 667.) The half brother of an intestate is entitled to letters of administration as against a sister of the whole blood. (Matter of Moran, 5 Misc. 176.)

⁴⁰ Co. Civ. Proc., § 2660, as amended 1893.

⁴¹ Peters v. Public Adm'r, 1 Bradf. 207; Quintard v. Morgan, 4 Dem. 171.

⁴² Tucker v. Westgarth, 2 Addams, 352.

⁴³ 2 R. S. 74, § 27.

⁴⁴ Id. 75, § 29. See Shumway v. Cooper, 16 Barb. 556; Ransom v. Nichols, 22 N. Y. 110; Watson v. Bonney, 2 Sandf. 405; McCosker v. Golden, 1 Bradf. 64; Vallance v. Bauseh, 28 Barb. 633; Libbey v. Mason, 42 Hun, 470; rev'd., on another point, in 112 N. Y. 525.

⁴⁵ Co. Civ. Proc., § 2660, as amended 1893.

⁴⁶ Barnes v. Underwood, 47 N. Y. 351; Robins v. McClure, 100 id. 328; Matter of Harvey, 3 Redf. 214.

mon-law rule is the statute which provides that the husband of a deceased wife, leaving descendants, is entitled to the same distributive share of her estate to which a widow is entitled in the personal property of her husband.”⁴⁷ The statute declares that “if a surviving husband does not take out letters on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor.” If, however, he takes out letters, then, as administrator, he is liable “for the debts of his wife only to the extent of the assets received by him.”⁴⁸ The statute now confirms a rule which the courts have adopted, that if a husband, who has taken out letters on his wife’s estate, “dies, leaving any assets of his wife, unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal estate; but are liable for her debts, in preference to the creditors of the husband.”⁴⁹ The proviso refers to the statutory order of preference, so that in case a wife left descendants, they would take letters in preference to the husband’s representative.⁵⁰

§ 347. **Divorced wife.**— A divorced woman, whether the divorce was granted because of the misconduct of herself or of her husband, not being entitled, if he die intestate, to a distributive share of his estate, is not entitled to administer his estate.⁵¹ But otherwise where the husband and wife were separated by articles containing a release of all her right in his estate, as such a release does not amount to a renunciation of the right to administer.⁵²

⁴⁷ Co. Civ. Proc., § 2734, as amended 1893, substantially adopting 2 R. S. 98, § 11, as amended L. 1867, c. 782, § 11.

⁴⁸ Co. Civ. Proc., § 2660, as amended 1893.

⁴⁹ Co. Civ. Proc., § 2660, as amended 1893.

⁵⁰ In *Matter of Harvey* (3 Redf. 214; overruling *Matter of O’Niel*, 2 id. 544), it was held that where the wife died, intestate, *leaving no descendants*, and afterward the husband died without taking letters of administration upon her estate, his executors were entitled to them; and if, during his lifetime, such letters had been issued to her relatives without his renunciation, the surrogate would revoke them and issue new letters to his executors. See *Matter of Thomas*, 33 Misc. 729; 68 N. Y. Supp. 1116. Under no construction of the statute can the public administrator become entitled to letters in such a case.

(*Matter of Sturtzkoher*, 37 St. Rep. 939; 14 N. Y. Supp. 501.)

⁵¹ *Matter of Ensign*, 103 N. Y. 284. See § 95, *ante*. In *Matter of Boyle*

(N. Y. Law J., March 14, 1891), letters were refused to a woman claiming to have married decedent after his divorce from his first wife, for his own adultery, the decree having forbidden decedent marrying again during lifetime of plaintiff. A woman who went to another State and obtained a divorce, procuring the decree on service by publication on her husband, cannot claim the right to letters of administration on his estate on the ground the decree is invalid here, since a party who has invoked the jurisdiction of any court and submitted to its decree, cannot be heard to question its jurisdiction. (*Matter of Swales*, 60 App. Div. 599; 70 N. Y. Supp. 220.)

⁵² *Matter of Wilson*, 92 Hun, 318; 36 N. Y. Supp. 882.

§ 348. **Joinder of person not entitled.**—Administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled, to be joined with such person; which consent must be in writing, and be filed in the surrogate's office.⁵³ The consent is absolutely necessary to authorize the joinder;⁵⁴ and notwithstanding a consent, a stranger cannot be appointed administrator, without the joinder with him of a person entitled.⁵⁵

§ 349. **Preference not to be delegated.**—The right to administer is a personal one, and an individual who has the prior right thereto can prevent the grant of administration to those subsequent to him in the order of preference, only by taking letters himself. He is not entitled to nominate a third person.⁵⁶

TITLE THIRD.

PROCEEDINGS TO OBTAIN LETTERS.

§ 350. **Who may make the application.**—It is not essential that the applicant for letters should be one claiming the first or exclusive right thereto. Any person entitled, absolutely or contingently, to administration on the estate of an intestate, may apply for an award of letters, either to himself, or to such other person or persons having a prior right, as may be entitled thereto, or, in the alternative, as the petitioner elects.⁵⁷

§ 351. **Mode of application and contents of petition.**—The application must be made to the Surrogate's Court having jurisdiction, and must be by a written petition, duly verified, setting forth "the petitioner's title; the facts upon which the jurisdiction of the court to grant letters of administration upon the estate depends; and the names of the husband or wife, if any, and of the next of kin of the decedent, as far as they are known to the petitioner, or can be ascertained by him with due diligence." The following facts should appear by the petition: 1. The full name and address of each person to whom it is asked

⁵³ 2 R. S. 76. § 34. incorporated in Co. Civ. Proc., § 2660, as amended 1893.

⁵⁴ *Peters v. Public Adm'r*, 1 Bradf. 200.

⁵⁵ *Matter of Root*, 1 Redf. 257; *Matter of Ward*, id. 254.

⁵⁶ *Matter of Root*, 1 Redf. 257; *Matter of Ward*, id. 254. A nonresident

alien is incapable of obtaining letters of administration upon the property of a resident here, and cannot, by power of attorney, authorize another to do so in his behalf. (*Sutton v. Public Adm'r*, 4 Dem. 33.)

⁵⁷ Co. Civ. Proc., § 2662, as amended 1893, by consolidating former §§ 2660, 2661.

that letters be issued, and enough to show, *prima facie*, his competency to administer, including his relationship to, or the fact that he is a creditor of, the decedent, and his age. If either of such persons does not reside in this State, there should be an allegation that he is a citizen of the United States, since a nonresident alien is incompetent. It is not necessary to state that he has not been convicted of an infamous crime, as that will be presumed. The other grounds of incompetency specified in the statute depend on the adjudication of the surrogate upon the facts, and there need be no allegation in regard to them.

2. The fact of the death of the person upon whose estate a grant of administration is sought. The time, place, and manner of the death should be specified, if the petitioner has knowledge thereof. If he has not such knowledge, the allegations upon that point may be made on information and belief. In case the only available evidence of the death is circumstantial, there should be a statement of such facts and circumstances as raise a presumption of death, and justify the surrogate in adjudging that the same has occurred. In such instances, great care should be taken to set forth every circumstance which would raise an inference of death, since, in a case where the fact of death does not actually exist, the letters cannot be sustained against collateral attack, unless due proof of death is adduced before the surrogate. As to the fact of death, mere information and belief, without any reasons for it, are not proof or evidence in any legal sense.⁵⁸ No absolute rule can be laid down as to what is sufficient circumstantial proof of death, so as to make the surrogate's decision, that the person is really dead as alleged, conclusive. Little question can exist where there is direct evidence, as the testimony of one who witnessed the death and burial; but where the evidence is circumstantial, there may be considerable difficulty.⁵⁹

⁵⁸ *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316. In this case, the petition was not presented to the surrogate, who never saw the petitioner, and never in fact acted upon the petition, and had no actual knowledge of it, nor of the issuing of the letters, the business being done by a clerk in the office, who used a blank which had been signed by the surrogate and left with him, and attached the surrogate's seal. The only proof of the death of the person on whose estate administration was asked, was the allegation of the petitioner, upon the best of her knowledge, information,

and belief, the fact being that he was living. Held, that "there was too much 'voidness' in this proceeding to justify any court in sustaining it for any purpose whatever," and that the letters were no protection to an innocent person who had, upon presentation thereof, in good faith and relying upon them, paid to the person named as administratrix a sum due the alleged decedent.

⁵⁹ As to the burden of proving decedent's death, and for illustrations of what circumstances will prove it inferentially, see § 186, *ante*.

3. That the decedent left no valid will,⁶⁰ and the other facts essential to show that the surrogate to whom the application is made has jurisdiction to grant it—*e. g.*, that the deceased was, at the time of his death, a resident of the surrogate's county, or, being a nonresident of the State, died in that county, leaving property in the State, etc. 4. The value of the decedent's personal estate, so far as ascertained. 5. Whether the decedent left any husband or widow, children, adopted children, etc., so as to show the order of priority of right to the letters. If any such persons survive, the petition should show the full name and residence of each, and his relationship to the decedent, and whether any of them are infants, and, if so, the full names and residences of the guardians, if any. Also, whether the relatives of the same degree of kindred are males or females,—if females, whether married or single,—and whether they are of the whole blood or of the half blood, as these matters determine the preference among several persons of the same degree of relationship. Where several are equally entitled to administration, the petition may properly contain a statement of such facts as will guide the surrogate in the exercise of his discretionary power to choose among them. 6. In case there are persons who have a right of administration prior, or equal, to that of those to whom the letters are sought to be issued, and they have renounced, that fact should be alleged. If the applicant prays for the issue of letters to himself, and desires to have one or more persons, not entitled to administer, joined with him in the administration, the petition should state the full names and residences of such persons, and facts showing, *prima facie*, their competency to administer, in the same manner as with respect to a person entitled, and contain a consent to such joinder. The petition must always pray for a decree which, under the present statute, is a preliminary to the issuing of the letters in all cases. In certain instances there will also be a clause asking that a citation issue; and where

⁶⁰ A verified petition alleging the death of decedent "without leaving any valid last will and testament, to my knowledge, information, or belief," made by the nephew of the decedent, a resident of the same county she lived in, and one of her nearest of kin.—Held sufficient to confer jurisdiction on the surrogate to determine the fact as to intestacy, a will having been probated in another State. (Matter of Cameron, 47 App. Div. 120; 62 N. Y. Supp. 187; *affd.*, 166 N. Y. 610.) An allegation that the peti-

tioner has made diligent search among the papers of the decedent, and found no will, is sufficient; or that a paper purporting to be a will was revoked by the testator in his lifetime; or that the paper was not a valid will, by reason of the incapacity of the testator. Where an invalid or inoperative testamentary paper is alleged, the executors and legatees named therein, if known, should be mentioned, and the court ought to require notice to them before granting administration.

the petitioner asks that letters issue to himself, and desires a person, not entitled, to be joined, he should add a prayer to that effect. The Code provides that the prayer shall be for a decree awarding letters of administration, either to him or to such other person or persons, having a prior right, as may be entitled thereto, or in the alternative, as the petitioner elects; and, if necessary, that the persons required to be cited, as prescribed in the statute, may be cited to show cause why such a decree should not be made.⁶¹

§ 352. **Renunciation of prior right to letters.**—As in the case of one appointed executor by a will, the right to administration may be renounced. The Code provides for a renunciation by a person who has either a prior or an equal right to that of the petitioner, and the mode prescribed for the renunciation is “by a written instrument, acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, or otherwise proved to the satisfaction of the surrogate; which must be filed in the surrogate’s office.”⁶²

§ 353. **Qualified renunciation.**—A distinction, not indicated in the statute, has arisen in practice between an absolute and a qualified renunciation. By the former, the person having the right gives it up without qualification, and it may then be taken advantage of by any one standing in the same or the subsequent order of preference; while, by the latter, the person executing the renunciation inserts a clause stating that he renounces in favor of a certain person only, and such a renunciation is of avail only to the person in whose favor it is made. It seems that a renunciation may be retracted at any time before the letters of administration have actually issued, and that such a retraction is a matter of right which the surrogate cannot refuse to allow.⁶³

§ 354. **Proof requisite for citation or decree.**—Ordinarily the filing of the petition will be followed by the issuing of a citation; but where it is not necessary to cite any person, a decree granting letters may be made directly upon presentation of the petition.⁶⁴ Before the surrogate acts in either manner, the statute requires that he should have before him satisfactory presumptive

⁶¹ Co. Civ. Proc., § 2662, as amended 1893 (former § 2660).

⁶² Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2664. A renunciation of the right to be appointed administrator in another State relates only to assets which must be

administered on in such State. (*Sulz v. Mutual Reserve Fund Life Assn.*, 83 Hun. 139; *revd.*, on other points, in 145 N. Y. 563.)

⁶³ *Case v. Gardiner*, 4 Bradf. 13.

⁶⁴ Co. Civ. Proc., § 2662, as amended 1893, consolidating former § 2661.

evidence of the facts upon which his jurisdiction depends. It is provided that "a citation shall not be issued, and a decree shall not be made where a citation is not necessary, until the petitioner presumptively proves, by affidavit or otherwise, to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and, particularly, that the decedent left no will. For the purpose of the inquiry touching any of these matters, the surrogate may issue a subpoena, requiring any person to attend and be examined as a witness."⁶⁵ For example, where administration is claimed by an alleged son of the intestate, but his legitimacy is denied, proofs must be taken, and the question of interest determined.⁶⁶ Where the decree for letters is made without citation, upon the presentation of the petition, it is manifest that the latter must contain all the proof which the statute requires to be presented. The surrogate is not confined to any form of procedure or mode of proof on an application for letters of administration. He may receive proof by affidavit.⁶⁷

§ 355. **When citation to issue.**— As to whether or not a citation shall issue, upon an application for a grant of administration, the Code specifies three classes of cases, in two of which a citation is required, while in the third its issuing is in the discretion of the surrogate: "1. Every person, being a resident of the State, who has a right to administration, prior or equal to that of the petitioner, and who has not renounced, must be cited upon a petition for letters of administration."⁶⁸ 2. Where the surrogate is unable to ascertain, to his satisfaction, whether the decedent left surviving him any person entitled to succeed to his estate,

⁶⁵ Co. Civ. Proc., § 2662, as amended 1893, consolidating former § 2661. The last clause of this section is in addition to the general provision (Co. Civ. Proc., § 2481, subd. 3) conferring upon surrogates power to issue subpoenas to witnesses. The provision of the Revised Statutes (2 R. S. 74, § 26), which this section supersedes, differed from it in phraseology, requiring that before the letters shall be issued, "the fact of such persons dying intestate shall be proved to the satisfaction of the surrogate, who shall examine the person applying for such letters, on oath, touching the time, place and manner of the death, and whether or not the party dying left any will, etc." But it was held that the provision was merely directory, and that the jurisdiction of the sur-

rogate to issue the letters did not depend upon its observance. (*Farley v. McConnell*, 52 N. Y. 630; *Johnston v. Smith*, 25 Hun, 171.) As to verification before a notary, and the form of it, see *Perry v. Cornell Steamboat Co.*, 27 Hun, 216.

⁶⁶ *Public Adm'r v. Hughes*, 1 Bradf. 125.

⁶⁷ *O'Connor v. Huggins*, 113 N. Y. 511.

⁶⁸ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2662. Formerly, persons having equal right to the administration with the petitioner, were not required to be cited. (*Peters v. Public Adm'r*, 1 Bradf. 200.) But not so now. (*Matter of Tobin*, 7 N. Y. Surr., MS. Dec. 138; *Matter of Early*, N. Y. Law J., Feb. 18, 1890.)

a citation must be issued, directed generally to all creditors of, and persons interested in, the estate, and also to the attorney-general and the public administrator of the proper county, requiring them to show cause why administration should not be granted to the petitioner.⁶⁹ 3. The surrogate may, in his discretion, issue a citation to nonresidents, or those who have renounced, or to any or all other persons interested in the estate, whom he thinks proper to cite.”⁷⁰

“Where it is *not* necessary to cite any person, a decree, granting to the petitioner letters, may be made on presentation of the petition.”⁷¹ It is obvious that where there is no one who has a right to the administration either “prior or equal to that of the petitioner,” no citation is necessary; for example, no citation is necessary on the application of a widow for letters on her deceased husband’s estate,⁷² nor where application is made by a residuary legatee.⁷³ A person who has the prior right of administration must be cited, even although letters issued to him have been revoked for a failure to give new sureties.⁷⁴ Where the person having such prior right or one having an equal right has not been cited, letters issued to another will be revoked on his application.⁷⁵

§ 356. **Contents and service of citation.**—In respect to its contents, the citation must of course conform to the requirements of the statute applying to all citations issued by a surrogate.⁷⁶ The Code specifies, in only one instance, *i. e.*, where the public administrator and the attorney-general are to be cited,⁷⁷ the tenor of a citation issued upon an application for letters in intestacy; but, in other cases, as in the one referred to, it should require these to whom it is directed to show cause why administration should not be granted to the petitioner, or as prayed for by him. The rules governing the time, manner, and proof of service of the citation have been already given, while treating of the commencement of proceedings in general.⁷⁸

⁶⁹ Co. Civ. Proc., § 2663. The mode of service of such a citation, upon the general class of creditors and persons interested, will be by publication, under Co. Civ. Proc., § 2523. See § 75, *ante*.

⁷⁰ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2662.

⁷¹ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2662.

⁷² Matter of Moulton, 32 St. Rep. 631; 10 N. Y. Supp. 717.

⁷³ Matter of Richardson, 8 Misc. 140; 29 N. Y. Supp. 1079.

⁷⁴ Barber v. Converse, 1 Redf. 330.

⁷⁵ Barber v. Converse, 1 Redf. 330; Public Adm’r v. Peters, 1 Bradf. 100. And see Oram v. Oram, 3 Redf. 300.

⁷⁶ Co. Civ. Proc., § 2519.

⁷⁷ Co. Civ. Proc., § 2663.

⁷⁸ Chapter III, *ante*, § 76 *et seq.*

§ 357. **Appearance by person not cited.**—It is provided, with respect to an application for letters in intestacy, that “where a citation is issued, any creditor of the decedent, or any person interested in the personal estate, although not cited, may appear and make himself a party to the special proceeding, in like manner and with like effect as a devisee or legatee, who is not cited upon an application for probate.”⁷⁹

§ 358. **Proceedings on the hearing.**—The statute contemplates two species of hearings before the surrogate, on an application for a grant of administration in case of intestacy,—one upon his own motion, as a preliminary to the issuing of a citation, or, where no citation is necessary, in case he requires proof of the existence of one or more of the requisite jurisdictional facts, in addition to that furnished by the allegations of the verified petition; and the other, the ordinary hearing where a citation is issued, and questions are presented, by opposing allegations, for his determination before the rendering of his decree. If the jurisdictional facts set forth in the petition, such as the intestate's death, and his leaving personal property within the State, are not put in issue, oral proof of these facts upon the hearing is unnecessary.⁸⁰ The fact that the deceased was not intestate may be shown, either by original proof of a will, or by evidence that a will has been duly proved in a court of competent jurisdiction. Upon an allegation of the existence of an unproven will, proceedings will be stayed to afford opportunity to have it proved in due course.⁸¹ If it is alleged that the decedent left a will, and an executed will is traced last to his possession, there must be proof of search for it among his papers. If it cannot be found, the presumption is that he revoked it by destroying it.⁸² In determining the right of the petitioner, or other person, to letters of administration, it frequently becomes necessary to determine questions of marriage, legitimacy,⁸³ etc., and these,

⁷⁹ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2665. See *ante*, § 85.

⁸⁰ Matter of Gooseberry, 52 How. Pr. 310.

⁸¹ *Isham v. Gibbons*, 1 Bradf. 69. Where the applicant for letters swore that decedent died without leaving a will, and those claiming that a will had been made and destroyed adduced no evidence.—Held, that the proof, on the part of the applicant, was sufficient, and that his petition should be granted. (Matter of Demmert, 5

Redf. 299.) See Matter of Cameron, 47 App. Div. 120; 62 N. Y. Supp. 187; *affd.*, 166 N. Y. 610.

⁸² *Bulkley v. Redmond*, 2 Bradf. 281. See § 235, *ante*.

⁸³ In cases where there is a dispute as to whether the intestate was ever married, the presumption is always in favor of marriage, and if the evidence merely shows filiation, legitimacy will generally be presumed, especially if the affair be remote and the parents are dead, and the children alone are interested. The *lex loci contractus*

as well as questions of preference, require to be first determined on evidence to be produced before the surrogate.

§ 359. **The decree and letters.**—The surrogate must make a decree, either granting or refusing to grant the letters. If a citation has issued, the Code provides that upon its return—that is, not necessarily immediately upon its return,⁸⁴ but after hearing the allegations and proofs of the parties—the surrogate must make such a decree in the premises as justice requires.⁸⁵ If the decree grants letters, it may, in the surrogate's discretion, award administration without a personal examination⁸⁶ of the person to whom it is awarded; and it may make the award to any party to the special proceeding who appears to be entitled thereto.⁸⁷ Having, with his sureties, executed the bond⁸⁸ and justified, and taken the oath of office, he is entitled to receive the letters.

§ 360. **Limited letters.**—In a proper case, the court may, in a grant of administration, insert in the letters a limitation of the authority to be exercised thereunder by the recipient. For example, where the only asset is a cause of action of decedent, of uncertain value, surviving to the representative, or which is granted to the representative by law,—*e. g.*, damages for negligently causing decedent's death,—the amount likely to be recoverable being doubtful, the court may accept a modified secu-

governs as to the fact, whether a valid marriage took place, which, in the absence of proof to the contrary, will be taken to be the same as the *lex fori*. (Ferrie v. Public Adm'r, 4 Bradf. 28.) But where the person claiming as a party to the alleged contract of marriage is living, and the transaction is recent, defects in the proof, or in the explanation of suspicious circumstances, are taken more adversely than when the events involved are remote, and both of the parties are deceased. (Hill v. Burger, 3 Bradf. 432.) See Minor v. Jones, 2 Redf. 289; Clayton v. Wardell, 4 N. Y. 231; Cheney v. Arnold, 15 id. 351; Van Tuyl v. Van Tuyl, 8 Abb. Pr. (N. S.) 5; 57 Barb. 235; Jackson v. Winne, 7 Wend. 47; Caujolle v. Ferrie, 23 N. Y. 90; Jacques v. Public Adm'r, 1 Bradf. 499; Hyde v. Hyde, 3 id. 509; Bissell v. Bissell, 55 Barb. 325; Fleming v. People, 27 N. Y. 329; Brower v. Bowers, 1 Abb. Ct. App. Dec. 214; O'Gara v. Eisenlohr, 38 N. Y. 296; Cunningham v. Burdell, 4

Bradf. 343; Foster v. Hawley, 8 Hun, 68; Blossom v. Barrett, 37 N. Y. 434; Oram v. Oram, 3 Redf. 300; Davis v. Brown, 1 id. 259; White v. Lowe, id. 376; Wyles v. Gibbs, id. 382; Decker v. Morton, id. 477; Renholm v. Public Adm'r, 2 id. 456; Byrnes v. Dibble, 5 id. 383.

⁸⁴ See Co. Civ. Proc., § 2514, subd. 10, for a definition of this expression.

⁸⁵ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2666. The requirement of a decree in all cases is new. It has not been the practice, we believe, to enter a formal decree where there is no contest, except so far as the entry in the record-book kept for that purpose is a decree. It is still the practice to issue letters forthwith in such a case. If any order is made, it is by an entry in the surrogate's books.

⁸⁶ See Farley v. McConnell, 52 N. Y. 630.

⁸⁷ Co. Civ. Proc., § 2663, as amended 1893, consolidating former § 2666.

⁸⁸ See c. XV, *post*, on Official Bonds.

city, and limit the authority of the letters to the prosecution of such action, and restraining the representative from compromising the action or enforcing any judgment recovered therein without the order of the surrogate, on additional further satisfactory security.⁸⁹

TITLE FOURTH.

QUALIFICATIONS OF ADMINISTRATOR.

§ 361. **Who are incompetent to administer.**—The rules governing the competency of a person to be an administrator are, with the single exception hereinafter noted, the same as those in the case of an executor. These have been detailed in a previous chapter.⁹⁰ With respect to letters of administration, the statute declares that such letters shall not be granted to (1) a person convicted of an infamous crime; nor to (2) any one incapable by law of making a contract; nor to (3) a person not a citizen of the United States, unless he is a resident of this State; nor to (4) a person under twenty-one years of age; nor to (5) a person who is judged incompetent by the surrogate to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding.⁹¹

The exception referred to is, that whereas “dishonesty,” when so adjudged by the surrogate, disqualifies a person for the office of executor, it is not expressly stated to be a bar to a grant of letters of administration, though, by another section, dishonesty is made a ground for revoking such letters.⁹² The fact that a man sought to obtain property from another by theft or fraud has been held not to be “improvidence” within the meaning of the statute, though no one can doubt that it is “dishonest.”⁹³ The standard of incompetency fixed by the written law can alone be applied in passing upon the qualifications of an applicant to

⁸⁹ Co. Civ. Proc., § 2664, as amended 1893, incorporating former § 2667. Aside from the question of security, we fail to see any jurisdictional objection to the court's limiting the effect of letters granted by it in a proper case, according to English practice. In *Martin v. Dry Dock, etc.*, R. R. Co. (92 N. Y. 70), the letters granted power “with the powers expressed in the margin,” and on the margin was written, “These letters are issued with limited authority to prosecute only; and not with power to collect or compromise.” In an ac-

tion by the administrator, on an objection that the letters were invalid upon their face, and did not authorize him to bring the action, the surrogate's power to insert the limitation was upheld.

⁹⁰ See § 303, *ante*.

⁹¹ Co. Civ. Proc., § 2661, as amended 1893, incorporating 2 R. S. 75, § 32; as amended L. 1830, c. 320, § 18; L. 1863, c. 362; L. 1867, c. 782, § 2.

⁹² Co. Civ. Proc., § 2685.

⁹³ *Coope v. Lowerre*, 1 Barb. Ch. 45. See *Coggshal v. Green*, 9 Hun. 471; *Matter of Cutting*, 5 Dem. 456.

whom that law has given priority; hence indebtedness to the estate or personal interest in its administration are not of themselves,⁹⁴ nor are old age and physical infirmity, *per se*, disqualifications for the office.⁹⁵ The fact that the person having the right to a grant of letters claims to own the property alleged to belong to the estate, is not a bar to such grant.⁹⁶ A corporation cannot be administrator, unless so authorized by its charter; which is the case of several trust companies.⁹⁷

§ 362. **Administrator's oath.**—The official oath or affirmation of an administrator, to the effect that he will well, faithfully, and honestly discharge the duties of his office, describing it, must be filed with the surrogate before letters are issued to him. Where his appointment and qualifying are brought in question in a collateral action, he will be presumed, in the absence of proof to the contrary, to have taken the oath of office.⁹⁸

§ 363. **Administrator's bond.**—An administrator must before letters are issued to him, besides filing his official oath, execute to the people of the State, and file with the surrogate, the joint and several bond of himself, and two or more sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property of which the decedent died possessed, and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law.⁹⁹ The regulations for ascertaining the amount of penalty, etc., are reserved for consideration in the chapter on official bonds.

TITLE FIFTH.

EFFECT OF GRANT OF LETTERS.

§ 364. **The letters as authority.**—The consideration of the effect of the grant of letters of administration properly involves the general question of the effect of surrogates' decrees — a topic which has been to some extent discussed in the chapter on probate, and will be further discussed in another chapter.¹

Unlike an executor, who may assume some of the duties of his trust before probate, the rule, with respect to an

⁹⁴ Estate of Morgan, 2 How. Pr. (N. S.) 194; Churchill v. Prescott, 2 Bradf. 304.

⁹⁵ Matter of Berrien, 3 Dem. 263.

⁹⁶ Hayward v. Place, 4 Dem. 489; Matter of Facundi, N. Y. Law J., Nov. 20, 1890.

⁹⁷ Thompson's Estate, 33 Barb. 334.

⁹⁸ Johnston v. Smith, 25 Hun. 171; Dayton v. Johnson, 69 N. Y. 419.

⁹⁹ Co. Civ. Proc., § 2664, as amended 1893 (former § 2667).

¹ See § 247, *ante*, and c. XXI, *post*.

administrator, is, that a party entitled to administration can do nothing before letters are granted to him, inasmuch as he derives his authority, not like an executor from the will, but entirely from the appointment of the court. Upon the issue of letters, however, the personal property of the intestate vests in the administrator, by relation, from the death of the intestate,² so that one who has taken possession wrongfully is a trespasser *ab initio*.³ Upon the same principle, a contract entered into, after the intestate's death, but before the issuing of letters, by one subsequently appointed administrator, is rendered valid by the appointment.⁴ The authority conferred by the letters has reference exclusively to the personal property of the intestate.⁵

§ 364a. **Priority among different letters.**—The person or persons to whom letters of administration are first issued from a Surrogate's Court having jurisdiction to issue them, have sole and exclusive authority as administrators, pursuant to the letters, until the letters are revoked as prescribed by law; and they are entitled to demand and recover from any person, to whom letters upon the same estate are afterward issued by any other Surrogate's Court, the decedent's property in his hands. But the acts of a person to whom letters were afterward issued, done in good faith before notice of the letters first issued, are valid; and an action or special proceeding commenced by him may be continued by and in the name of the person or persons to whom the letters were first issued.⁶

§ 365. **Effect of grant, by way of estoppel.**—Where letters of administration are granted to a person, his acts, in the course of the proceedings to obtain the grant, are held to operate upon him, in various ways, as an estoppel. Thus, the administrator and the sureties on his bond are estopped from denying that the surrogate had jurisdiction to grant the letters, in an action upon the bond,⁷ or in any proceeding to recover assets which the appointment and the bond enabled the administrator to obtain;⁸ and where one made application for administration on the estate of

² Whitlock v. Bowery Sav. Bank, 36 Hun. 460, and cases cited.

³ Rockwell v. Saunders, 19 Barb. 473. Where there are no creditors, the widow and daughter of an intestate, his only next of kin, may settle his estate, without taking out letters. (Herrington v. Lowman, 22 App. Div. 266; 47 N. Y. Supp. 863.)

⁴ Allen v. Eighmie, 9 Hun, 201.

⁵ See Hillman v. Stephens, 16 N. Y. 278; Brevoort v. McTimsey, 1 Edw. 551; Griffith v. Beecher, 10 Barb. 432. For a consideration of the rights and liabilities of administrators generally, see c. XVII. *post*.

⁶ Co. Civ. Proc., § 2592.

⁷ Field v. Van Cott, 5 Daly, 308. See c. XV. *post*.

⁸ Johnston v. Smith, 25 Hun, 171.

his deceased wife, alleging, under oath, that she died possessed of personal property, and received letters and afterward filed his account, in which certain moneys were returned, as constituting the whole estate, it was held that he was estopped, as against a creditor of the estate, from claiming the moneys as his own individual property.⁹

§ 366. **Letters as evidence of authority.**— Subject to the rule of priority among different letters, above mentioned, it is provided that letters of administration, granted by a court or officer having jurisdiction to grant them, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked.¹⁰ This rule protects the decree and letters, in general, from collateral impeachment;¹¹ but it is, of course, subject to the exception which exists with reference to the adjudication of all other tribunals, viz., that where the court had no jurisdiction the decree is void, and its character may be shown in a collateral proceeding. Where the validity of the appointment of administrators is attacked, the burden of proof is upon the attacking party, to show a want of jurisdiction in the surrogate.¹² The statute does not require the facts conferring jurisdiction to be proved in any particular way, nor the proofs to be filed or reduced to writing, and, therefore, a failure to find such proofs on file in the surrogate's office is not evidence that no such proofs were adduced before him; the presumption is that they were.¹³ The production of the letters, or the record, or the exemplification of the record thereof, establishes, *prima facie*, the representative character of an administrator, in an action brought by him.¹⁴ A formal defect in the letters may, it has been held, be remedied after the commencement of the action in which they are offered as evidence.¹⁵

§ 367. **Record, etc., of letters as evidence.**— The surrogate is required to record, in a book kept for that purpose, all letters of ad-

⁹ Garvey v. McCue, 3 Redf. 313; Welch v. N. Y. Cent. R. R. Co., 53 id. revd. on another point, 14 Hun. 562. 610.

¹⁰ Co. Civ. Proc., § 2591; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; Kelly v. West, 80 id. 139; Roderigas v. East River Sav. Inst., 63 id. 460; Parhan v. Moran, 4 Hun. 717; More v. Finch, 65 id. 404; c. XXI, *post*.

¹¹ Kelly v. Jay, 79 Hun. 535; 29 N. Y. Supp. 933.

¹² Belden v. Meeker, 47 N. Y. 307; Farley v. McConnell, 52 id. 630;

¹³ Farley v. McConnell, *supra*.

¹⁴ Belden v. Meeker, and cases *supra*. See Flinn v. Chase, 4 Den. 85.

¹⁵ Maloney v. Woodin, 11 Hun. 202; where an administrator, plaintiff, was allowed to cause the letters to be sealed, pending the trial of the action upon which they had been excluded, for the want of sealing, when offered in evidence.

ministration issued out of his court.¹⁶ A transcript of the record of the letters duly certified is evidence, as if the originals were produced.¹⁷

TITLE SIXTH.

ADMINISTRATION DE BONIS NON.

§ 368. **When will be granted.**—The distinction between an administrator with the will annexed (being one who succeeds to or takes the place of an executor), and an administrator of the goods, etc., left unadministered by a former administrator, has been pointed out. Where an administrator dies, or becomes incapacitated to act, by revocation of his letters, or otherwise, a successor will not ordinarily be appointed, unless he was a sole administrator or survivor.¹⁸ But where all the administrators to whom letters have been issued die, become lunatic, are convicted of an infamous offense, or otherwise become incapable of discharging the trust reposed in them, or the letters are revoked as to all of them, the surrogate must grant letters of administration to one or more persons as their successors, in like manner as if the former letters had not been issued.¹⁹ Notwithstanding this mandatory language, yet where the administrator, before his letters were revoked, had fully administered the estate, his accounts may be settled, without appointing a successor; moreover, the prosecution of his bond does not require such appointment.²⁰ The Code does not expressly state which surrogate has jurisdiction to grant the new letters;²¹ but, in another section,²² treating of revocation of letters, the power to appoint a successor is conferred upon the Surrogate's Court which granted the decree of revocation.

§ 369. **His powers.**—The successor to an administrator, whose letters have been revoked, may complete the execution of the trust committed to his predecessor; he may continue, in his own name, a civil action or special proceeding pending in favor of his predecessor; he may enforce a judgment, order, or decree in favor of the latter;²³ and he may maintain an action against the surety

¹⁶ Co. Civ. Proc., § 2498, subd. 2.

¹⁷ Co. Civ. Proc., § 933.

¹⁸ See Co. Civ. Proc., § 2692.

¹⁹ Co. Civ. Proc., § 2693.

²⁰ *Prentiss v. Weatherly*, 68 Hun, 114; 22 N. Y. Supp. 680; *affd.*, 144 N. Y. 707.

²¹ The original statute (2 R. S. 78, § 45) specified, "the surrogate having authority to grant letters originally."

²² Co. Civ. Proc., § 2605.

²³ Co. Civ. Proc., § 2605. An administrator *de bonis non* has no greater rights than his predecessor; and a payment which, by relation back and ratification, is protected, is a defense as against an action by the successor as well as against the one who received it. (*Whitlock v. Bowery Sav. Bank*, 36 Hun, 460.)

of his predecessor for moneys received by him.²⁴ And there would seem to be no doubt that this is true in all cases of succession.²⁵

§ 370. **Petition for, and form of, letters.**—The proceedings to obtain such letters are the same as upon an original application, and the same rules in regard to priority obtain,²⁶ except that a person who has been removed for incompetency, etc., and not for a mere failure to give sureties, cannot apply again for letters. The petition should state the same facts as on an application for original administration, and also the facts showing a proper case for the grant of letters *de bonis non*, as the death of all the administrators, or their removal, etc., and that there are assets left unadministered, stating their value, etc. In all other respects the petition and the subsequent proceedings are the same as upon an original application. The Code says, briefly, “the proceedings to procure the grant of such letters are the same as in a case of intestacy.”²⁷ The form of letters is in all respects the same as on an original grant, except that they recite the revocation of letters, or death, etc., of the former administrator, and commit to the new administrator the administration of all and singular the goods, chattels, and credits of the deceased left unadministered by him.

TITLE SEVENTH.

ANCILLARY LETTERS OF ADMINISTRATION.

§ 371. **Jurisdiction, when possessed.**—The statute makes provision for the recognition, by the Surrogates’ Courts of this State, of a grant of administration upon the estate of an intestate non-resident, made by a court of his domicile, by the issuing of ancillary letters in accordance therewith.²⁸ The application for ancillary letters of administration upon the estate of such a non-

²⁴ *Dunne v. American Surety Co.*, 34 Misc. 584; 70 N. Y. Supp. 391.

²⁵ The Revised Statutes enacted that the “administrator shall give bonds in the like penalty with like sureties and conditions as heretofore required of administrators, and shall have the like power and authority.” (2 R. S. 78, § 45.)

²⁶ *Matter of Place*, 3 St. Rep. 210; 9 Civ. Proc. Rep. 435. The public administrator may be appointed. (*Ketchum v. Morrell*, 2 N. Y. Leg. Obs. 58.) A nephew of decedent has priority of

right to letters *de bonis non* over a creditor. (*Matter of Hine*, N. Y. Law J., Jan. 26, 1893.)

²⁷ Co. Civ. Proc., § 2693. The surrogate may fix as the penalty of the bond to be given a sum not less than twice the value of the assets remaining unadministered. (*Id.*, as amended 1889.)

²⁸ As to when letters are ancillary and when principal, see *Hendrickson v. Ladd*, 2 Dem. 402; 5 Civ. Proc. Rep. 50; *Black v. Woodman*, 5 Redf. 363.

resident intestate is required to be made "to a Surrogate's Court having jurisdiction of the estate."²⁹ In order to decide which Surrogate's Court has jurisdiction in any particular case, it is necessary to consult the sections of the Code already discussed in this chapter, prescribing in general the jurisdiction of the Surrogates' Courts in cases of intestacy.³⁰ So much of those sections and of such discussion as relates to nonresidents of the State will be pertinent to the determination of the question suggested.

§ 372. **To whom the letters issued.**—A grant of ancillary letters of administration will only be made to the person named in the foreign letters, or to the person otherwise entitled to the possession of the decedent's personal property, unless another person applies therefor, and files with his petition an instrument executed by the foreign administrator, or person otherwise entitled as aforesaid, or, if there are two or more, by all who have qualified and are acting, and also acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters; in which case the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as above prescribed, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs.³¹ The statute declares the cases in which letters shall *not* be issued, to wit: "1. Where ancillary letters have been previously issued, as prescribed in the Code. 2. Where an application for letters of administration upon the estate has been made by a relative of the decedent, who is legally competent to act, to a Surrogate's Court of this State having jurisdiction to grant the same; and letters have been granted accordingly, or the application has not been finally disposed of."³²

§ 373. **The application for letters.**—The application must be made by the written petition, either of the party who is entitled to letters, or of his duly authorized attorney in fact, accompanied—in case decedent, at his death, resided out of the State, but in the United States—by a duly authenticated copy of letters of administration upon his estate granted in the place of his residence.

²⁹ Co. Civ. Proc., § 2696.

Willetts, 76 Hun. 211; 27 N. Y. Supp.

³⁰ Co. Civ. Proc., §§ 2476, 2477; 785.

§ 338, *ante*.

³² Co. Civ. Proc., § 2696.

³¹ Co. Civ. Proc., § 2697; *Ross v.*

In case decedent, at the time of his death, resided without the United States, "satisfactory proof" must be furnished the court, "that the party so applying, either personally or by such attorney in fact, is entitled to the possession, in the foreign country, of the personal estate of such decedent."³³ As the proceedings for a grant of ancillary letters, whether of administration or testamentary, are identical, and as the powers under both kinds of letters are the same, the reader is referred to the page treating of ancillary letters testamentary, where they are detailed.³⁴

³³ Co. Civ. Proc., § 2696. In *Weed v. Waterbury* (5 Redf. 114), after principal letters had been applied for here, on the ground that the decedent was a resident of the county, another application was made for ancillary letters on the ground that the decedent was an inhabitant of another State. Held, that principal letters on the first application should be granted.

³⁴ See § 312, *ante*. As to the amount of the penalty of the bond, see *Sutton v. Weeks*, 5 Redf. 353; *Matter of Govan*, 2 Misc. 291; 23 N. Y. Supp. 766, and § 316, *ante*, and c. XV, *post*.

CHAPTER XII.

PUBLIC ADMINISTRATORS.

TITLE FIRST.

NATURE AND OBJECT OF OFFICE.

§ 374. **In general.**—Public administrators are the officers — one of whom exists in each county in the State — charged by law with the duty of collecting, preserving, and administering the estates of persons dying intestate, in cases where no other administrator is appointed. The object for which the office is established is that the estates of decedents shall not be wasted, but collected and preserved for those entitled thereto, or to remain in the public treasury if no rightful claimant appears. In all the counties, except those of New York, Kings, and Richmond, and except in those counties wherein the office of county treasurer has been abolished, the county treasurer is, by virtue of his office, public administrator of the county.¹ It may be stated, generally, that the powers and duties of a public administrator are (1) such

¹The sixth title of chapter 6 of part 2 of the Revised Statutes, devoted to the subject of public administrators, was repealed by L. 1893, c. 686. So much of it as related to the public administrator in the city of New York had already been superseded by the Consolidation Act of 1882, c. 410, which adopted, without material amendment, the first article of title 6, relating to that officer. In 1895 (L. 1895, c. 827) the office was made independent of the law department of the city, and a general act was then passed (L. 1898, c. 230) regulating his powers and duties. The second article of the sixth title of the Revised Statutes so repealed, relating to public administrators in the several counties other than New York county, has been readopted as sections 2665, 2666, 2667, and 2668 of the Code of Civil Procedure. The laws creating the office of public administrator of Kings county (L. 1871, c. 335; L. 1882, c. 124) were likewise repealed by L. 1893, c. 686, and their provisions substantially readopted as section 2669 of the Code of Civil Procedure. In Richmond county the office of public administrator was created in 1899 (L. 1899, c. 486), and the powers of a county treasurer, when acting as public administrator, conferred upon him. Provision is also made for the appointment of a public administrator in counties where the office of county treasurer has been abolished. (L. 1900, c. 501.) As the cases arising under the original statutes necessarily refer to them, we have, for the better understanding of such references, cited the original statutes as well as the sections of the Code where their provisions may now be found.

as devolve upon him by virtue of his office, without any formal investiture of authority in a particular case, and (2) such additional powers and obligations as he acquires and is subject to, after receiving letters or his becoming otherwise duly clothed with the character of administrator of an estate. He has, *virtute officii*, without any appointment by the surrogate, or its equivalent, authority to act, in the cases specified in the statute, in the capacity of temporary administrator of an estate,—*i. e.*, to “collect and take charge of the assets,” including the right to sue for such purposes.² The provisions of the statute, defining the powers and obligations of the officer, are not to be understood as exhaustive, but are, throughout, to be taken with the qualification that the public administrator is an administrator as well as a public officer.³

§ 375. **Extent of authority.**—The powers which the public administrator has, *by virtue of his office*, do not extend further than to allow him to pay the funeral expenses of the deceased, to collect debts, to take possession of and secure the effects, to sell such as may be perishable, and to defray the expenses of the proceedings required by law.⁴

§ 376. **Collecting and preserving estate.**—General authority is conferred upon public administrators, when authorized to take charge of an intestate's property, “to take the same proceedings which an administrator, etc., may have or be entitled to take, (1) for the discovery of any property of the intestate which may be concealed or withheld, and (2) for the sale of any that may be perishable.”⁵ The court may authorize him (if its authority

² 2 R. S. 129, § 47; L. 1871, c. 335, § 5; Co. Civ. Proc., § 2665, as amended 1893. He may maintain an action to annul a fraudulent transfer of the property of the deceased and to recover the same or its avails, for the benefit of simple contract creditors. (*Hangen v. Hachemeister*, 53 Super. Ct. [J. & S.] 532.) But if he seizes property of a third person, as a mortgagee of chattels, in possession after default, although in good faith, and believing it to belong to the intestate's estate, he is liable to an action therefor. (*Levin v. Russell*, 42 N. Y. 251.) Where he is appointed successor to a temporary administrator, and the latter's bond has been assigned to him by the surrogate, he may bring an action thereon, in his own name.

(*Dayton v. Johnson*, 69 N. Y. 419.) See Co. Civ. Proc., § 2607.

³ *Miller v. Franklin Bank*, 1 Paige, 444.

⁴ 2 R. S. 123, § 28; L. 1882, c. 410, § 233; 2 R. S. 131, § 65; Co. Civ. Proc., § 2666, as amended 1893.

⁵ 2 R. S. 129, §§ 50, 51; Co. Civ. Proc., § 2665, as amended 1893. The proviso of original statute, that sales of perishable property could be made “on obtaining an order for that purpose,” is omitted in the Code enactment. (§ 2665.) But the same proviso in the original statute, relating to the public administrator of New York county (2 R. S. 121, § 15), was preserved in the Consolidation Act of 1882, § 226, and was continued in L. 1898, c. 230, § 11. By the

is necessary at all) to sell a lot of household furniture, in order to save the cost of storage.⁶ And in certain cases, where there is danger of the waste or embezzlement of the estate, the surrogate may authorize him to take charge of and secure the effects, even though there is resident in the county a person who is entitled to administer.⁷ In order to obtain the power to pay debts, and dispose of the surplus, he must have letters of administration granted to him, or must file the affidavit, the filing of which, in certain minor cases, is equivalent to the issue of letters. When he has acquired this authority, he acts by virtue of his letters, not merely by virtue of his office,⁸ and is subject, in general, to all the duties and obligations of an ordinary administrator.⁹

§ 377. Authority, how evidenced.—In all cases of death occurring under such circumstances that the public administrator may ultimately become entitled to be fully invested with the rights and powers of administrator of the estate, intestacy is presumed until a will is proved and letters testamentary are issued thereon.¹⁰ And where letters are issued to him, such letters, the record thereof, and a duly certified copy of such record, are made conclusive evidence of his authority to act, in all cases within the statute.¹¹

original statute (2 R. S. 129, § 50), the county treasurer was entitled to the same process to discover concealed and withheld effects, as the public administrator of New York: by section 2665, as amended 1893, he is entitled to take the same proceedings as a general administrator, that is, under Co. Civ. Proc., § 2707, as amended 1893. The public administrator in New York, however, when acting by virtue of his office merely, must proceed under 2 R. S. 120, § 8 *et seq.*; L. 1882, c. 410, §§ 222–224. See L. 1898, c. 230, § 7.

⁶ Public Adm'r v. Burdell, 4 Bradf. 252.

⁷ 2 R. S. 119, §§ 6, 7; L. 1882, c. 410, § 221; L. 1898, c. 230, § 6 [relating to public administrator of New York]; and 2 R. S. 129, § 49; Co. Civ. Proc., § 2665, as amended 1893 [relating to county treasurers].

⁸ Miller v. Franklin Bank, 1 Paige, 444.

⁹ The mode of obtaining the general power of administration is different in the county of New York, and the other counties, and will be stated in connection with the powers and duties of the public administrators in those places.

¹⁰ 2 R. S. 118, § 4; L. 1882, c. 410, § 219; L. 1898, c. 230, § 4 [relating to New York public administrator]; and 2 R. S. 129, § 47; Co. Civ. Proc., § 2665, as amended 1893 [relating to county treasurers]. It is difficult to see how intestacy can be presumed after a will is proved, although letters testamentary should never issue, *c. g.*, where letters of administration with the will annexed are granted. Another peculiarity of the statute may also be noticed in this connection, viz., that although the authority conferred upon the public administrator by the Revised Statutes is expressly stated to relate to the estates of "persons dying intestate" (2 R. S. 118, § 34; *id.* 129, § 47), they in terms provide for issuing to him, in certain cases, letters of administration with the will annexed (2 R. S. 122, § 23; *id.* 131, § 61; L. 1898, c. 230, § 15), as does also Co. Civ. Proc., § 2643, as amended 1881. Matter of Blank (2 Redf. 443), and Matter of Hanover (3 *id.* 91), are rulings under the Revised Statutes.

¹¹ 2 R. S. 122, § 23; L. 1882, c. 410, § 230; 2 R. S. 131, § 63; L. 1898, c. 230, § 15; Co. Civ. Proc., § 2666, as amended 1893.

§ 378. **Application for letters in right of priority.**—Public administrators are included in the enumeration of those who have a right, in the order of their priority, to a grant of letters of administration upon intestates' estates. In New York county the public administrator has a preference for appointment, after the next of kin, and after the executor or administrator of a sole legatee named in a will, etc., over creditors and all other persons; in other counties (except Kings), the county treasurer has the preference, next after creditors, over all other persons.¹² In Kings county, the public administrator has the "prior right and authority," after the next of kin.¹³

§ 379. **Authority, how superseded.**—When his power to act is superseded in the instances prescribed by statute—*e. g.*, by the production to him of letters granted to any other person upon the same estate—he must deliver to the person producing such letters all the assets of the deceased in his hands, after deducting his commissions and expenses.¹⁴ But the fact that his powers have ceased, or that he has been superseded, does not cause any suit commenced by him to abate; but the same may be continued by the person who succeeds to his powers in regard to the estate.¹⁵

§ 380. **Annual statement.**—Every public administrator is required, under penalty of fine and forfeiture of office, to publish annually a statement, showing among other things, each case in which he shall have taken charge of and collected any effects, or in which he shall have administered on any estate during the preceding year, with the name of the deceased, the place of his residence at the time of his death, if the same be known, and the place from which he came, if he was not a resident of this State at the time of his death.¹⁶ Having taken this general view of the statutes and principles applicable to the functions of public

¹² Co. Civ. Proc., § 2660, as amended 1893. See § 344, *ante*. The public administrator may be appointed administrator *de bonis non*. (Ketchum v. Morrell, 2 N. Y. Leg. Obs. 58.) In New York city, if the relatives having a prior right to letters make no application, within a reasonable time, it is the duty of the public administrator to apply for letters. (Matter of Page, 107 N. Y. 266.)

¹³ Co. Civ. Proc., § 2669. See § 401, *post*; Matter of Gilchrist, 37 Misc. 543; 75 N. Y. Supp. 1055.

¹⁴ 2 R. S. 125, § 33; L. 1882, c. 410,

§ 237; 2 R. S. 132, § 67; L. 1898, c. 230, § 22; Co. Civ. Proc., § 2667, as amended 1893.

¹⁵ *Id.*; L. 1898, c. 230, § 23. After he is invested with the powers of an administrator, he is within the provisions of Co. Civ. Proc., §§ 1828, 766.

¹⁶ 2 R. S. 127, §§ 39, 40; L. 1882, c. 410, § 242; L. 1898, c. 230, §§ 27, 28 [relating to N. Y. public adm'r]; and 2 R. S. 132, §§ 72, 73; Co. Civ. Proc., § 2668, as amended 1893 [relating to county treasurers]; 2 R. S. 132, §§ 72, 73.

administrators, we may pass to the consideration of their authority and proceedings in particular counties.

TITLE SECOND.

THE COUNTY TREASURER AS PUBLIC ADMINISTRATOR.

§ 381. **Powers of treasurer before grant of letters.**—In counties other than New York, Kings, and Richmond, the duties of public administrator devolve upon the county treasurer,¹⁷ who, by virtue of his office, is empowered to collect and take charge of the assets of every person dying intestate, where such assets shall amount to one hundred dollars or more, upon which no letters of administration have been granted, in the following cases: “1. When such persons leave assets in the county of the treasurer, and there is no widow or relative in the county, entitled or competent to take letters of administration on the estate. 2. When assets of any such person, after his death, come into the county of the treasurer, and there is no person in the county entitled, or competent, to take administration of the estate.” In Richmond county the public administrator possesses the powers and jurisdiction, and is subject to the liabilities of a county treasurer.¹⁸ Under the Code, therefore, he has no power to act as public administrator in any case in which the public administrator in the city of New York has jurisdiction.¹⁹ If (or although) there is a widow or a relative in the county who is entitled to administration, the surrogate may authorize the county treasurer to seize and secure the effects, upon proof that there are creditors or relatives of the deceased, residing more than one hundred miles distant from the residence of such surrogate, who are interested in the distribution of the estate, and that the effects of the deceased are in danger of waste or embezzlement; and the granting of such order vests him with all the powers which he has, by virtue of his office, as above.²⁰ Until letters of administration are granted to him, the county treasurer cannot proceed further than to pay the funeral charges of the deceased, collect and secure the effects, to sell such things as are perishable and defray the expenses of the proceedings required

¹⁷ In those counties wherein the office of county treasurer has been abolished, the statute provides for the appointment of a public administrator who shall possess all the powers of a county treasurer relating to the office of public administrator. (L. 1900, c. 501.)

¹⁸ L. 1899, c. 486.

¹⁹ Co. Civ. Proc., § 2665, as amended 1893; adopting, with verbal changes, 2 R. S. 129, § 47. See *Sutton v. Public Adm'r*, 4 Dem. 33.

²⁰ Co. Civ. Proc., § 2665, as amended 1893 (2 R. S. 129, § 49).

by law.²¹ Upon taking possession, he must cause an inventory to be made by appraisers appointed by the surrogate, executed by him and filed with the surrogate, within ten days after he takes charge, unless the surrogate, for good cause shown, extends the time ten days longer. For neglect to make the return within the time prescribed, he will forfeit one hundred dollars for the use of the poor of his county, and will forfeit his office.²²

§ 382. **Granting letters to treasurer, or other person.**—When the inventory is returned, the county treasurer must give the bond required by law to be given by a temporary administrator appointed by a surrogate, with such sureties and in such penalty as the surrogate approves, and the surrogate must then issue letters to such county treasurer, authorizing him to collect and preserve the estate of the deceased. “The surrogate must immediately thereafter cause notice thereof to be published once in each week for three months, in a newspaper printed in his county, and in the official State paper, requiring all persons claiming a right to administer on such estate to appear and interpose such claim before the surrogate within a certain time to be therein specified, not less than six months after the first publication of such notice in the official State paper. If before such time any person entitled to administer appears and claims the same, the surrogate must cause ten days’ notice of such claim to be served on the county treasurer, and may, at the expiration of such time, grant letters to such person unless it appear that he is not entitled thereto; and thereon the publication of the notice must be discontinued. At the time appointed, if letters have not been previously granted, any person entitled to administration on such estate and duly qualified and competent, who appears and claims the same, shall be entitled to letters testamentary or of administration, as the case may be.”²³

“If letters testamentary or of administration be not granted by the surrogate to any person at or before the expiration of the time specified in the notice, then, unless it appear that such letters have already been granted by some other surrogate, the surrogate must grant letters of administration thereon to the county treasurer as in other cases, on receiving the like bond, with the like sureties, and in the like penalty, as administrators are required to give. The county treasurer must accept of such letters

²¹ Id., § 2666 (2 R. S. 131, § 65).

²³ Co. Civ. Proc., § 2666, as amended

²² Co. Civ. Proc., § 2665, as amended 1893 (2 R. S. 130, §§ 57-59).
1893 (2 R. S. 130, §§ 52-55).

and give the bond above required. Such letters and the record thereof, and a transcript of such record, duly certified, are conclusive evidence of the authority of the county treasurer in all cases in which the surrogate has jurisdiction under this article. The surrogate must immediately transmit to the comptroller a certified copy of all such letters granted by him to the county treasurer, the expense of which must be paid to him out of the State treasury, on the warrant of the comptroller."²⁴

§ 383. Powers and duties under letters.— Upon receiving letters of administration, the county treasurer becomes vested with all the powers and rights of other administrators, and subject to the same duties and obligations, except as otherwise provided by the statute.²⁵ He acts in each case by virtue of his letters chiefly; and he is subject to the supervision of the surrogate in the same manner and to the same extent as other administrators, except so far as the provisions of the statute may exclude that responsibility, or may prescribe a wholly inconsistent rule.²⁶

§ 384. Accounting and compensation.— He must account, and may be compelled to account, in the same manner as other administrators, at the instance of any person interested, or of the attorney-general, or the comptroller.²⁷ On the settlement of his accounts, he is allowed for his expenses as other administrators, and double their commissions. The balance of moneys in his hands must be paid into the State treasury for the benefit of such persons as shall be entitled thereto.²⁸

§ 385. Superseding treasurer's letters.— Upon letters being granted to an authorized claimant, the authority of the county treasurer ceases, and he must deliver to the person appointed, the assets in his hands, after deducting certain expenses, and a reasonable compensation for his services, not exceeding three dollars for each day necessarily employed, to be allowed and taxed

²⁴ Co. Civ. Proc., § 2666 (2 R. S. 131, §§ 61-64).

²⁵ Co. Civ. Proc., § 2668, as amended 1893.

²⁶ Thus his appointment as administrator, in a particular case, is subject to revocation, on the ground that it was obtained upon a false suggestion, or under mistake of fact, as would be the appointment of any other administrator. (*Proctor v. Wanmaker*, 1 Barb. Ch. 302.)

²⁷ Co. Civ. Proc., § 2668, as amended 1893 (2 R. S. 132, §§ 69, 70).

²⁸ Co. Civ. Proc., § 2668, as amended 1893 (2 R. S. 132, § 71). The original statute (2 R. S. 133, § 74, L. 1877, c. 456), now repealed, provided that

any person claiming any moneys that have been paid into the State treasury as so provided, might petition the Supreme Court that such moneys be paid to him. No such provision is in the present statute, though the remedy undoubtedly is available, on general principles.

by the surrogate.²⁹ The statute provides that the "powers and authority of the county treasurer, in relation to the estate of any deceased person, shall be superseded — 1. By the production of any letters testamentary, granted before or subsequently to his becoming vested with the authority of an administrator, on the same estate; 2. By the production of any letters of administration granted to any other person, on the same estate, before the said county treasurer became vested with the powers of an administrator thereon; 3. By the production of letters of administration, issued by the surrogate of a county in this State, of which the deceased was a resident at the time of his death, granted after the county treasurer became vested with the powers of an administrator upon the estate of such deceased." On his authority being so superseded, he must deliver, to the one producing letters, all the assets in his hands, after deducting his expenses and allowance. All acts done by the county treasurer in good faith, previous to the time when his authority was superseded, are declared valid, and all suits commenced by him may be continued by his successor.³⁰

TITLE THIRD.

PUBLIC ADMINISTRATORS IN NEW YORK AND KINGS.

§ 386. **Public administrator in New York county.**— Previous to 1895, the public administrator in the city of New York was chief officer of a bureau in the law department of the corporation.³¹ In that year the bureau was made independent of the law department, and his appointment and removal vested in the surrogates of the county.³² Upon the enactment of the new city charter, he was continued as a county officer.³³ He receives a regular salary,³⁴ and is required to pay all commissions which he receives into the city treasury, and to make monthly reports to the comptroller, which must be published in the City Record.³⁵ Although a county officer, he is answerable for his acts to the municipal corporation of the city, which is made the conservator of the effects of strangers who die within the city or port, or who die abroad, leaving effects therein, and where no relative or executor appears to administer

²⁹ Co. Civ. Proc., § 2666, as amended 1893 (2 R. S. 131, § 60). power to appoint and remove his subordinates.

³⁰ Co. Civ. Proc., § 2667, as amended 1893 (2 R. S. 131, §§ 66-68). ³³ L. 1897, c. 378, § 1585; L. 1901, c. 466, § 1585.

³¹ L. 1873, c. 335, § 38; L. 1882, c. 410, § 216. ³⁴ L. 1898, c. 230, § 31.

³² L. 1895, c. 827; L. 1898, c. 230, 410, § 216; L. 1898, c. 230, § 3.

§ 2. The public administrator has

such effects.³⁶ To compensate the corporation for undertaking this duty, in addition to the commissions allowed, the public administrator, upon the settlement of his accounts, is required to pay the balance of the fund into the city treasury, where it remains until the rightful owner appears, and such balance may be used by the city without the payment of interest.³⁷ The corporation is responsible for his official acts.³⁸

§ 387. **Powers in right of office.**—His powers and duties differ in some respects from those of the public administrator of Kings county, and those of the county treasurers of other counties when acting as public administrators. The powers which he has by virtue of his office, and before any letters of administration have been granted to him, are declared by the statute as follows: "In the right of his office, he shall have authority to collect and take charge of the goods, chattels, personal estate, and debts, of persons dying intestate, and for that purpose, to maintain such suits as public administrator, as any executor might by law, in the following cases: 1. Whenever any person shall die intestate, either within this State or out of it, leaving any goods, chattels, or effects within the county of New York; 2. Whenever any goods, chattels, or effects of any person who shall have died intestate, shall arrive within the county of New York after his death; 3. Whenever any person, coming from any place out of this State, in a vessel bound to the port of New York, and arriving at the quarantine, near the city of New York, shall there die intestate, and shall leave any effects either at the said quarantine or in the county of New York, or elsewhere; 4. Whenever any effects of any such person so arriving and dying intestate at the said quarantine, shall, after his death, arrive either at the said quarantine or within the county of New York; 5. Whenever any person, coming from any place out of this State in a vessel bound to the port of New York, shall die intestate on his passage, and any of his effects shall arrive at the said quarantine." ³⁹

³⁶ See *Suarez v. Mayor*, 2 Sandf. Ch. 193-200.

³⁷ 2 R. S. 125, § 35, subd. 14; *id.* 127, § 43; L. 1882, c. 410, § 239, subd. 14, and *id.*, § 244; L. 1898, c. 230, § 24, subds. 14, 16; *Suarez v. Mayor*, *supra*; *Sullivan v. Herrera*, 7 Hun, 309.

³⁸ 2 R. S. 127, §§ 42, 43; L. 1882, c. 410, § 244; L. 1898, c. 230, § 29. See § 398, *post*.

³⁹ L. 1898, c. 230, § 4. For previous

statutes, see 2 R. S. 118, § 4; L. 1882, c. 410, § 219. But the powers conferred by this section do not extend his authority to the estate of any person not a citizen of this State, dying within or outside of this State, or on board of any foreign vessel within the harbor of New York, unless, "1. Such person shall have landed within the county of New York, or at the quarantine near the said county; or, 2. Unless the effects of such person, or

The public administrator has like power in the foregoing cases where an executor named in a will refuses or neglects to act or has died.⁴⁰

He also has power, by virtue of his office, to receive and sell at public auction, all property (except cash), not exceeding twenty dollars in value, which may be delivered to him, of persons dying, and reported to him by any other person, when the same is unclaimed for a period of three months; the proceeds of such sale must be paid into the city treasury.⁴¹

§ 388. Information of death of strangers.— In order that he may have full information in regard to those who die intestate, provision is made for the report to him by keepers of hotels and boarding and lodging-houses, of the names of strangers dying in their houses; by coroners, of the names of those on whom they hold inquests, and by undertakers of those whom they bury; and a failure to comply with this requirement is made punishable by fine or imprisonment. It is his duty to send a copy of this statute to all boarding and lodging-houses.⁴² In order to aid him in securing the property which is committed to his custody, it is made the duty of the health officer of the port of New York to take charge of and secure all decedent's effects at quarantine, and to account therefor to the public administrator;⁴³ although this is modified by the provision allowing the board of health, etc., to remove from the city to quarantine, or destroy, property in certain cases.⁴⁴

§ 389. Where letters may be dispensed with.— In cases where the property does not exceed in value one hundred dollars, the public administrator is required immediately to give notice, in the mode prescribed by the statute, that the effects of the deceased in his

some part of them, shall have been so landed: and when any effects of such person shall have been so landed, the authority of the public administrator shall extend to such effects only; or, 3. Unless the decedent died leaving personal property within the county of New York; or leaving personal property which has, since his death, come into the county, and remains unadministered." And he has "no authority to collect and take charge of the wages and effects of seamen dying on board the vessels of a foreign country, whose laws intrust the custody and disposition of such wages and effects to their respective consuls or consular officers." (L. 1898, c. 230, § 5; former statutes, 2 R. S. 119, § 5; L. 1882, c. 410, § 220.) See 2 R. S. 74, § 27 (now Co. Civ. Proc., § 2660); Matter of Page, 107 N. Y. 266.

⁴⁰ L. 1898, c. 230, § 4, last clause.

⁴¹ L. 1898, c. 230, § 18, in part.

⁴² 2 R. S. 128, §§ 45, 46; L. 1866, c. 802, § 1; L. 1882, c. 410, §§ 246, 247; L. 1898, c. 230, § 33.

⁴³ L. 1898, c. 230, § 10; former statutes, 2 R. S. 121, § 14; L. 1863, p. 580, c. 358, § 27, subd. 4, as amended by L. 1865, p. 1207, c. 592, § 5; L. 1882, c. 410, § 225.

⁴⁴ Id. and L. 1856, c. 147, § 4.

and effects to their respective consuls

hands will be administered and disposed of by him according to law, unless the same be claimed by some lawful executor or administrator of the deceased, by a certain day. Notice to the widow and relatives of the deceased must be given. If, at the time appointed in the notice, no claim has been made as therein required, the public administrator, upon filing in the surrogate's office an affidavit stating the value of the property, the giving of notice, the failure of any claimant to appear, and that he has taken upon himself the administration of the estate of the deceased, becomes thereby vested with all the rights and powers, and subject to all the duties of an administrator of the estate of the deceased, in the same manner as if letters of administration had been granted. The affidavit, or a certified copy, is presumptive evidence of the facts it contains, and that administration of the deceased has been committed to the public administrator according to law.⁴⁵

§ 390. **Powers before grant of letters.**—Until vested with the powers of an administrator by the issuing of letters to him, or the filing of an affidavit as above, he has no power to proceed in the administration of the estate, further than to pay funeral charges, and to do such acts as are necessary for the collection and preservation of the estate, and to clothe himself with the full powers of an administrator.⁴⁶ He may, however, at any time, advance to any relative such a portion of his share of the estate to which he may be entitled as in the opinion of the surrogate may be necessary for the support of such relative, not exceeding, however, fifty dollars.⁴⁷ Although the public administrator cannot interfere with the estate, where he has notice that any one who is entitled to a distributive share is a resident of the city of New York, the surrogate may, nevertheless, authorize his taking charge thereof, upon it appearing by affidavit that the effects of the deceased are in danger of waste or embezzlement, or that for any other reason it would be for the benefit of the estate to have the same or any part thereof seized and secured.⁴⁸

After grant of letters, the public administrator is in charge of the estate, not *virtute officii*, but by investiture of letters of ad-

⁴⁵ 2 R. S. 123, §§ 24-27; L. 1882, c. 410, §§ 231, 232; L. 1898, c. 230, §§ 16, 17. ⁴⁶ 2 R. S. 127, § 38; L. 1882, c. 410, § 241; L. 1898, c. 230, § 26.

⁴⁷ 2 R. S. 119, §§ 6, 7; L. 1882, c. 410, § 221; L. 1898, c. 230, § 6.

⁴⁸ 2 R. S. 123, § 28; L. 1882, c. 410, § 233; L. 1898, c. 230, § 18, in part.

ministration issued to him by the surrogate. His proceeding for the discovery of property of his intestate's estate claimed to be concealed or withheld is then fixed by the Code, and not by the Consolidation Act.⁴⁹

§ 391. **Letters of administration, when to be applied for.**—In case the property of which he is authorized to take charge exceeds in value one hundred dollars, the public administrator must immediately give notice of his intention to apply for letters of administration; and the notice (the contents of which are prescribed by the statute) must be served on the widow and relatives entitled to share in the estate.⁵⁰ In case the widow and relatives of the deceased cannot be found in the city of New York, the service may be made by publication, in the cases and manner directed by the statute.⁵¹ If the deceased was a foreigner, unnaturalized, or one who had never taken any step for that purpose, the notice must be served on the consul of the nation of which the deceased was a citizen, if there be one in the city of New York, or upon his deputy, in the same manner as upon the relatives of the deceased.⁵² Notice need be given only to such relatives of the intestate within the city as are actually entitled to a distributive share of his personal estate. The court obtains jurisdiction by the presentation of the application and by the existence of the jurisdictional facts, and failure to give notice of such application to any party whose right to letters was superior to the applicant's, and who was entitled to notice, is a mere irregularity, which does not vitiate the proceedings, and of which advantage can be taken only by the party failing to receive notice.⁵³ The facts upon which the jurisdiction depends are the death of the decedent, his intestacy, and the presence

⁴⁹ *Public Adm'r v. Elias*, 4 Dem. 139. The proceeding for the discovery of concealed effects which the public administrator is authorized to institute, before he applies for letters, is by a subpœna, and is regulated by L. 1898, c. 230, §§ 7, 8, and 9 (former statutes, 2 R. S. 120, §§ 8-13; L. 1882, c. 410, §§ 222-224).

⁵⁰ See *Matter of Page*, 107 N. Y. 266.

⁵¹ 2 R. S. 121, §§ 16, 17; L. 1882, c. 410, § 227; L. 1898, c. 230, § 12.

⁵² 2 R. S. 124, § 29; L. 1882, c. 410, § 234; L. 1898, c. 230, § 19. In any action or proceeding affecting the administration of the estate, a consul or

his representative may appear in person or by attorney, on behalf of any person interested who is then a resident of the country which such consul represents, and citations may be served upon him on behalf of such nonresident, but infants must be represented by a special or general guardian. (Ib.)

⁵³ *Matter of Brewster*, 5 Dem. 259. It was held, further, in that case that notice of the application need only be given to such relatives within the city as are actually entitled to a distributive share of the intestate's estate.

in the surrogate's county, at the time of his death, or afterward, of effects belonging to his estate.⁵⁴

§ 392. **Hearing upon application.**—At the time of the application, any one interested in the estate of the deceased may appear and contest the granting of letters to him, and he is entitled to compulsory process for the attendance of witnesses. If, upon such application, it appears that the deceased has disposed of his personal property by will, and therein appointed an executor competent and qualified to act, or if there is a widow or any relative of the deceased entitled to a share in the estate, who is willing, competent, and qualified to act, the application will be denied, and letters will be granted to such person;⁵⁵ otherwise they will be issued to the public administrator, without his being required to file any further or other official oath or bond.⁵⁶

§ 393. **Cessation of authority on denial of application.**—Upon the granting of letters testamentary or of administration to any other person, the authority of the public administrator ceases, and every order granted to him in relation to the estate is revoked;⁵⁷ and he must turn over to the executor or administrator thereby appointed, the effects of the deceased in his hands. If, *at any time*, before he becomes vested with the power of administering, any executor or administrator appears and produces letters testamentary or of administration, he is entitled to receive the property in the public administrator's hands, after deducting his expenses as taxed and allowed.⁵⁸

§ 394. **Superseding letters.**—The cases in which the powers and authority of the public administrator, in relation to the estate of the deceased, may be superseded, are enumerated as follows: "1. Where letters testamentary shall be granted to any executor of a will of any deceased person, either before or after the public administrator shall have taken letters, or become vested with the powers of an administrator upon such estate; 2. Where letters of administration of such estate shall have been granted to any other person, before the public administrator became

⁵⁴ *Matter of Brewster, supra.* Whether at the time of his death decedent was or was not a citizen of this State is irrelevant to the inquiry respecting the surrogate's jurisdiction. The fact that the proceeding was instituted by a petition made upon information and belief, does not affect the regularity of the proceedings. (Ib.)

⁵⁵ 2 R. S. 122, §§ 18, 19, 20; L. 1882, c. 410, § 228; L. 1898, c. 230, § 13.

⁵⁶ L. 1882, c. 410, § 230; L. 1898, c. 230, § 15.

⁵⁷ *Ib.*

⁵⁸ 2 R. S. 124, § 30; L. 1882, c. 410, § 235; L. 1898, c. 230, § 20.

vested with the powers of an administrator upon the same estate; 3. Where letters of administration shall be granted upon such estate, by any surrogate having jurisdiction, at any time within six months after the public administrator became vested with the powers of an administrator upon such estate.”⁵⁹

Any relative of the deceased, entitled to administer, upon making application to the surrogate within three months,⁶⁰ after the public administrator has become vested with power to administer, may have letters of administration granted to him, upon proof (1) that he did not reside in the county of New York at the time of the death of the intestate; or, (2) that, residing in the said county, no notice was served on him as required by the statute. And upon his giving notice to the public administrator of the granting of such letters, and producing to him duly attested copies thereof, he is entitled to a delivery of the property of the deceased in the hands of the public administrator, after deducting his charges and commissions.⁶¹ But no suit or proceeding that shall have been commenced by him shall abate on account of his authority having ceased for any cause; but the same may be continued by his successor.⁶²

§ 395. General statutory powers under letters.—The rights, powers, and obligations of the public administrator, upon his becoming vested with the right to administer upon any estate, are specifically set forth in the statute. Space will not permit their statement in the precise phraseology of the act, but, in substance, they are as follows: 1. He shall have all the rights, powers, and authority given by law to any administrator except as qualified by the provisions of the statute. 2. He may sue and be sued. 3. He shall make and return an inventory in all cases and in the same manner as is required by law of other administrators and the same proceedings may be had to compel such return. 4. He may sell the property either at public auction, after publishing notice thereof three days daily, or at private sale, or in such other manner as the surrogate may direct. 5. He shall sell public stock, or stock or bonds of any incorporated company, or other security, within two months after the issue of letters, unless he is directed by the surrogate to hold the same for a

⁵⁹ 2 R. S. 124, § 31; L. 1882, c. 410, late. (Tuohay v. Public Adm'r, 2 Dem. § 236; L. 1898, c. 230, § 21. 412.)

⁶⁰ Consequently, an application by a relative to supersede a public administrator, made more than three months after the latter became vested, is too

⁶¹ L. 1898, c. 230, § 22 (former statutes, 2 R. S. 125, §§ 32, 33; L. 1892, c. 410, § 237).

⁶² L. 1898, c. 230, § 23.

longer period, or unless the same have no market value, in which case he may hold them until his accounting or until a sale is directed. 6. In all cases where the estate, after the payment of funeral expenses, is less than fifty dollars, he may make distribution, without notice to creditors or legatees to present their respective claims; in other cases, he shall give such notice by publication once in each week for twelve weeks, requiring creditors and persons interested, to present their claims within twelve weeks from the date of the first notice; if a suit be brought by any creditor or person interested, on a claim not presented within six months from the date of his letters, he shall not be chargeable with any money he may have paid in satisfaction of lawful claims or legacies or in making distribution before such suit was brought, provided he shall have given such notice. 7. He may proceed, as other administrators, to discover assets and obtain delivery and possession of same; and the surrogate may, although an answer be filed as provided in section 2709 of the Code, direct the person cited to be examined as to any knowledge he may have as to the property sought to be discovered. 8. He shall adjust and pay all demands against the estate and may refer all disputes respecting such demands. 9. Six months after he shall become vested with the right to administer, and except in the cases mentioned in subdivision 16, he shall account to the surrogate for all assets received by him and for the application thereof; and such accounting may be compelled as in the case of other administrators. 10. He may, in his discretion, after the expiration of six months, have a final settlement of his accounts. 11. In the settlement of his accounts he shall not be allowed for any payments made by him, unless, in addition to the other vouchers therefor, it shall appear that the same was made on a check, signed by himself, upon the bank in which his deposits are required to be made, except that he may be allowed for current expenses authorized by law, expenses of administration, claims of creditors, distributive shares and legacies not exceeding twenty dollars. 12. Upon the settlement of his accounts, he shall not be allowed for any demand he may have against the estate, unless such demand was specified in writing to the surrogate at the time of applying for letters, or of filing the affidavit required to vest him with the rights of administrator, or unless it appears that such demand existed previous to the death of the intestate. 13. He shall pay all legacies and shares according to the decree of the surrogate; but he may, in his discretion, pay a legacy or

share of an infant, having no general guardian appointed by a court of this State, to his father, or, if his father be dead, to his mother; and if both be dead, to the person with whom the infant resides, for the use of such infant, but the aggregate of such payments shall not exceed two hundred and fifty dollars. 14. The balance of any moneys in his hands, on the adjustment of his accounts, shall be paid into the city treasury, and he shall transfer to the city corporation all securities belonging to the estate then unsold. 15. Whenever in the performance of his duty he shall take an appeal from any decision affecting the estate, an undertaking is not necessary to perfect the appeal, or stay execution. 16. When the estate is not claimed by creditors or other persons interested for one year after the estate passes into his possession, and, after paying the debts and expenses of administration, the balance is less than two hundred and fifty dollars, he shall pay such residue unclaimed into the city treasury; the rights and remedies of all persons interested in the estate to compel an accounting by him are not affected, but the decree of distribution shall provide that payments therein directed, shall be made by the comptroller. 17. Where the estate in his hands is claimed by creditors or other persons interested, and, after paying the debts and expenses of administration, the balance is less than two hundred and fifty dollars, service of the citation upon his accounting shall be made upon those persons only whose places of residence are known; the order for the service of the citation by publication upon nonresidents shall direct the deposit of copies of the citation and of said order in the post-office at least forty days before the return day, directed to the persons to be served at the places specified in such order; he shall pay the shares of unknown persons, or of persons whose residence is unknown, into the city treasury, but the right of any persons to compel an accounting is not affected thereby, but the decree of distribution shall direct payments to be made by the comptroller.⁶³

§ 396. Deposit of moneys.— He is required to deposit all moneys by him collected and received, except a sum for current expenses

⁶³ L. 1898, c. 230, § 24 (former statutes, 2 R. S. 125, § 35; as amended L. 1882, c. 410, § 239). The money so deposited may be obtained by any person entitled thereto, whether in his own right, or as an assignee, by means of a proceeding in the Surrogate's

Court, under Co. Civ. Proc., § 2717. (Matter of Conway, 5 Dem. 290.) Such application must, however, be preceded by claim and demand, under section 261 of the City Charter. (Matter of Rooney, 26 Misc. 106; 56 N. Y. Supp. 855.)

not exceeding twenty dollars in any one case, within two days after the receipt thereof, in a bank designated by law, to the credit of himself, and to be drawn out upon his own check.⁶⁴ Where the bank allows interest on moneys so deposited, it belongs to the next of kin, on the distribution of the estate, and not to the city. But after the settlement of the administrator's account, and the payment of the balance remaining in his hands into the city treasury, to be there preserved awaiting an application for it by its lawful but undiscovered owner, no interest on such balance is chargeable against the city.⁶⁵ The object of the provision requiring such a deposit in a designated bank is to secure the funds against loss through conversion by the administrator, or his indiscreet selection of a bank. But where only the bank-book representing a deposit, in a savings bank, of moneys belonging to the decedent, came to the hands of the public administrator, the money was held not to be collected and received by him within the meaning of the statute.⁶⁶

§ 397. **Commissions and expenses.**— If the public administrator's application for letters is denied, he is entitled nevertheless to retain, out of the effects in his hands, certain necessary expenses which have been incurred, the amount thereof to be taxed and allowed by the surrogate, but no commissions are allowed him. And if there are no effects of the deceased in his hands to pay such expenses, and they are allowed and taxed, then they are to be paid by the executor or administrator, and are given a preference over all other claims, except funeral charges, and he is allowed to maintain an action therefor in his own name.⁶⁷ In case letters were granted to him, he is entitled to retain, on the settlement of his accounts, in addition to his expenses, a commission of five per cent. on all sums not exceeding twenty-five hundred dollars, and two and one-half per cent. on all sums in excess thereof; and such commissions may be retained in preference to any debt or claim, except funeral charges.⁶⁸

⁶⁴ L. 1898, c. 230, § 25 (former statutes, 2 R. S. 126, §§ 36, 37; L. 1882, c. 410, § 240). The disposal of moneys in his hands is a subject upon which the surrogate may direct, as in the cases of other administrators, notwithstanding the provision in case of the public administrator of New York, that moneys shall be drawn from his bank only on the joint check of the public administrator and the comp-

troller, in cases where by law the public administrator is required to pay out moneys. (*Lockhart v. Public Adm'r*, 4 Bradf. 21.)

⁶⁵ *Sullivan v. Herrera*, 7 Hun. 309.

⁶⁶ *Sheerin v. Public Adm'r*, 2 Redf. 421.

⁶⁷ 2 R. S. 122, §§ 21, 22; L. 1882, c. 410; L. 1898, c. 230, § 14.

⁶⁸ 2 R. S. 118, § 3; L. 1882, c. 410, § 218; L. 1898, c. 230, § 3, in part.

§ 398. **City corporation liable for acts of public administrator.**—The corporation of New York city, as above stated, is responsible for the faithful performance of his duties, and the application of all moneys received by him, and for stock transferred, dividends thereon received, and moneys paid into the city treasury by him, or which should be so transferred or paid in by him, after deducting his commissions, but not for any interest on such moneys or dividends on stock. And the persons aggrieved have the same remedies against the corporation as they would have against any executor.⁶⁹ The corporation is liable not as a surety and collaterally, but primarily and in the first instance, for the due and faithful performance of all the duties of his office; and, therefore, where the public administrator, without reasonable cause therefor, brought an action for an alleged conversion of the goods of the deceased, and was defeated, and a judgment for costs obtained against him, it was held that the party in whose favor it was obtained could maintain an action of debt on it against the corporation.⁷⁰ The intent of the statute is to give the aggrieved person a direct remedy by action against the city, and not to require him to seek an accounting in the Surrogate's Court.⁷¹

§ 399. **His personal liability.**—This responsibility of the corporation for his acts does not take away his personal liability, and he has been held liable personally for the wrongful taking or detention of personal property of a stranger, although he had acted in his official capacity and in good faith, and in the belief that the property belonged to the intestate at the time of his death.⁷² In case of his death, removal or resignation, the papers, money, and effects are to be delivered to his successor in office, without the reissuance of any letters to him, and such delivery may be compelled in the same way as in the case of other public officers.⁷³

§ 400. **Public administrator in Kings county.**—The statute provides for the appointment of a public administrator in the county of Kings; and declares "that all provisions of law conferring jurisdiction, authority, or power on, or otherwise relating to, the office of public administrator of the city of New York, and to the office of public administrator in the several counties of this State,

⁶⁹ 2 R. S. 127, §§ 42, 43; L. 1882, c. 410, § 244; L. 1898, c. 230, § 29.

⁷⁰ *Matthews v. Mayor*, 1 Sandf. 132.

⁷¹ *Glover v. Mayor*, 7 Hun, 232.

⁷² *Levin v. Russell*, 42 N. Y. 251.

⁷³ 2 R. S. 128, § 44; L. 1882, c. 410,

§ 245; L. 1898, c. 230, § 32.

so far as applicable, apply to and are conferred upon the office hereby created.”⁷⁴

§ 401. **His authority.**—In New York county, as will have been noticed, the statute specifies certain cases of intestacy in which the public administrator has, in right of his office, power to act at once as a collector and conservator of decedent's effects, while provision is made for confirming or superseding his powers according to facts subsequently appearing. But in Kings county, absolute and sole authority is conferred upon the public administrator, not only to collect and secure, but also to administer upon, an intestate's estate in enumerated cases, unless certain relatives entitled to share therein, and entitled and willing to administer thereupon, reside in the State. It is enacted, that “he shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal estate, and debts of persons dying intestate,⁷⁵ and for that purpose to maintain suits as such public administrator, as any executor or administrator might by law, in the following cases: 1. Whenever such person shall die leaving any assets or effects in the county of Kings, and there is no widow, husband, or next of kin entitled to a distributive share in the estate of such intestate, resident in the State, entitled, competent, or willing to take out letters of administration on such estate. 2. Whenever assets or effects of any person dying intestate shall, after his death, come into the county of Kings, and there is no such person entitled, competent, or willing to take administration of the estate. In such cases, intestacy shall be presumed until a will is proven, and letters testamentary issued thereon.”⁷⁶

§ 402. **His commissions.**—He is allowed the commissions of executors and administrators, besides the necessary expenses incurred by him in administering the estate. The surrogate may also issue letters of temporary administration to him without special security.⁷⁷

⁷⁴ Co. Civ. Proc., § 2669, as amended 1893, adopting L. 1871, c. 335, § 5; as amended L. 1882, c. 124.

⁷⁵ This provision of the statute relates solely to nonresident decedents. (Taylor v. Public Adm'r. 6 Dem. 158.)

⁷⁶ Co. Civ. Proc., § 2669, as amended 1893. See § 377, note 10, *ante*. The

public administrator has a right prior to the Brooklyn Trust Company, to which, before the act of 1882, letters might issue, in the surrogate's discretion. (Goddard v. Public Adm'r. 1 Dem. 480; *affd.* 94 N. Y. 544.)

⁷⁷ Co. Civ. Proc., § 2669, as amended 1893.

CHAPTER XIII.

TEMPORARY ADMINISTRATION.

§ 403. **Jurisdiction to grant letters.**—Where the appointment of an executor or administrator is delayed, it often becomes necessary that some immediate steps should be taken for the preservation of the estate, as well as for the collection of debts and other assets. Grave inconvenience has sometimes arisen, also, in respect to the right to collect the assets, and otherwise manage the property of a person who has disappeared and is unheard from, where there is no sufficient evidence of death. In each of these cases, the statute authorizes the appointment of a temporary custodian of the property, who has heretofore received the various appellations of collector, special administrator, receiver, and trustee, but by the Code of Civil Procedure is uniformly styled a temporary administrator.¹ Power is conferred on the surrogate to grant, in his discretion, such letters — “1. Where, for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will. “2. Where a person, of whose estate the surrogate would have jurisdiction, if he was shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary for the protection of his property, and the rights of creditors, or of those who will be interested in the estate, if it is found that he is dead.”²

¹ Under the English ecclesiastical law, several different sorts of limited or temporary administrations are recognized,—*e. g.*, administration *durante minore ætate*, *pendente lite*, *durante absentia*, etc. See Wms. on Exrs. (7th ed.) 479.

² Co. Civ. Proc., § 2670, as amended 1901 (L. 1901, c. 21). The amendment consisted mainly in striking out the words “in consequence of a contest upon an application therefor”

(that is, for letters testamentary or of administration), and the words, “or in consequence of the absence from the State of an executor named in the will, or for any other cause.” As to collectors and special administrators appointed before the date when the provisions of the Code relating to temporary administrators took effect (Sept. 1, 1880), see Co. Civ. Proc., § 2683.

It is expressly provided³ that pending a proceeding for the grant of letters of administration, on giving a *limited bond*, no temporary administrator shall be appointed, except upon petition of the next of kin, who consent to the giving of a limited bond.

Prior to the amendment of 1901, it was said that the "delay" referred to in the first clause as one necessarily occurring in a contested proceeding for letters in chief, implied that such a proceeding was pending, and hence, if no such proceeding was pending, an original independent proceeding by a creditor to procure temporary letters, to enable him to collect his debt, was unauthorized.⁴ It is believed that the amendment has not, in this respect, enlarged the powers of the surrogate; for it is still provided that notice of the application for letters must first be given "to each party to the proceeding who has appeared." The ruling, before the adoption of the present Code, that the authority of the surrogate was not confined to cases where the contest as to probate, etc., was *pending* before him, but extended to any contest, whether before him or on appeal from his decision,⁵ holds good, under the present statute, provided a grant of letters is delayed by the appeal. The controlling fact now is, not merely whether there is a *contest*, but whether there is a *delay* in the granting of letters; and letters being once granted, an appeal from such grant is not good ground for temporary administration.⁶

§ 404. Who may apply for temporary administrator.—A creditor, or any person interested⁷ in the estate, may apply to the surrogate to grant letters of temporary administration; and, if the estate is that of an absentee, the county treasurer of the county [or the public administrator in New York and Kings counties] where he last resided, or, if he was not a resident of the State, of the county where any of his property, real or personal, is situated, may make the application, with like effect and in like manner as a creditor.⁸

§ 405. Mode of application.—The manner of proceeding to obtain a grant of temporary letters is different in the case of a de-

³ Co. Civ. Proc., § 2664, as amended 1893. This provision does not apply to an administrator with the will annexed, as, in that case, the next of kin may have no interest in the matter. (Matter of Le Roy, 1 Connoly, 491.)

⁴ Saw Mill Co. v. Dock, 3 Dem. 55; Matter of Colton, N. Y. Law J., May 1, 1891; Matter of Nichols, N. Y. Surr., MS. Dec. (1890) 163.

⁵ Hicks v. Hicks, 12 Barb. 322. See Mootrie v. Hunt, 4 Bradf. 173; Lawrence v. Parsons, 27 How. Pr. 26; Crandall v. Shaw, 2 Redf. 100.

⁶ Tooker v. Bell, 1 Dem. 52.

⁷ See Co. Civ. Proc., § 2514, subd. 11, and *ante*, § 98.

⁸ Co. Civ. Proc., § 2670, as amended 1893.

cedent's estate from that in the case of the estate of an absentee. In the former case, the application is a step taken in a special proceeding already commenced before the surrogate,⁹ and undetermined, while, in the latter, an original and distinct special proceeding is instituted for that purpose. Accordingly, where a decedent's estate is in question, no formality is prescribed by the Code, which merely directs that the appointment "must be made by an order," at least ten days' notice of the application for which must be given to each party to the special proceeding who has appeared, unless the surrogate is satisfied, by proof, that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days.¹⁰ In many cases, the facts upon which the application is based will be obvious to the court, so that it will take judicial notice of them without proof. Where it is necessary to furnish proof, it may be made by affidavit, or petition, or oral examination.¹¹ On the other hand, an application for temporary administration of the estate of an absentee "must be made by petition, in like manner as where an application is made for administration in a case of intestacy," and the proceedings are the same as upon such an application.¹²

§ 406. **Petition, etc., in cases of absentee.**—The only guide as to the contents of the petition, and the details of the subsequent proceedings before decree, where letters are asked for upon the estate of an absentee, is the succinct provision of the Code, that "the proceedings are the same as prescribed in article fourth of this title, relating to such last-mentioned application," *i. e.*, an application for permanent letters in cases of intestacy.¹³ But at the threshold of an attempt to elaborate the scheme thus indicated, we are confronted with the difficulty that the manner of procedure to obtain permanent letters upon an intestate's estate is dependent upon the question of priority of right to administer; while no statutory rules of priority exist in reference to the right

⁹ When the surrogate of New York county transfers the proceedings for the probate of a will to another court, he is not deprived of power to appoint a temporary administrator. (*Matter of Blair*, 60 Hun, 523; 39 St. Rep. 502.)

¹⁰ Co. Civ. Proc., § 2670, as amended 1893. An appointment made without due notice is irregular, and will be vacated on application; but the appointee having acted in good faith

may be allowed his compensation and expenses. (*Crandall v. Shaw*, 2 Redf. 100.)

¹¹ Much slighter proof of death is sufficient than upon application for letters of permanent administration. (*Czech v. Bean*, 35 Misc. 729; 72 N. Y. Supp. 402.)

¹² Co. Civ. Proc., § 2670, as amended 1893.

¹³ Co. Civ. Proc., § 2670, as amended 1893.

of temporary administration upon the estate of either a decedent or an absentee, the letters being apparently issuable to any person competent to be an executor, who will duly qualify. It is clear, however, that the petition must set forth (1) the petitioner's title,—*i. e.*, must show that he is a creditor, or person interested, or the county treasurer of the proper county; and (2) the jurisdictional facts, such as the disappearance of the owner of the estate, under the prescribed circumstances, the unsuccessful search for his abode, the necessity for the appointment to protect property, and the rights of creditors and others, and such additional facts concerning residence, and the location of property, etc., as would give jurisdiction to the surrogate applied to, if the absentee was shown to be dead. The assumption being that there is no ground for the formal legal presumption of death, it is not very clear how certain clauses of the Code,¹⁴ relating to the place of death and the residence at the time of death of an intestate, should be applied to the case in hand. A citation should issue wherever it is impossible, for reasons already indicated, to determine whether there is ground for dispensing therewith.¹⁵ The remaining proceedings, to procure the decree and letters, sufficiently resemble those already set forth under the topic of administration in intestacy.

§ 407. Power, discretionary and summary.—The statute provides that the surrogate may grant temporary administration, *in his discretion*. The propriety of the exercise of the surrogate's discretion in the grant of such letters is plainly dependent upon the exigencies of the estate, the value and situation of the property, and other circumstances which require to be judged summarily. Consequently, his decision upon an application made

¹⁴ Co. Civ. Proc., § 2476.

¹⁵ See Co. Civ. Proc., § 2662. *Matter of Cohen* (N. Y. Law J., Mar. 26, 1891) was an *ex parte* application for a decree by the father of the absentee, who was also her creditor: her only property being a distributive share in the estate of another, to which she had become entitled after her disappearance. All the next of kin made affidavits sustaining the petition. No citation was required to be issued. In that case, the petition showed that eight years before, the absentee, then seventeen years old, left her home in New York city, where she resided with the petitioner, stating that she would return at supper time, and since that

date, had been neither seen nor heard of by the petitioner, nor by any relative or friend. The petitioner employed detectives to search for her, and kept them so employed for upwards of one month. He corresponded with the justices of the peace of numerous villages; he advertised for her repeatedly in the New York Herald, and wrote letters to many persons, in many places, wherever he had the faintest hope she might have been seen or heard of, but has never received the slightest clue of her whereabouts. She always lived happily at home with the petitioner and her brothers and sister. She had never been married, was not betrothed, nor

to him is not subject to review upon appeal, or to collateral attack.¹⁶ His determination is summary and exclusive.¹⁷

§ 408. Competency, eligibility, and qualification of administrator.

— It is provided that the letters can be issued only “to one or more persons competent and qualified to serve as executors.”¹⁸ The word “qualified,” here, would seem to be expetive, since, a temporary administrator must qualify, as the Code prescribes with respect to an administrator in chief. It was formally held that one named as executor should not be appointed temporary administrator, pending a contest over the probate of the will, against the objection of the contestant, especially where he had an interest in any degree hostile to the estate;¹⁹ and also that no party to the litigation should be appointed.²⁰ But it is now well settled that whether, pending a contested probate, one of the executors will be selected as temporary administrator, rests in the discretion of the surrogate.²¹ The court would be justified, therefore, in refusing to appoint the nominated executor, where he is the largest beneficiary under the will; is the principal proponent thereof; is charged with having influenced decedent; has large unsettled transactions with the estate, and is unfriendly with testator’s family.²² Indeed, in every case where the interests involved are conflicting, a disinterested person should be appointed.²³ Ordinarily, considerations of economy will justify the appointment of a person named in the disputed will as executor; and the fact that he is charged with exercising undue influence upon testator will not prevent such appointment, where the allegations of such influence are vague, and the appointment is opposed by but a small interest of the estate.²⁴ Where, however, such appointment would be of advantage to the estate, and a majority of the parties so request, it will be made almost as a matter of course.²⁵ The court is certainly not required to make his selection from

had any preference for any man among her acquaintances, so far as petitioner had been able to ascertain. Held, a proper case for appointing a temporary administrator.

¹⁶ *Czech v. Bean*, 35 Misc. 729; 72 N. Y. Supp. 402.

¹⁷ *McGregor v. Buel*, 24 N. Y. 166. And see *Mootrie v. Hunt*, 4 Bradf. 173; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 255; *Matter of Chase*, 32 Hun. 318.

¹⁸ Co. Civ. Proc., § 2670. *supra* (formerly § 2668).

¹⁹ *Howard v. Dougherty*, 3 Redf. 535; *Cornwell v. Cornwell*, 1 Dem. 1.

²⁰ *Crandall v. Shaw*, 2 Redf. 100.

²¹ *Jones v. Hamersley*, 2 Dem. 286; *Matter of Bankard*, 19 Week. Dig. 452. Compare *Matter of Wanninger*, 3 N. Y. Supp. 137.

²² *Matter of Stearns*, 31 St. Rep. 960; 9 N. Y. Supp. 748.

²³ *Matter of Eddy*, 10 Misc. 211; 31 N. Y. Supp. 423.

²⁴ *Haas v. Childs*, 4 Dem. 137. But compare *Matter of Sterns*, 2 Connolly, 272.

²⁵ *Matter of Hilton*, 29 Misc. 532; 61 N. Y. Supp. 1073.

among the relatives who would be entitled, under the statute, to a grant of permanent letters in a case of intestacy.²⁶ In cases arising in Kings county, the surrogate is given a discretion to appoint the public administrator of that county, without requiring him to give further security than his official bond.²⁷

§ 409. Form and effect of letters.—The Code contains no special provisions relating to the form of letters of temporary administration. Those granted upon the estate of a decedent may be in the same form as permanent letters of administration; but those granted upon the estate of an absentee will naturally vary somewhat from the former, inasmuch as the administrator, in the latter case, has, in right of his office, certain powers in respect to real property, which the administrator of the estate of a decedent possesses only by special grant from the surrogate. In either case, the letters are subject to the general provisions of the Code, prescribing the manner in which surrogates' letters must be tested, signed, sealed, and recorded, and specifying their effect as evidence of the authority of the persons to whom they are granted.²⁸ The Code contains a general provision to the effect, that where the law requires or permits an act relating to the estate of a decedent to be done within a specified time after letters testamentary or of administration are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters.²⁹ But it declares,³⁰ substantially, that letters testamentary or of administration in chief are not deemed successive or supplementary to temporary letters previously issued upon the same estate, within the meaning of the foregoing provision, except as otherwise prescribed in two sections of the Code,³¹ relating to advertisement for claims and payment of debts.

§ 410. Certain notices, how served.—The Code provides that notices required to be given, as prescribed in the article thereof concerning the appointment, etc., of a temporary administrator, "to

²⁶ So held in *Matter of Plath* (56 Hun. 223; 31 St. Rep. 101; 9 N. Y. Supp. 251), where the petitioner, the decedent's only relative, was disqualified, and a large creditor of the estate claimed the appointment—the public administrator not having intervened.

²⁷ Co. Civ. Proc., § 2669, as amended 1893.

²⁸ See § 301, *ante*, for general regulations as to the form, etc., of letters

of administration. As to amount of bond, and actions thereon, see c. XV, *post*.

²⁹ Co. Civ. Proc., § 2593.

³⁰ Co. Civ. Proc., § 2682. Such, at least, is the purport of this section, as we interpret its provisions, though it is not entirely clear.

³¹ §§ 2673, 2674. See c. XVIII, *post*.

a party *other than that officer*, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the Supreme Court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him, in any manner which he thinks proper."³²

§ 411. **Authority as to personalty.**—The temporary administrator has authority to take into his possession personal property, to secure and preserve it, and to collect choses in action. The surrogate may, by an order, made upon ten days' notice, or shorter notice (not less than two days), to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee, whom he represents, as it appears to be necessary to sell, for the benefit of the estate.³³

§ 412. **Authority over decedent's realty.**—A special administrator or collector, appointed under the former statutes, had no power in reference to the real property, his sole function being that of a receiver of the assets during a period of controversy as to the right of administration or of executorship. But it is provided in the Code, that "where a temporary administrator is appointed, and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will, or in the qualification of a trustee named therein, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the

³² Co. Civ. Proc., § 2681.

³³ Co. Civ. Proc., § 2672. While he would not be justified in making a sale of property, if it was the sole property of the decedent, without the order of the court, where he was also executor under the will, a sale, pending probate, of a seat in the Stock Ex-

change, owned by the firm composed of himself and the testator as partners, could be allowed on his accounting, and he was entitled to prove the fact of such ownership by legal evidence. (Matter of Grant, 49 N. Y. Supp. 574.)

surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property." ³⁴ The powers of the administrator are limited to those thus conferred. They are confined to the preservation of the estate; he cannot be authorized to administer it. ³⁵

§ 413. **Authority over absentee's realty.**—A temporary administrator, appointed upon the estate of an absentee, has the same powers and authority (enumerated above), with respect to the real property of the absentee, without any special delegation from the surrogate. His acts, done in pursuance of that authority, bind the absentee, if he is living, or his heir or devisee, if he is dead, in the same manner as the acts of an executor or administrator bind his successor. ³⁶

§ 414. **Authority to pay certain claims.**—The surrogate may, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, ³⁷ including stenographer's or referee's fees on the contest of a will or administration. He may also direct the payment of a legacy or other pecuniary provision under a will, or a distributive share, or just proportionate part thereof, as though the temporary administrator were an executor or administrator. ³⁸ A surrogate has no power to direct a temporary administrator to pay sums to enable the proponents of a will to procure expert witnesses, ³⁹ nor has he authority to direct payment out of the estate, of the costs of the proceeding for the probate of an alleged will of the decedent. The decree in such case should award costs and provide for their payment by the

³⁴ Co. Civ. Proc., § 2675, as amended 1901 (L. 1901, c. 21), substantially adopting L. 1870, c. 359, § 13, which related, however, to the county of New York only.

³⁵ *Riegelman v. Riegelman*, 4 Redf. 492. Accordingly, an application, pending a contest over probate, for a direction to the collector to pay her one-third of the rents and profits of the estate, both real and personal, and also to pay to her, for her two infant children, one-sixth each of the residue of said rents and profits, and that he be ordered to pay all interest on mortgages, ground rent, taxes, and insurance, was denied. (Ib.)

³⁶ Co. Civ. Proc., § 2676.

³⁷ See *Matter of Marcellin*, 25 Misc. 260; 55 N. Y. Supp. 425.

³⁸ Co. Civ. Proc., § 2672. See *Mat-*

ter of Cogswell, 4 Redf. 241. Upon an application for an order directing a temporary administrator to pay to the applicant a sum of money on account of a legacy or distributive share to which he is entitled, a citation is properly addressed to and served upon the administrator alone. (*Rank v. Camp*, 3 Dem. 278.)

³⁹ *Kruse v. Fricke*, 2 Dem. 264; *Matter of Marcellin*, *supra*. In *Matter of Moderno* (N. Y. Law J., July 16, 1891), the widow claimed her expenses from the Island of Madeira to New York and returning, for the purpose of proving decedent's death and rendering assistance in and about the probate of the will. The court ordered proof to be taken of the necessity of the expenses thus incurred.

person to whom letters of administration or letters testamentary should thereafter be granted.⁴⁰

§ 415. **Same; in case of absentee.**—Where the temporary administrator was appointed upon the estate of an absentee, and satisfactory proof is furnished to the surrogate, that the wife or any infant child of the absentee is in such circumstances as to require provision to be made out of the estate, for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor, as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.⁴¹

§ 416. **Advertising for creditors.**—“After six months have elapsed since letters were issued to a temporary administrator, appointed upon the estate, of either a decedent or an absentee, he has the same power, as an administrator in chief, to publish a notice requiring creditors of the decedent or absentee, to exhibit their demands to him. The publication thereof has the same effect, with respect to a temporary administrator, and also an executor or administrator subsequently appointed upon the same estate, as if the temporary administrator was the executor or an administrator in chief, and the person to whom the subsequent letters are issued was his successor.”⁴²

§ 417. **Payment of debts.**—The surrogate’s authority to direct a temporary administrator to pay debts is derived wholly from the statute, and must be exercised strictly according to its provisions.⁴³ After the lapse of a year, since the issue of letters, “the surrogate may, upon the application of the temporary administrator, and upon proof to his satisfaction, that the assets exceed the debts, make an order permitting the applicant to pay the whole or any part of a debt due to a creditor of a decedent or absentee; or, upon the petition of such a creditor, he may issue a citation to the temporary administrator, requiring him to show cause why he should not pay the petitioner’s debt.”⁴⁴ When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or administrator in chief to pay his debt, as prescribed in the Code.⁴⁵

⁴⁰ Matter of Aaron, 5 Dem. 362; Matter of Marcellin, *supra*.

⁴¹ Co. Civ. Proc., § 2677.

⁴² Co. Civ. Proc., § 2673.

⁴³ Matter of Haskett, 3 Redf. 165.

⁴⁴ Co. Civ. Proc., § 2674.

⁴⁵ Co. Civ. Proc., § 2674. See § 2717, c. XVII, *post*.

If he proceeds without such authority to pay the debts of the estate, relying upon the adequacy of the realty, the personalty being insufficient, his accounts will be surcharged with the excess, and interest.⁴⁶

§ 418. **Actions, etc., by and against administrator.**—The temporary administrator has power to maintain any action or special proceeding for the purpose of taking possession of, securing and preserving the personal estate, and collecting choses in action;⁴⁷ also to maintain or defend any action or special proceeding in the exercise of authority conferred upon him by the surrogate over the real property of a decedent, or possessed in right of his office over the real property of an absentee.⁴⁸ Like other administrators, he is the judge of the propriety of his own course in respect to the institution of suits, subject to his liability when the administration is terminated and his accounts settled.⁴⁹ An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, in like manner and with like effect as if he were an administrator in chief.⁵⁰

§ 419. **Duty as to depositing moneys.**—A special administrator has no authority as such to make investments.⁵¹ A statutory provision, still in force, directs that all interest received by any special administrator on any moneys which may come to his hands, shall be accounted for and paid over by him in the same manner as the principal sum in his hands.⁵² He is required, within ten days after any money belonging to the estate comes into his hands, to deposit it as follows: (1) Where he is appointed by the Surrogate's Court of any county except New York, with a person or with a bank, or in a domestic incorporated trust company, desig-

⁴⁶ *Matter of Philp*, 29 Misc. 263.

⁴⁷ Co. Civ. Proc., § 2672. Thus a temporary administrator has power to present notice and proofs of loss based on a fire occurring after the death of the insured and to bring an action to recover for such loss. (*Matthews v. American Central Ins. Co.*, 154 N. Y. 449; 48 N. E. 751.) His right to sue cannot be questioned collaterally, where the surrogate had jurisdiction to appoint him. (*Czech v. Bean*, 35 Misc. 729; 72 N. Y. Supp. 402.)

⁴⁸ Co. Civ. Proc., §§ 2672, 2675, 2676.

⁴⁹ *DeLafield v. Parish*, 4 Bradf. 24.

⁵⁰ Co. Civ. Proc., § 2672. But the surrogate's discretion should not be exercised where its exercise, at the instance of one of the parties, might re-

sult in inflicting upon his adversary an injury far greater than he himself would probably suffer if his application were denied. The proponents and legatees should have an opportunity to resist the claim with the aid of counsel of their own choosing, and in an action the defense of which will be under their own control. (*Matter of Fleming*, 5 Dem. 336.)

⁵¹ *Baskin v. Baskin*, 4 Lans. 90.

⁵² L. 1864, c. 71, § 12. As to duties and powers of a special administrator prior to the Code, see *Westervelt v. Gregg*, 1 Barb. Ch. 478; *Smith v. Van Kuren*, 2 Barb. Ch. 473; *Buchan v. Rintoul*, 70 N. Y. 1; *Campbell v. Bruen*, 1 Bradf. 224; *Matter of Douglas*, 3 Redf. 538; *Berdell v. Schell*, 2 Dem. 292.

nated by the surrogate; but a natural person, so designated as depository, must first file in the surrogate's office a bond to the surrogate, in a penalty fixed by him, executed by the depository and two sureties, and conditioned to render a faithful account, and pay over all moneys received by him, upon the direction of any court of competent jurisdiction. (2) Where he is appointed by the surrogate of the county of New York, in a domestic incorporated trust company, having its principal office or place of business in the city of New York, and either specially approved by the surrogate, or designated, in the general rules of practice, as a depository of funds paid into court.⁵³ Money so deposited cannot be withdrawn, except upon the order of the surrogate, a certified copy of which must be presented to the depository. Such an order may be made upon two days' notice of the application therefor, given to all the parties to the special proceeding, in which the temporary administrator was appointed, who appeared therein; but not otherwise.⁵⁴

§ 420. **Liability for neglect to deposit funds.**—If he neglects to make a deposit within the times so limited, the surrogate is required, upon the application of a creditor, or person interested in the estate, accompanied with satisfactory proof of the neglect, to make an order directing the administrator to do so forthwith, or show cause why a warrant of attachment should not issue against him.⁵⁵ If a warrant of attachment issues and is returned not served, the surrogate must revoke the administrator's letters.⁵⁶ The remedy against the administrator is not limited to proceedings by attachment. Where he has deposited the funds of the estate, first with his firm and thereafter in his own name in bank, he should be charged, on his accounting, with interest at the highest rate, for the time the funds were so deposited;⁵⁷ but no more, unless he has been guilty of misconduct.⁵⁸ He may, however, keep on hand a reasonable sum to pay current expenses.⁵⁹

⁵³ Co. Civ. Proc., § 2678.

⁵⁴ Co. Civ. Proc., § 2680.

⁵⁵ Co. Civ. Proc., § 2679. In the county of New York, the order must be made returnable three days after issuing it; and it must be served upon the temporary administrator, at least two days before the return day thereof, either personally or by leaving a copy thereof within the State, at his dwelling place, or his office for the regular transaction of business, in person; or, if it cannot be served in either of those methods, by serving it in such other

manner as the surrogate directs. In any other county, it must be made returnable within a reasonable time, not exceeding fifteen days after issuing it; and it must be served, in like manner, at least ten days before the return day thereof. (Ib.)

⁵⁶ Co. Civ. Proc., § 2691, subd. 4.

⁵⁷ Matter of Mairs, 4 Redf. 160.

⁵⁸ Matter of Philp, 29 Misc. 263; citing *Livermore v. Wortman*, 25 Hun, 341.

⁵⁹ *Harrington v. Libby*, 6 Daly, 259.

§ 421. **Revocation of letters.**—The statute provides that the letters of the temporary administrator of the estate of an absentee may be revoked upon the petition of a creditor or person interested in the estate⁶⁰ (including, it is presumed, the returned absentee), where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor or administrator in chief has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the State.⁶¹ And the surrogate is required to make a decree, on his own motion, revoking the administrator's letters, where an order has been made and served, as already specified, directing him to deposit money, or show cause why a warrant of attachment should not issue against him, and a warrant of attachment issued thereupon has been returned not served upon him.⁶² His letters are, of course, revoked where he resigns and the resignation is accepted by the surrogate.⁶³ Where permanent letters are issued on a decedent's estate, a formal order revoking the temporary letters is not necessary; the issuance of such letters, of itself, effects the retirement of the temporary administrator from office, and a discontinuance of his administration of the estate.⁶⁴ Where he is superseded, he may be compelled to deliver, to the person succeeding to the administration, all the property belonging to the estate in his hands; but where he himself claims leasehold property, by virtue of a title acquired prior, to his appointment, the surrogate has no power to pass upon the question.⁶⁵ The events upon, and the manner in, which the authority of a temporary administrator of the estate of an absentee is terminated have already been specified.

§ 422. **Accounting.**—The Surrogate's Court may compel a judicial settlement of the accounts of a temporary administrator at any time.⁶⁶ The persons interested in the estate, as well as the executor of the will, are proper parties to the accounting, and have

⁶⁰ Co. Civ. Proc., § 2685, subd. 8. This section confines the right to petition to "a creditor or person interested in the estate of a decedent;" but this appears to be due to an inadvertence. The proceedings to procure the revocation are detailed in chapter XIV, *post*.

⁶¹ Co. Civ. Proc., § 2685.

⁶² Co. Civ. Proc., § 2691, subd. 4.

⁶³ *Id.*, §§ 2689, 2690; L. 1879, c. 406.

⁶⁴ Matter of Lewis, 17 Week. Dig. 311; Matter of Eisner, 5 Dem. 383; Matter of Hotchkiss, N. Y. Law J.,

Feb. 14, 1893. The former statute contained an express provision to that effect (2 R. S. 77, § 40).

⁶⁵ Gottsberger v. Smith, 2 Bradf. 86.

⁶⁶ Co. Civ. Proc., § 2726, as amended 1893, incorporating former § 2725. It is error to charge a temporary administrator on his final accounting with moneys which the executrix collected and refused to pay over to him. (Deegan v. Von Glahn, 75 Hun. 39; 26 N. Y. Supp. 989.) For the proceedings to settle his account, see chapter on Accountings, *post*.

the right to make such objections to the account as the circumstances require.⁶⁷ Where his letters are revoked, he may be called to account by his successor,⁶⁸ who may also prosecute his official bond, on its assignment to him.⁶⁹ Where he is also an executor of the will, the surrogate will not, upon the decree settling his accounts, in the former capacity, insert a provision canceling his official bond.⁷⁰

§ 423. Compensation of temporary administrator.—The former statute⁷¹ provided for payment of the expenses, but not of compensation for the services, of a temporary administrator; but it was held that he was within the equity of the statute relating to executors and administrators, and entitled to the same commissions, which were to be based not simply on the money actually received and paid out, but upon the value of the whole estate received and passed over by him, to his successor.⁷² The present Code seems clearly to contemplate the payment of the same commissions to him as to a permanent administrator; and the settled practice is to regard the statutory commissions of executors and administrators as the measure of the remuneration of a temporary administrator.⁷³

⁶⁷ *Matter of Lane*, N. Y. Surr., MS. Dec. (1891) 388. In *Matter of Hotchkiss* (N. Y. Law J., Feb. 17, 1893), contestant claimed an interest in the estate as next of kin, but her claim had been adjudged against her by the probate decree, from which she had appealed. Held, no bar to her right to appear and contest the accounting; but the trial of the objections was stayed pending the appeal.

⁶⁸ Co. Civ. Proc., § 2605.

⁶⁹ *Dayton v. Johnson*, 69 N. Y. 419. See the same case, as to the effects of recitals in the bonds in an action against the sureties. The sureties in the bond are liable for property belonging to the estate received by the temporary administrator before his appointment, and as agent of a former administrator, or in any other capacity. (Co. Civ. Proc., § 2596; *Gottberger v. Taylor*, 19 N. Y. 150.)

⁷⁰ *Matter of Eisner*, 5 Dem. 383. Co. Civ. Proc., § 2731.—conferring upon the Surrogate's Court authority to determine a disputed claim by or against an accounting party,—applies to temporary administrators and includes the right to adjudicate upon a claim of the estate against a firm of which such temporary administrator is a member. (Ib.)

⁷¹ L. 1837, c. 460, § 24.

⁷² *Green v. Sanders*, 18 Hun, 308.

⁷³ *Green v. Sanders*, 18 Hun, 308; *Matter of Duncan*, 3 Redf. 153; *Matter of Eisner*, 5 Dem. 384; *Matter of Campbell*, N. Y. Surr., Dec. (1890) 444. In *Matter of Lane* (N. Y. Law J., Oct. 22, 1891), it was held that section 2736 (now part of section 2730, as amended 1893), providing for the apportionment of commissions among two or more executors and administrators, applied to temporary administrators. "The 'compensation' mentioned in this section evidently refers to, and has always been held to be, the usual statutory commissions. Section 2738 [now incorporated in section 2730], considered in connection with section 2736, is relieved of any ambiguity or uncertainty which it otherwise might be claimed to present. The 'compensation' mentioned in section 2738, in connection with a temporary administrator, is evidently the same as that specified in section 2736. I conclude that a temporary administrator is to be considered as an administrator within the meaning of section 2736 and is entitled only to such compensation as can be awarded to an executor or administrator." A tem-

An allowance to him of a gross sum for his services will not be reversed on that ground, if it appears not to exceed the amount of the statutory fees.⁷⁴ Where, however, permanent letters are subsequently issued to him, he is entitled to compensation, in one capacity only, at his election; except that where he has received compensation in one capacity, he is entitled to the excess, if any, of the compensation allowed by law above the sum which he has already received in the other capacity.⁷⁵

porary administrator is entitled to commissions on property specifically bequeathed which is received by him and delivered over in kind on the termination of his office. (Estate of Egan, 7 Misc. 262; 27 N. Y. Supp. 1009.) As to allowance of salary as manager of decedent's business, see Matter of Moriarity, 27 Misc. 161; 58 N. Y. Supp. 380.

⁷⁴ Green v. Sanders, *supra*. The surrogate has no power in the order appointing a temporary administrator to make an allowance to such administrator to compensate him for expenses to be incurred in the course of the application for his appointment. (Matter of Bankard, 19 Week. Dig. 452.)

⁷⁵ Co. Civ. Proc., § 2730, as amended 1893, consolidating former § 2738.

CHAPTER XIV.

REVOCATION OF AUTHORITY OF EXECUTORS, ADMINISTRATORS, AND TESTAMENTARY TRUSTEES.

TITLE FIRST.

INCIDENTAL REVOCATION OF LETTERS.

§ 424. **Revocation of probate by action.**—As the authority to issue letters testamentary, or of administration, is vested solely in the Surrogates' Courts, those courts alone have the power to recall and revoke such letters. But, indirectly, the letters may be revoked or rendered inoperative by the vacating of the decree upon which the letters were granted. We shall have occasion hereafter to speak of the effect of surrogates' decrees, and the method in which they may be impeached in a collateral action.¹ When it is said that equity will not interfere to set aside a will and its probate for fraud, it is not meant that there is an absolute want of jurisdiction in a court of equity to set aside a probate and the will itself, but only that there is no occasion for the exercise of such jurisdiction, if the party aggrieved has an adequate remedy at law or in the court of probate.² The new powers of Surrogates'

¹ See c. XXI. *post*.

² *De Bussierre v. Holladay* (4 Abb. N. C. 111) was an action to set aside a probate as having been obtained by fraudulent contrivance and collusion, and by an imposition upon the court which granted it. At that time the Surrogate's Court which granted the probate had not power to open a decree on such grounds, and the remedy by ejectment was not clear and adequate. It was held that the action could be maintained, and that since the transfer of the powers of the Court of Chancery to the Supreme Court, it could not be successfully urged, as an objection to maintaining an action, that the remedy of the plaintiff was at law and not in equity. But in *Wallace v. Payne* (9 App. Div. 34; 41 N. Y. Supp. 111), which was an action

in equity to set aside a will on the usual grounds, the complaint alleged that in a probate proceeding the plaintiff had interposed an answer, contesting the validity of the will upon the same grounds, and that the proceeding was still pending, it was held that the action could not be maintained, as the plaintiff, as soon as the will was admitted to probate, had a perfect remedy at law under Code, § 2653a, for determining whether the writing was the last will of the testatrix.

As to the reluctance of courts of equity to interfere in such cases, see *Brady v. McCosker*, 1 N. Y. 214; *Clark v. Sawyer*, 2 id. 498; *Colton v. Ross*, 2 Paige, 396; *Booth v. Kitchen*, 7 Hun, 255, and cases cited.

Courts to open, vacate, and set aside their decrees for any sufficient cause furnish so adequate a remedy against fraud, error, and mistake, that there is less occasion now than ever to resort to other courts for relief against them. The power to revoke administration, granted here, is confined to our own courts, and a court of another State can have no jurisdiction to revoke letters of administration granted in this.³

§ 425. **Revocation of probate on motion.**—Among the incidental powers of Surrogates' Courts is the power "to open, vacate, modify, or set aside its decrees or orders," and to grant a new trial or hearing "for fraud, newly-discovered evidence, clerical error, or other sufficient cause;"⁴ and a decree revoking probate is expressly required to contain a revocation of the letters issued upon it, though it is obvious that the revocation of a decree of probate, or of a decree of administration in intestacy, will, of itself, effect a revocation of any letters which may have been issued upon it. In general, it may be stated that Surrogates' Courts may vacate or modify their orders and decrees in like cases, and in the same manner, as other courts of record,⁵ and in the exercise of the jurisdiction conferred by law, they may issue letters of various descriptions, to executors, administrators, and other officers, all of which are revocable for the causes, and in the methods specified in the statutes relating thereto.

§ 426. **Incidental recall of authority.**—All letters are subject to revocation in one way or another; but the statute provides, in the case of two of them, to wit: the letters of executors and those of administrators,—a particular special proceeding to effect that purpose directly. Besides this direct method, the authority of the several kinds of appointees, as evidenced by the letters issued from the Surrogate's Court, may be recalled indirectly in some other proceeding instituted nominally for another purpose. Such a proceeding is one instituted by a creditor, or person interested in the estate, to compel an executor (where he has given a bond), or an administrator, to give a new bond in a larger penalty or with new or additional sureties; in which the surrogate may, in a proper case, make an order granting such prayer and directing that, in default of obedience thereto, the letters be revoked; and if a bond is not approved and filed as required by the order, the

³ Chapman v. Fish, 6 Hill, 554.

⁴ Co. Civ. Proc., § 2481, subd. 6.

⁵ See Bailey v. Hilton, 14 Hun, 3.
See Pettigrew v. Foshay, 12 Hun, 483;
and also §§ 54, 276, *ante*.

surrogate is required to make a decree removing the delinquent from office and revoking the letters issued to him.⁶ Again, the sureties in an executor's or administrator's bond, may present a petition praying to be released from responsibility on account of any future breach of the condition of the bond, and that the principal may be required to file a bond with new sureties, whereupon, unless a bond with new sureties, satisfactory to the surrogate, is duly filed, he is required to make a decree revoking the delinquent's letters.⁷

§ 427. **Revocation where will proved, after letters.**—It may happen that, after letters of administration on the ground of intestacy have been granted, a will is admitted to probate and letters are issued thereupon; or that, after letters have been issued upon a will, the probate thereof is revoked, or a subsequent will is admitted to probate, and letters are issued thereupon. In either of such cases, the decree granting or revoking probate must revoke the former letters.⁸ Where a decree declares a will void, and letters of administration are granted, but all proceedings on those letters are stayed pending an appeal, the letters should be revoked, in order to permit a grant of temporary administration for the protection of the personal property, until the appeal is decided.⁹

§ 428. **Summary revocation for defaults in certain proceedings.**—The Code¹⁰ requires the surrogate to make a decree revoking letters testamentary or of administration¹¹ issued from his court, without a petition or the issuing of a citation, for certain inexcusable acts of misconduct on the part of the executor or administrator, as, where he refuses to account, or evades service of process, or otherwise so acts as to render it manifestly unfit that he should longer remain in office, even for a brief period. The cases enumerated are: 1. Where the person, to whom the letters were issued, is not a resident of the State, or is absent there—

⁶ Co. Civ. Proc., § 2599. See c. XV, *post.* But a surrogate has no authority, in proceedings for the vacation of a decree, on an accounting, on the ground of a false suggestion of fact, to revoke the letters of administration. (Matter of Patterson, 79 Hun, 371; 29 N. Y. Supp. 451; *affd.*, 146 N. Y. 327.)

⁷ Co. Civ. Proc., § 2601.

⁸ Co. Civ. Proc., § 2684.

⁹ Newhouse v. Gale, 1 Redf. 217. Letters of administration will not be

revoked upon an unproved allegation that a will exists, or that a will which had been executed has been lost or fraudulently destroyed. (Holland v. Ferris, 2 Bradf. 334.) And see Bulkley v. Redmond, *id.* 281; Matter of Cameron, 47 App. Div. 120; *affd.*, 166 N. Y. 610.

¹⁰ Co. Civ. Proc., § 2691.

¹¹ The expression "letters of administration," includes letters of temporary administration. (Co. Civ. Proc., § 2514, subd. 5.)

from; and, upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefor; and the surrogate has not sufficient reason to believe that such an excuse can be made. 2. Where a citation, issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself. 3. Where, by reason of his default in returning an inventory, such a person has remained for thirty days committed to jail, under the surrogate's order, granted in proceedings¹² to compel him to return an inventory or a further inventory. 4. In the case of a temporary administrator, where an order has been made and served directing him to deposit money,¹³ or show cause why a warrant of attachment should not issue against him; and a warrant of attachment, issued thereupon, has been returned not served upon him.

TITLE SECOND.

DIRECT REVOCATION BY PROCEEDING OR ON RESIGNATION.

ARTICLE FIRST.

REVOCATION OF LETTERS OF EXECUTORS AND ADMINISTRATORS.

§ 429. **Grounds of petition.**—The section of the Code which defines the general jurisdiction of Surrogates' Courts confers on them authority "to grant *and revoke* letters testamentary and of administration, and to appoint a successor in place of a person whose letters have been revoked."¹⁴ The power to revoke letters necessarily implies that they have previously been issued; hence where a person acts as executor, without qualifying or receiving letters, no court can remove him or accept his resignation.¹⁵ A proceeding to revoke by a direct proceeding may be instituted by the representative himself, as where he wishes to resign, or by another who has a legal interest to procure his removal. The latter kind of proceeding is here first considered. Before stating the statutory causes for removal, it will be well to state the general principle, that Surrogates' Courts have no power to revoke letters except for the causes, and on the grounds, stated in the statute, no matter how gross a breach of duty the

¹² See Co. Civ. Proc., § 2715; and c. XVI, *post*.

¹³ See Co. Civ. Proc., § 2679; and § 419, *ante*.

¹⁴ Co. Civ. Proc., § 2472, subd. 2. See § 44, *ante*.

¹⁵ Matter of Richardson, 8 Misc. 140; 29 N. Y. Supp. 1079.

representative may be guilty of.¹⁶ Another rule worth noticing is, that if the evidence tends to establish any one or more of the causes for removal, specified in the statute, the question of removal is one resting in the discretion of the surrogate;¹⁷ and while his decision, in favor of removal, is subject to review, on appeal to the General Term, it is not reviewable in the Court of Appeals, if there is any evidence to sustain it.¹⁸

§ 430. **Incompetency and disqualification.**—The first of the causes enumerated is: "Where the executor or administrator was, when letters were issued to him, or has since become, incompetent, or disqualified by law to act as such; and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, upon the hearing of the application for letters."¹⁹ The facts constituting incompetency — or disqualification, which appears to amount to the same thing — to administer, having been already detailed and discussed under another head,²⁰ it will be unnecessary to renew their consideration here. The foregoing rule enlarges the previous statute by permitting revocation for a ground existing before appointment, but not then made a basis of objection, instead of confining it to the supervening causes.

§ 431. **Malfeasance, dishonesty, and general unfitness.**—Other grounds enumerated are: "Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office."²¹ An executor or testamentary trustee may now be removed for gross negligence or bad faith in failing to sell real estate as empowered and directed by the will.²² Although the mere fact that an ex-

¹⁶ *Emerson v. Bowers*, 14 N. Y. 449; *Wood v. Brown*, 34 id. 337. These cases were decided under the former statute, which was not so comprehensive in its enumeration of causes as the Code.

¹⁷ *Matter of Keinz*, 88 Hun. 298; 34 N. Y. Supp. 339; *sub nom.* *Matter of Rettig*, 68 St. Rep. 264.

¹⁸ *Matter of McGillivray*, 138 N. Y. 308.

¹⁹ Co. Civ. Proc., § 2685, subd. 1.

²⁰ See §§ 303, 361, *ante*. Letters of

administration should not be revoked because, prior to the appointment, a renunciation of a right to administer had been executed, where it was withdrawn by permission of the court. (*Matter of Treadwell*, 37 Misc. 584; 75 N. Y. Supp. 1058.)

²¹ Co. Civ. Proc., § 2685, subd. 2. See *Matter of Treadwell*, *supra*.

²² *Haight v. Brisbin*, 100 N. Y. 219, on former hearing, 96 id. 132. Compare *Matter of Moss*, N. Y. Law J., Jan. 27, 1892.

ecutor, administrator, or trustee has, without lawful authority, borrowed funds intrusted to his charge, does not, *ipso facto*, call for his removal, nevertheless when his conduct has been such as to endanger the trust property, or to show a want of honesty, or of proper capacity, or of reasonable fidelity, he must be pronounced "unfit for the due execution of his office," and must accordingly be deprived of it.²³ The representative's refusal to bring an action to set aside a fraudulent conveyance is not necessarily a ground for removal;²⁴ nor is the mere delay of an executor to convert real estate into personalty, when the same has increased in value.²⁵ But where an executor or administrator fails to assert his decedent's title to property and connives at a suit to divest it,²⁶ or wrongfully claims ownership of a large portion of the estate and insists upon receiving all benefits therefrom,²⁷ he is guilty of misconduct and should be removed. So, too, an executor will be removed on the application of his co-executor where he fails to do his part in the management of the estate, and there are constant dissensions between the executors, where it is evident that his continuance in office will prejudice the best interests of the estate.²⁸ Although dishonesty is a ground of objection to appointment only in the case of an executor, it

²³ Matter of Petrie, 5 Dem. 352. In Matter of Stanton (18 St. Rep. 807), the executrix was removed for a wasteful and improvident management of the estate. In Denton v. Sanford (39 Hun. 487), the court refused to remove an executor on account of the fact that he had invested moneys of the estate in the purchase of real estate situated in another State in fulfilment of testator's agreement for such purchase made in his lifetime, although by reason of a defect in title a loss was sustained by the estate; where at the time of the purchase the land was apparently worth the amount paid and the title apparently good. The taking title to such land in the individual names of the executors, will not justify their removal, where it was done as an act of prudence and the land was held for the benefit of the estate. In Matter of West (40 Hun. 291), the administrator had resisted all attempts to inventory the property, and had refused to produce a large portion of it for that purpose, and had treated the administrator first entitled in a disrespectful and unbecoming manner. Held, "misconduct in the execution of his office." See Mat-

ter of Hood, 104 N. Y. 103; Matter of Ferrigan, 42 App. Div. 1; 58 N. Y. Supp. 920; *affd.*, 160 N. Y. 689; Matter of Hickey, 34 Misc. 360; 69 N. Y. Supp. 844. In Matter of Leavitt (28 Abb. N. C. 457), an executor was not removed for retaining in his business money belonging to the estate, but was required to give bonds to secure the estate against loss, where it appeared that the petitioners for his removal had assented to the retention of the money in the business, and its immediate withdrawal would embarrass the business and involve a loss to the estate. In Matter of Havemeyer (3 App. Div. 519), an executor and trustee was removed for defiance of the directions of a will, and for making improper investments.

²⁴ Matter of Moulton, 32 St. Rep. 631; 10 N. Y. Supp. 717.

²⁵ Wilcox v. Quinby, 20 N. Y. Supp. 5. See Haight v. Brisbin, *supra*.

²⁶ Matter of Jacob, 5 App. Div. 508; 38 N. Y. Supp. 1083.

²⁷ Matter of Gleason, 17 Misc. 510; 41 N. Y. Supp. 418.

²⁸ Matter of Wheaton, 37 Misc. 184; 74 N. Y. Supp. 938.

is made, by this subdivision, a reason for removal of an administrator also.²⁹ There can be no doubt that the rule, in respect to grounds of objection to the appointment, should be the same as in respect to causes for revoking the letters of the representative of a decedent. This subdivision practically supersedes a decision whereby a gross breach of duty was held not a cause for removing an executor.³⁰

§ 432. **Willful violation of law, etc.**— He may also be removed “where he has willfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate contained in a decree or order; or any provision of law relating to the discharge of his duty.”³¹

§ 433. **False suggestion of fact.**— “Where the grant of his letters was obtained by a false suggestion of a material fact,” they may be revoked.³² Where the consent of an administrator who is entitled to sole letters, had been obtained to the appointment of a coadministrator by false representations that there was no conflict of interest between them, when in fact, after the granting of such letters, such coadministrator sets up an adverse claim to most of the property which was in the possession of the intestate at the time of her death,—this is obtaining a grant of letters “by a false suggestion of a material fact.”³³ Independently of statute, the surrogate has power to revoke letters of administration, obtained upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration.³⁴ The false suggestions need not be fraudulent, *i. e.*, known to have been false, when made. It is enough that they were false, even though they were made by mistake.³⁵

²⁹ See § 307, *ante*.

³⁰ *Emerson v. Bowers*, 14 N. Y. 449. And see *Wood v. Brown*, 34 *id.* 337; *Coggs v. Green*, 9 Hun. 471.

³¹ Co. Civ. Proc., § 2585, subd. 3. The nonfiling of an inventory, if the omission is satisfactorily explained, will not, of itself, justify a removal. (*Matter of George*, N. Y. Law J., Jan. 16, 1890.) In *Matter of Arkenburgh* (11 App. Div. 193; 42 N. Y. Supp. 965), an oral stipulation in open court to file an account was held equivalent to an order under this section.

³² Co. Civ. Proc., § 2685, subd. 4.

³³ *Matter of West*, 40 Hun. 291; *affd.*, 111 N. Y. 687.

³⁴ In *Proctor v. Wanmaker* (1 Barb. Ch. 302), the false representation

consisted in a false affidavit of service of citation—which affidavit was not made by the person to whom the letters were issued. He'd., that the surrogate had power to revoke, although the statute then specified, as a ground of revocation, only the false representations made by the person to whom the letters were granted. See § 54, *ante*.

³⁵ *Perley v. Sands*, 3 Edw. 325; *Kerr v. Kerr*, 41 N. Y. 272. In *Oram v. Oram* (3 Redf. 300), letters had been granted to one claiming to be the widow of the intestate, and who had in fact been married to him before his death, in good faith supposing that he had been divorced from his first wife. The surrogate, however, having

§ 434. **Particular grounds against an executor.**— It is obvious that, as an executor is not usually required to give a bond, like an administrator, certain grounds of objection to him are pertinent, which would not be in the case of an administrator. An application is, therefore, allowed against an executor for the following, among other, causes: "Where his circumstances are such that they do not afford security to the creditors, or persons interested, for the due administration of the estate."³⁶ The former statute read: "Where his circumstances are so precarious as not to afford adequate security for the due administration of the estate." What circumstances will be so considered, must, of course, depend upon the facts of each case as it arises. The surrogate must decide each case on its own features and circumstances.³⁷ The main point in every case is, whether there is a reasonable doubt that the trust fund is safe in the executor's hands, to be administered as directed.³⁸ It does not necessarily follow that the fund is not safe from the fact that the executor does not own property to the full value of the estate,³⁹ but where the executor's only property consisted of an unliquidated demand, and he was about to remove from the State, and the trust created by the will was to continue for many years, it was held a proper case in which to require him to give security.⁴⁰ The fact that the executors are "men of inconsiderable means, not transacting business or having any place of business," does not show that their "circumstances are such that they do not afford adequate security for the due administration of the estate," within the meaning of the provision.⁴¹ The allegation that an executor's circumstances are insufficient for the administration of the es-

decided that the divorce which had been obtained in Indiana was void for want of jurisdiction, revoked the letters, and granted administration to the first wife. In *Matter of Hetherington* (25 Week. Dig. 4), the application was made on the ground that the letters were issued to one claiming to be a widow of the deceased, whereas her marriage with deceased was void by reason of her having contracted a previous marriage with another person still living. Held, that the court might inquire into the validity of such first marriage for the purpose of ascertaining whether it was absolutely void, and the marriage with decedent, therefore, valid. In *Matter of Gerlach* (29 Misc. 90), which was a proceeding for revocation

of letters of administration on the ground that the administratrix was not the widow of the intestate, being previously a divorced woman forbidden to marry in the State of New York, she was permitted to prove a ceremonial or nonceremonial marriage to the intestate, without the State.

³⁶ Co. Civ. Proc., § 2685, subd. 5.

³⁷ See *Shields v. Shields*, 60 Barb. 56; *Hovey v. McLean*, 1 Dem. 396; *Ballard v. Charlesworth*, id. 501.

³⁸ *Cotterell v. Brock*, 1 Bradf. 148.

³⁹ *Mandeville v. Mandeville*, 8 Paige, 475.

⁴⁰ *Wood v. Wood*, 4 Paige, 299. And see *Holmes v. Cook*, 2 Barb. Ch. 426.

⁴¹ *Postley v. Cheyne*, 4 Dem. 492, 494.

tate, is not enough to justify his removal;⁴² nor is the fact of his insolvency.⁴³ It is not material to inquire whether the testator was aware of the want of responsibility at the time of making the will.⁴⁴

§ 435. **Removal from State.**—The other grounds for revoking an executor's letters are: "Where he has removed or is about to remove from the State, and the case is not one where a non-resident executor would be entitled to letters without giving a bond;" and "where, by the terms of the will, his office was to cease upon a contingency, which has happened."⁴⁵ The provision with regard to the executor's removal from the State has no application to the case of one who was a nonresident when his letters were issued.⁴⁶

§ 436. **Grounds against temporary administrator of absentee.**—An application is allowed against a person appointed temporary administrator upon the estate of an absentee, according to what appears to be a correct construction of the Code, not only in the cases above mentioned as applying to administrators, but also, in addition thereto, "where it is shown that the absentee has returned; or that he is living and capable of returning and resuming the management of his affairs; or that an executor, or an administrator in chief, has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the State."⁴⁷ A liberal construction is necessary, in case the application for revocation of letters is made by a person interested in the estate of an absentee who "has returned," or "is living," *e. g.*, by the absentee himself, inasmuch as the opening clause of the section mentions only a person interested in the estate of *a decedent*.

§ 437. **By whom and how application made.**—The application for revocation of letters testamentary or of administration, in the various cases mentioned, may be made by a creditor or person interested in the estate of a decedent, to the Surrogate's Court from which the letters were issued, upon a written petition duly verified, praying for a decree revoking the same, and that the

⁴² Grubb v. Hamilton, 2 Dem. 414. Rep. 373. And see Co. Civ. Proc.,

⁴³ Matter of Hart, 6 St. Rep. 535; § 2638; § 292, *ante*.
Martin v. Duke, 5 Redf. 600.

⁴⁴ Wood v. Wood, 4 Paige. 299; ⁴⁶ Postley v. Cheyne, 4 Dem. 492;
Freeman v. Kellogg, 4 Redf. 218. Matter of Prime, N. Y. Law J., Sep.

⁴⁵ Co. Civ. Proc., § 2685, subds. 6 and 7; Sohn's Estate, 1 Civ. Proc. 8, 1892.
⁴⁷ Co. Civ. Proc., § 2685, subd. 8.

executor or administrator may be cited to show cause why a decree should not be made accordingly.⁴⁸ The fact that an action is pending for his removal in the Supreme Court is no bar to such action by the surrogate.⁴⁹ A creditor of a firm of which the executor, as such, is a partner is not a creditor of the estate.⁵⁰ Though, formerly, a *prima facie* valid claim against the estate, established a sufficient interest to authorize the court to proceed on his application,⁵¹ it is now settled that where the representative, whose removal is sought, denies that the petitioner is a creditor, the surrogate has not jurisdiction to try the issue.⁵² An executor who applies for the revocation of letters granted to his coexecutor⁵³ is a "person interested," but the executor of a deceased coexecutor, not having any rights as against the surviving executor, cannot apply for the latter's removal.⁵⁴ A debtor to the estate of a testator is not a person interested therein, entitling him to apply for the revocation of letters issued to the executor.⁵⁵ A parent, as the natural guardian of a child beneficially interested, cannot make the application,⁵⁶ nor can the widow of a son of decedent's husband by a former wife.⁵⁷ An executor, however, who is also a legatee, under an alleged will of a later date than that already admitted to probate, is such a person, pending proceedings on the probate of the paper propounded by him.⁵⁸

§ 438. **The petition and citation.**—The petition must set forth the facts and circumstances, showing that the case is within the statute.⁵⁹ Besides the allegations of interest or creditorship, it must specify the acts or omissions of the executor or administrator, or other grounds, upon which the prayer for revocation of his letters is based. These will vary, according to the clause of the statute under which the applicant proceeds. Where an executor's removal is asked for on the ground that his circumstances are so precarious as not to afford adequate security for the due administration of the estate, the petition should set forth

⁴⁸ Co. Civ. Proc., § 2685.

⁴⁹ Hood v. Hood, 2 Dem. 583; citing Wood v. Brown, 34 N. Y. 337; Quackenboss v. Southwick, 41 id. 117.

⁵⁰ Matter of Stern, 29 St. Rep. 216; 9 N. Y. Supp. 445.

⁵¹ Cotterell v. Brock, 1 Bradf. 148. See Co. Civ. Proc., § 2514, subd. 11, and § 96, *ante*.

⁵² Matter of Wheeler, 46 Hun. 64; Estate of Gillingham, 10 St. Rep. 864; Susz v. Forst, 4 Dem. 346.

⁵³ Hassey v. Keller, 1 Dem. 577.

⁵⁴ Shook v. Shook, 19 Barb. 653; Fosdick v. Delafield, 2 Redf. 392.

⁵⁵ Drexel v. Berney, 1 Dem. 163; 3 Civ. Proc. Rep. 122.

⁵⁶ Quin v. Hill, 6 Dem. 39.

⁵⁷ Stapler v. Hoffman, 1 Dem. 63.

⁵⁸ Cunningham v. Souza, 1 Redf. 462.

⁵⁹ Co. Civ. Proc., § 2686.

particulars as to the situation and value of the estate, and the pecuniary circumstances of the executor, so as to make a *prima facie* case of doubt whether the estate is safe in his hands; an allegation following the words of the statute, and verified upon information and belief merely, is insufficient.⁶⁰ The proceeding contemplated by this statute is a separate proceeding, asking for no other relief. Hence, a creditor's application to compel an administrator to file an intermediate account should not include an application for a revocation of his letters,⁶¹ though, on appearance and consent, an order of removal may be made.⁶² The Code does not provide, as it does in most cases, that a citation shall issue upon the presentation of the petition, but requires, in the first instance, proof by affidavit or oral testimony, satisfactory to the surrogate, of the truth of the allegations contained in the petition. If the surrogate is satisfied, he must issue a citation according to the prayer of the petition; except that where the petitioner's case is based on the alleged precarious circumstances of the executor, and the latter has given a bond to obviate that objection, before the issuing of letters to him, the surrogate may, in his discretion, entertain or decline to entertain the application.⁶³ Except in the cases where the power of removal may be summarily exercised, a surrogate has no jurisdiction to revoke letters upon an *ex parte* application, and if he proceeds to do so, he may be restrained by writ of prohibition.⁶⁴ It is not enough to serve the citation upon the executor only, as he is not "united in interest" with the legatees within the meaning of the Code, section 2517.⁶⁵

§ 439. **Proceedings upon the hearing.**— The executor should file a verified answer to the allegations of the petition, if he desires

⁶⁰ *Colegrove v. Horton*, 11 Paige, 261; *Atkinson v. Striker*, 2 Dem. 261; *Moorhouse v. Hutchinson*, id. 429.

⁶¹ *Matter of Meyers*, N. Y. Law J., Feb. 21, 1893; *Matter of Patterson*, 79 Hun. 371; 29 N. Y. Supp. 451; *affd.*, 146 N. Y. 327.

⁶² *Matter of Hernandez*, N. Y. Law J., Nov. 25, 1892. A successor, however, can only be appointed on a new application on notice to all parties interested. (Ib.)

⁶³ Co. Civ. Proc., § 2686. See *People v. Hartman*, 2 Sweeny. 576; *Stevens v. Stevens*, 3 Redf. 507.

⁶⁴ *People ex rel. Sprague v. Fitzgerald*, 15 App. Div. 539; 44 N. Y. Supp. 556; *affd.*, 156 N. Y. 689.

Where the acting surrogate, in a proceeding to remove administrators on the charge of conspiring to swindle the estate, dismissed the charge as to conspiracy, but ordered that the petitioner should have the right to make an *ex parte* application to the court for the immediate removal of the administrators, if they should disregard the provisions of the decree requiring them to take certain measures in another action, and apply for the appointment of petitioner as administratrix.—Held, that such order was void. (*Matter of Engelbrecht*, 15 App. Div. 541; 44 N. Y. Supp. 551.)

⁶⁵ *Fountain v. Carter*, 2 Dem. 313; § 70, *ante*.

to contest the application. The burden of proof then rests upon the petitioner;⁶⁶ the lines of evidence have been indicated above. The validity of the complainant's demand, and the plea of limitations, should not be tried upon the application.⁶⁷ To justify the removal of an executor, proof of his incapacity should be very strong.⁶⁸

§ 440. **Dismissing proceedings, notwithstanding proof.**— Upon the return of the citation, and, of course, after the introduction of the evidence, the surrogate may, in his discretion, although an objection is established to his satisfaction, dismiss the proceedings upon such terms, as to costs, as justice requires, and allow the letters to remain unrevoked, in either of the following cases: 1. Where the executor or administrator has disobeyed a direction of the law or of the surrogate, as to the discharge of his duties; if he obeys it and makes suitable amends to the injured persons. 2. Where the executor's or administrator's letters were obtained by a false suggestion of fact; if they ought to have issued notwithstanding. 3. Where the proceedings are against an executor, and his circumstances afford inadequate security; if, within a reasonable time, not exceeding five days, he gives a bond such as he would have been required to give to procure letters, in case a like objection, made before they were issued, had been sustained.⁶⁹ Such a bond must be the same as would be exacted of an administrator upon the estate of an intestate, that is, not less than twice the value of the personal estate;⁷⁰ subject, however, to the qualification that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property which may come to the hands of the executor by virtue of any provision contained in the will.⁷¹ In such a case, as in all others, where the surrogate or the statute requires a bond of an executor, the surrogate may direct securities to be deposited with him to reduce the penalty of the bond.⁷² The sureties in a bond given by an executor under the foregoing provision, cannot limit their liability to deficiencies or defalcations of the executor, occurring after the giving of the bond.⁷³

⁶⁶ *Cotterell v. Brock*, 1 Bradf. 148. *Kasson*, 46 App. Div. 348; 61 N. Y.

⁶⁷ *Matter of Wheeler*, 46 Hun. 64; Supp. 569.

Estate of Gillingham, 10 St. Rep. 864. ⁷⁰ See Co. Civ. Proc., § 2667; also

⁶⁸ *Matter of Johnson*, 15 St. Rep. c. XV, *post*.

⁷¹ Co. Civ. Proc., § 2645.

⁷² Co. Civ. Proc., § 2595.

⁶⁹ Co. Civ. Proc., § 2687; *Matter of Leavitt*, 28 Abb. N. C. 457; *Matter of* ⁷³ So held, under the Revised Statutes, in *Seofield v. Churchill* (72 N. Y. 565). It has been held that, where

§ 441. **Decree, where proceedings not dismissed.**—Where the objections of the creditor, or person interested, or any of them, are established to the surrogate's satisfaction, and he does not dismiss the proceedings as above mentioned, he must make a decree revoking the letters issued to the person complained of.⁷⁴ The decree must be recorded.⁷⁵ The costs of the application, if granted, should, as a general rule, be charged on the fund;⁷⁶ but, if denied, ought to be paid by the petitioner personally.⁷⁷ Pending an appeal from the decree, the court will not appoint a temporary administrator, unless in a peculiar case,⁷⁸ as an appeal does not stay the execution of such a decree.⁷⁹

§ 442. **Revocation upon resignation.**—The statute has changed the common-law rule forbidding the resignation of an executor or administrator who has once assumed the duties of the office, and now he has the right, upon reasonable cause shown, to resign his trust, and the surrogate is empowered to accept it, and to discharge him from the further execution thereof.⁸⁰ It is provided that "an executor or administrator may, at any time, present to the Surrogate's Court a written petition, duly verified, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly."⁸¹ It does not follow that the surrogate is bound to entertain the petition. On the contrary, he may, in his discretion, decline to entertain the application.⁸² Thus, the court

the executor is empowered to sell the real property, the security required of him should be for double the amount of the proceeds which may come into his hands for the benefit of others, unless they are very large, in which case security to a limited amount beyond the fund should be deemed sufficient. (*Holmes v. Cock*, 2 Barb. Ch. 426.) So, where a clear vested interest in a part or all of the fund is shown to exist in the trustee, security will be required only for the residue. (*Cotterell v. Brock*, 1 Bradf. 148.)

⁷⁴ Co. Civ. Proc., § 2687. Notwithstanding the reversal of the surrogate's decree admitting a will to probate, the executor remains such, and is entitled to possession of the property until his letters are revoked by the surrogate.

⁷⁵ Co. Civ. Proc., § 2498, subd. 5; § 2499.

⁷⁶ *Holmes v. Cock*, 2 Barb. Ch. 426.

⁷⁷ *Sheek v. Shook*, 19 Barb. 653.

⁷⁸ *Matter of Dunn*, 3 Law Bul. 65. See generally as to the power of the surrogate pending an appeal, *Matter of Angevine*, 1 Tuck. 245; *Vreedburgh v. Calf*, 9 Paige, 128; *Matter of Hancock*, 27 Hun. 575.

⁷⁹ Co. Civ. Proc., § 2583.

⁸⁰ For the former rule as to administrators, see *Flinn v. Chase*, 4 Den. 85; *Matter of Dyer*, 5 Paige, 534. In *Matter of Curtis* (9 App. Div. 285), it is said that an executor cannot resign; he must apply to have his letters revoked, but this would seem to be a mere refinement of expression. As to resignation by a testamentary trustee, see § 450, *post*.

⁸¹ Co. Civ. Proc., §§ 2689, 2690. These sections of the Code superseded, so far as executors and administrators are concerned, the provisions of L. 1879, c. 406, although that act was not expressly repealed until 1893.

⁸² Co. Civ. Proc., § 2689, last sentence.

will not revoke an executor's letters on his own request, upon allegations that he has interests, as surviving partner of the decedent, antagonistic to his duties as executor, necessitating resort to another tribunal where the estate should be represented by a disinherited person, the surrogate having ample power to adjust the equities of the case.⁸³

§ 443. **The petition and order.**— If the surrogate decides to entertain the application, "the proceedings must be, in all respects, the same as upon a petition for a judicial settlement of the petitioner's account; except that, upon the hearing, the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, he must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged."⁸⁴ The petition should, therefore, set forth "the facts upon which the application is founded," that is, some reason for the desire of the executor or administrator to be relieved, though, generally, we should think that a statement of such causes as ill health, contemplated absence from the State, want of harmony between coexecutors or administrators, or between the representatives and the beneficiaries, and the like, would be held to be sufficient. In all other respects, the petition "must conform to a petition, praying for a judicial settlement of the account of an executor or administrator."⁸⁵ It should recite the names of the same persons, who are required to be cited upon an ordinary settlement of an executor's or administrator's account. Citation should be served upon such persons in the same manner as in an ordinary accounting. The petitioning executor or administrator, having fully accounted and paid over all money which is found to be due from him to the estate, and delivered over all books, papers, and other property of the estate in his hands, either into the Surrogate's Court, or in such manner as the surrogate directs, is entitled to a decree, revoking his letters and discharging him accordingly.⁸⁶

§ 444. **Accounting on revocation of letters.**— Upon the revocation of the letters, the Surrogate's Court may compel a judicial settlement of the accounts of the executor, administrator, or tes-

⁸³ Becker v. Lawton, 4 Dem. 341; citing Matter of Saltus, 3 Abb. Ct. App. Dec. 243; Marre v. Ginochio, 2 Bradf. 165; Matter of Stouvenell, 1 Tuck, 241.

⁸⁴ Co. Civ. Proc., § 2690.

⁸⁵ Co. Civ. Proc., § 2689.

⁸⁶ Co. Civ. Proc., § 2690. See Matter of Bernstein, 3 Redf. 20.

tamentary trustee, as the case may be.⁸⁷ In its discretion, the court may, by its decree of revocation, include an order requiring the person, whose letters are revoked, to account for all money and other property in his hands, and to pay and deliver the same into the Surrogate's Court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending or thereafter to be brought.⁸⁸ The Surrogate's Court has the same jurisdiction, upon the petition of the successor, or of a remaining executor, administrator, or trustee, to compel the person, whose letters have been revoked, to account for, or deliver over money or other property, and to settle his account, which it would have upon the petition of a creditor or person interested in the estate, if the term of office, conferred by the letters, had expired by its own limitation.⁸⁹ The surrogate has no power to compel the committee of a lunatic trustee, who has been removed, to account for its ward's administration as executor and trustee and deliver up the property of the trust to his cotrustee or to his successor. Recourse should be had to the tribunal which appointed the committee.⁹⁰

§ 445. **Appointment and powers of successor.**— The Surrogate's Court, making the decree of revocation, has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person whose powers have ceased as if the letters had not been issued.⁹¹ And where letters of all the executors or all the administrators, to whom letters have been issued, are revoked as to all of them, the surrogate is expressly required to grant letters of administration to one or more persons, as their successors, in like manner as if the former let-

⁸⁷ Co. Civ. Proc., §§ 2726, as amended 1893, 2807.

⁸⁸ Co. Civ. Proc., § 2603. But a decree which *discharges* the representative should not direct him to retain certain assets pending a litigation concerning them. (Matter of Olmstead, 24 App. Div. 190; 49 N. Y. Supp. 104.)

⁸⁹ Co. Civ. Proc., § 2605. See Dunford v. Weaver, 21 Hun, 349; Casoni v. Jerome, 58 N. Y. 315; Matter of Seitz, 16 Misc. 522; 40 N. Y. Supp. 206; *affd.*, *sub nom.* Matter of Manhardt, 17 App. Div. 1.

⁹⁰ Matter of Fisher, N. Y. Law J., May 20, 1891. "Sections 2345-2348 of the Code provide a way to procure a conveyance of real estate held as trustee by one who has become a lunatic; and section 2339 seems to confer exclusive jurisdiction over the committee upon the court appointing it. I regard the omission in section 2606 of a provision for calling such a committee to account in the same manner as the representative of a deceased executor or administrator as significant." (Per Ransom, S., *ib.*)

⁹¹ Co. Civ. Proc., § 2605.

ters had not been issued.⁹² The appointment of such a successor to an executor is considered under the head of administration with the will annexed; that of a successor to an administrator, under the head of administration *de bonis non*; and that of a successor to a testamentary trustee, under the head of letters testamentary.⁹³

§ 446. **Effect on powers of executor, etc., as trustee.**—“Where an executor or administrator is also a testamentary trustee, a decree, revoking his letters, does not affect his power or authority as testamentary trustee,” except as specially provided in the Code in relation to the latter officer.⁹⁴

§ 447. **Right to reappointment.**—The removal of an administrator, for failure to furnish sureties, does not disqualify the person removed from being reappointed; therefore he is entitled to notice of an application for letters made by one having a right inferior to his.⁹⁵ But if another person is thereafter duly appointed, his preference is lost.⁹⁶

§ 448. **Cessation of powers.**—Upon the entry of a decree revoking letters issued to an executor or administrator, his powers cease.⁹⁷ An appeal from the decree does not stay its execution.⁹⁸ But the revocation does not affect the validity of any act, within the powers conferred by law upon the executor or administrator, done by him before the service of the citation where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers, with respect thereto, were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceedings against him; and he is not liable for such an act done in good faith.⁹⁹ This is substantially the rule at common

⁹² Co. Civ. Proc., § 2603. An administrator with the will annexed should not be appointed upon the resignation of the executors and trustees, where the amount of the residuary estate has been ascertained for the purposes of the trust. (Matter of Curtiss, 15 Misc. 545; 37 N. Y. Supp. 586; affd., 9 App. Div. 285.)

⁹³ See *ante*, §§ 322, 326, 368.

⁹⁴ Co. Civ. Proc., § 2688; superseding Matter of Crossman, 20 How. Pr. 350, and confirming Matter of Bull, 45 Barb. 334; 31 How. Pr. 69. See Co. Civ. Proc., § 2819, for the cases and manner in which a representative, who

is also a testamentary trustee, may be removed in both capacities by one decree.

⁹⁵ Barber v. Converse, 1 Redf. 330.

⁹⁶ Matter of Williams, 18 Abb. Pr. 350. There is no provision of law authorizing the reissue of letters to one whose letters have been revoked because he was adjudged insane, and who has since become competent, and been discharged from his committee. (Matter of Dearing, 4 Dem. 81.)

⁹⁷ Co. Civ. Proc., § 2603.

⁹⁸ Co. Civ. Proc., § 2583.

⁹⁹ Co. Civ. Proc., § 2603. This provision is manifestly framed in refer-

law, though as to the effect of a revocation of letters on the intermediate acts of the former representative, a distinction is made between grants of letters which are void and those which are merely voidable. But whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bona fide* payment to the executor or administrator, of a debt due to the estate, will be a legal discharge to the debtor.¹ But the person to whom any payment of money or delivery of property is made, whether as husband, wife, next of kin, or legatee of the decedent, is nevertheless liable to respond therefor, to the proper person, upon the revocation of the letters, whether the revocation is made because a supposed decedent is living, or because a will is discovered after administration granted in a case of supposed intestacy, or which revokes a prior will upon which the letters in question were granted.²

ARTICLE SECOND.

REVOCATION OF AUTHORITY OF TESTAMENTARY TRUSTEES.

§ 449. **Surrogate's jurisdiction.**—In speaking, on a previous page, of the issue of letters testamentary to executors, who are also, by the terms of the will, trustees of the estate or any part of it, for a particular purpose, we pointed out the distinction between the functions of the two offices of executorship and trusteeship, and stated, incidentally, that where the offices were intended by the testator to be essentially distinct, whether held by the same person, or by different persons, the Surrogate's Court had no authority to issue letters of trusteeship, separately from letters testamentary, except that, in the case of the death, resignation, or removal of a testamentary trustee, the court had

ence to a decree in a special proceeding adverse to the executor or administrator, commenced for the purpose of procuring a revocation, and in which a citation issued; yet it has appeared, in the present chapter, that a decree of revocation may be issued under many different circumstances. But the provision cited expressly applies to any revocation effected by "a decree made as prescribed in this chapter" (c. 18 of the Code). In a decree entered upon an executor's petition to resign, charging him with a balance, and without directing him to deliver it to his successor, it was provided

that "when he shall have paid over the sum" "found due from him as aforesaid," to his successor, his resignation be accepted and he be discharged.—Held, that this did not deprive him of the right to the possession of the securities of the estate, and he could maintain an action therefor against a bank with which he had deposited them before the decree was rendered. (*Van Buren v. First Nat. Bank of Cooperstown*, 53 App. Div. 80; 65 N. Y. Supp. 703.)

¹ Wms. on Exrs. (6th Am. ed.) 659.

² Co. Civ. Proc., § 2604.

power to appoint "a successor" to such trustee.³ Unlike a person named as executor, a testamentary trustee, having renounced, and letters having issued to others, cannot, on his subsequent retraction, be restored as trustee.⁴ The jurisdiction of the Surrogate's Court, in regard to testamentary trustees, is limited to the cases of "trust created by the will of a resident of the State, or relating to real property situated within the State," and this without regard either to the residence of the trustee or the date of the will.⁵ It has power to accept the resignation of such a testamentary trustee, and, in a proper case, to require him to give security in the same cases as an executor may be required to do; also to remove him from office upon substantially the same grounds as will warrant the removal of an executor; and in case of his resignation, removal, death, or lunacy, to appoint a successor.

§ 450. **When trustee is also executor, etc.**—It is expressly provided, however, that where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, for his resignation, or removal, or to require him to give security, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate,⁶ except in one of the following cases: 1. "Where he presents a petition praying for the revocation of his letters, he may also, in the same petition, set forth the facts, upon showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly. 2. Where a person presents a petition praying for the revocation of letters issued to an executor or administrator;

³ Where a trustee, named in a will, refuses or neglects to accept the trust, and qualify as trustee, for a period of twenty years, he must be deemed to have renounced the trust, and a vacancy is thereby created which may be filled by the court. (Matter of Robinson, 37 N. Y. 261; which was the case of an appointment by the Supreme Court.) And see *Ross v. Roberts*, 2 Hun. 90; *affd.*, 63 N. Y. 652; *Dunning v. Ocean Nat. Bank*, 6 Lans. 296; *affd.*, 61 N. Y. 497; *Green v. Green*, 4 Redf. 357.

⁴ See § 321, *ante*.

⁵ *Co. Civ. Proc.*, § 2820. The general duties and powers of testamentary

trustees will be considered in chapter XVII. For the old rule as to inability of a trustee to resign after having undertaken the trust, see *Cruger v. Halliday*, 11 Paige, 314; *Wood v. Wood*, 5 id. 596; *Craig v. Craig*, 3 Barb. Ch. 76; *Re Wadsworth*, 2 id. 381; *Matter of Robinson*, 37 N. Y. 261; *Matter of Bernstein*, 3 Redf. 20.

⁶ *Co. Civ. Proc.*, § 2819, which adopts the rule prevailing before the Code. See *Wood v. Brown*, 34 N. Y. 339; *Leggett v. Hunter*, 19 id. 445; 25 Barb. 81; *Craig v. Craig*, 3 Barb. Ch. 76; *Matter of Wadsworth*, 2 id. 381.

and any of the facts set forth in the petition are made, by the provisions of this title, sufficient to entitle the same person to present a petition praying for the removal of a testamentary trustee; the petitioner may pray for a decree removing the person complained of in both capacities, and for a citation accordingly." In either case, proceedings for the resignation or removal of the testamentary trustee, and for the judicial settlement of his account, may be taken in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs.

§ 451. **Petition for leave to resign.**—A testamentary trustee may, at any time, apply to the Surrogate's Court for leave to resign his trust. The application must be by the verified petition of the trustee. It is always a condition of the acceptance of such resignation that his accounts be first judicially settled and that he pay over all money belonging to the trust and deliver all books, papers, and other property of the trust in his hands, either into the Surrogate's Court, or as the surrogate directs. Upon such petition, an order to show cause may be granted, directed to all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of law, to share in the funds or estate, or the proceeds of any property held by the trustee.⁷ The petition must set forth the facts upon which the application is founded, conforming to the petition of an executor for a judicial settlement of his accounts, and should state some reasons, such as ill health, contemplated absence from the State, disagreement with cotrustee, dissatisfaction of the *cestui que trust*, or the like. The fact that the trustee is "too busy with his own matters" to continue in the service, is not a "sufficient reason" for permitting him to resign, especially where the beneficiaries of the trust are opposed to such a course.⁸ The surrogate has a discretion to entertain or to decline to entertain the petition,⁹ and should require proof of the allegations of the

⁷ Co. Civ. Proc., § 2814.

⁸ *Baier v. Baier*, 4 Dem. 162. In *Tilden v. Fiske* (4 id. 357), an executor and testamentary trustee who had been engaged for sixteen years in the execution of a trust, the administration of which was nearly completed, and who intended to make changes in his manner of life which would involve prolonged absence from the United States, was allowed to re-

sign. A provision in a will for the exigency of a resignation of an executor may be considered in determining the propriety of allowing such resignation.

⁹ Co. Civ. Proc., § 2814. In *Matter of Foster* (7 Hun. 129), the trustee was relieved from his trust, upon his own petition, by an order of the Supreme Court; but the order was opened, on the application of the

petition, where they are put in issue.¹⁰ If the application is entertained, the surrogate may impose reasonable conditions upon granting it, as, for example, that the trustee waive all right to commissions.¹¹ If he determines that sufficient reasons exist therefor, he may allow the trustee to account; and having accounted, and paid and delivered over the fund, and the books and papers of the trust, a decree will be granted accepting the resignation, and discharging him accordingly.¹²

§ 452. Requiring trustee to give security.—As in the case of executors, testamentary trustees may be required to furnish a bond for the faithful performance of their duties. In general, where the executor, as such, is also trustee, his bond as executor is security for the faithful performance of his duty as trustee; but where the will contemplates that the two offices, though held by the same person, are to be distinct and separate, then, it is said, the executor's bond is not security for the trustee.¹³ In such a case, or where the trustee is a person other than the executor, any person, beneficially interested in the execution of the trust, may present to the Surrogate's Court a verified petition "setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting a testamentary trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give security, in order to entitle himself to letters."¹⁴ The petition should pray for a decree, directing the testamentary trustee to give security for the performance of his trust; and that he may be

cestui que trust, upon allegations of improvident and improper investments, in respect of which she claimed an accounting, and a reference was ordered, pending which the trustee died. The court thereupon granted an order bringing in the representatives of the trustee as parties to the proceeding, which order was sustained by the General Term, holding that the trustee's proceeding was not purely a personal one, but such as directly affected his estate in the hands of his representatives.

¹⁰ *Matter of Cutting*, 49 App. Div. 388; 63 N. Y. Supp. 246.

¹¹ *Matter of Curtiss*, 15 Misc. 545; *affd.*, on opinion below, 9 App. Div. 285. See *Matter of Allen*, 96 N. Y. 327.

¹² See *ante*, § 444.

¹³ See § 320, *ante*.

¹⁴ Co. Civ. Proc., § 2815. The court is not confined to a proceeding instituted by a petition filed under this section, but may make an order to such effect, where objection is duly taken, on a motion to open a decree rendered upon an accounting, and modify it by delivering property to the applicant who occupies the position of trustee under a will. (*Kelsey v. Van Camp*, 3 Dem. 530.) An application to compel a trustee, of ample means, against whom no charge of misconduct is made, and who has relinquished his own business so as to devote his entire attention to the estate, should be denied. (*Matter of Weil*, 49 App. Div. 52; 63 N. Y. Supp. 688.)

cited to show cause why such a decree should not be made. Upon the presentation of the petition, a citation will issue. "Upon the return of the citation, a decree, requiring the testamentary trustee to give such security, may be made, in a case where a person so named as executor can entitle himself to letters testamentary only by giving a bond; but not otherwise."¹⁵ The security to be given must be a bond to the same effect, and in the same form, as an executor's bond. All the provisions of the Code, applicable to the bond of an executor, or to the rights, duties, and liabilities of the parties thereto, including the release of the sureties, and the giving of a new bond, apply to the bond so given, and to the parties thereto."¹⁶

§ 453. **Grounds for removal of trustee.**— The Surrogate's Court has jurisdiction, likewise, to remove a testamentary trustee, upon the petition of any person beneficially interested in the execution of the trust, in the following cases:¹⁷ 1. Where, if he was named in the will as executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency. 2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his trust, or dishonesty, drunkenness, improvidence, or want of understanding, he is unfit for the due execution of his trust. 3. Where he has failed to give a bond, as required by a decree, made as prescribed in the last two sections [sections 2815, 2816]; or has willfully refused, or without good cause neglected, to obey a direction of the surrogate, contained in any other decree, or in an order, made as prescribed in this title; or any provision of law, relating to the discharge of his duty." The removal may be made upon the petition of a single beneficiary, but the surrogate may in his discretion require notice to other parties in interest, in order that they may be heard in respect to the se-

¹⁵ Co. Civ. Proc., § 2815.

¹⁶ Id., § 2816. See c. XV, *post*.

¹⁷ Co. Civ. Proc., § 2817. See *Matter of Morgan*, 66 N. Y. 618; *Bronson v. Bronson*, 48 How. Pr. 481; *Matter of Wadsworth*, 37 Barb. Ch. 381; *Matter of McKeon*, 37 Misc. 658; *Matter of Mallon*, 38 id. 27. The foregoing section revises a provision of L. 1871,

c. 482, prior to the passage of which, surrogates, generally, had no power to remove a testamentary trustee. (*Hetzell v. Barber*, 6 Hun, 535.) That act, however, conferred such power, even where the title to real estate vests in the trustee by the terms of the will. (*Clapp v. Brown*, 4 Redf. 200.)

lection of a new trustee and the propriety of exacting a bond.¹⁸ It is better practice, if not essential, to have a citation in all cases, to be served at least upon the trustee whose removal is sought.¹⁹ When it appears that efforts to serve it would be futile, the court will grant the relief immediately after the issuance of the citation.²⁰ The authority thus conferred upon Surrogates' Courts, in respect to the removal of a testamentary trustee, is not so broad as that possessed by the Supreme Court, which may make a removal where "for any cause" the incumbent "shall be deemed an unsuitable person to execute the trust."²¹ But the surrogate may remove a testamentary trustee for the same causes for which executors are removable,²² which have already been detailed. It is only necessary here to cite some cases which are particularly applicable to testamentary trustees. A trustee who delegates to another the active duties of the trust, allowing his partner to manage the estate for his own benefit, taking second mortgages, converting good securities, and lending the proceeds in worthless or inadequate mortgages, and exposing the funds to risks of loss for his own profit, is not only improvident and incompetent, but dishonest, for which he is liable to removal by the surrogate.²³ It is a good ground for removing a testa-

¹⁸ Lane v. Lewis, 4 Dem. 468; citing Matter of Whitehead, 3 id. 227; Tompkins v. Moseman, 5 Redf. 403; People v. Norton, 9 N. Y. 176; Milbank v. Crane, 25 How. Pr. 193; Matter of Stuyvesant, 3 Edw. Ch. 299; Matter of Jones, 4 Sandf. Ch. 615; Matter of Robinson, 37 N. Y. 261. But compare Russak v. Tobias, 12 Civ. Proc. Rep. 390; Matter of Reinisch, 20 App. Div. 416; 46 N. Y. Supp. 902; Matter of Welch, 20 App. Div. 412; 46 N. Y. Supp. 689; affd., 154 N. Y. 774.

¹⁹ Hamilton v. Faber, 33 Misc. 64.

²⁰ Matter of Haussman, N. Y. Law J., May 9, 1891.

²¹ 1 R. S. 730, § 70; L. 1896, c. 547, § 92. See Quackenboss v. Southwick, 41 N. Y. 117; Blake v. Sands, 3 Redf. 168; Trask v. Sturges, 31 Misc. 195; affd., 56 App. Div. 625; revd., on other points, 170 N. Y. 482; Matter of Hoysradt, 20 Misc. 265; Disbrow v. Disbrow, 46 App. Div. 111; affd., 167 N. Y. 606.

²² Matter of Cady, 36 Hun. 122; affd., 103 N. Y. 678.

²³ Savage v. Gould, 60 How. Pr.

234. See Matter of Roosevelt, 5 Redf. 601. One of two executors had refused to join in a deed of land directed to be sold and the proceeds distributed. Held, that the power to sell and distribute was so connected with that of an executor that no separate proceeding could be brought to remove him as trustee, but that his action had been so flagrant that in this case the petition should be granted. (Oliver v. Frisbie, 3 Dem. 22.) The court should not remove a testamentary trustee on account of ill-feeling toward him on the part of a cotrustee, engendered by his making a lawful claim for commissions. (Russak v. Tobias, 12 Civ. Proc. Rep. 390.) As to the essentials of a *prima facie* case justifying the removal of a trustee, see Ferris v. Ferris, 2 Dem. 336. Where the circumstances of one of two testamentary trustees are such as not to afford adequate security for the proper discharge of his duties, he cannot be relieved from furnishing a bond merely by establishing that his cotrustee is solvent and responsible. (Matter of Sears, 5 Dem. 497.)

mentary trustee that he is a nonresident alien, upon which ground he was refused letters testamentary, although he had never acted as such, nor signified his acceptance of the office.²⁴ But in order to justify the removal of a testamentary trustee, upon the ground that, by an improper application of trust moneys or an investment in securities unauthorized by law, he has demonstrated his unfitness for the due execution of his trust, it must appear that his acts have been such as to endanger the trust property, or to show a want of honesty, or of proper capacity, or of reasonable fidelity.²⁵ Thus, the investment of trust funds in securities unauthorized by law is not, of itself, ground for the removal of the trustee, where the trust fund is not endangered and want of honesty or capacity is not shown.²⁶ On general principles, an application to remove a trustee, upon the ground that he has converted a portion of the trust property to his own use, will not be defeated by proof that he has made a settlement with those of the beneficiaries whose property he had converted, and that the residue of the trust property is then in possession of and properly invested by his cotrustees.²⁷ Where, however, the *cestui que trust* has, for more than twenty years, acquiesced in the trustee's retention of the trust fund in the investments in which it came into his hands, though unquestionably in violation of his duty, and has received interest thereon in excess of what would have been realized from investment securities, it cannot be said that the trustee has been improvident or is unfit for the execution of his trust.²⁸ But whatever may be the ground urged for the trustee's removal, he is entitled in every case to have the issues raised by his answer determined upon common-law evidence.²⁹

²⁴ Lane v. Lewis, 4 Dem. 468; s. c. as Estate of Brick, 9 Civ. Proc. Rep. 397. Compare Farmers' Loan & Trust Co. v. Hughes, 11 Hun, 130.

²⁵ Morgan v. Morgan, 3 Dem. 612; Dow v. Dow, 45 St. Rep. 5; 18 N. Y. Supp. 222.

²⁶ Matter of O'Hara, 62 Hun. 531; 17 N. Y. Supp. 91; Elias v. Schweyer, 13 App. Div. 336; 43 N. Y. Supp. 55. Evidence that a trustee had omitted to charge herself with rents collected, with an intent to conceal them from those interested and to convert them to her own use is dishonesty, sufficient to warrant her removal. (Matter of Smith, 26 St. Rep. 235; 7 N. Y.

Supp. 327.) So the omission to charge herself with rents collected after the death of her father when she knew that they constituted assets of his estate, of which she was executrix, is carelessness and inattention sufficient to warrant her removal. The fact of her good faith and honesty is not enough to prevent her removal. (Ib.) See Wilcox v. Quinby, 42 St. Rep. 159; 16 N. Y. Supp. 699.

²⁷ Matter of Wiggins, 29 Hun, 271.

²⁸ Matter of Seymour, N. Y. Law J., June 5, 1891.

²⁹ Matter of Scott, 49 App. Div. 130; 62 N. Y. Supp. 1059.

§ 454. **Appointment of successor.**— “ When a sole testamentary trustee dies or becomes a lunatic, or is by a decree of the Surrogate’s Court removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. When one of two or more testamentary trustees dies or becomes a lunatic, or is, by decree of the Surrogate’s Court, removed or allowed to resign, a successor shall not be appointed, except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court, or the Supreme Court, shall be of the opinion that the appointment of a successor would be for the benefit of the *cestui que trust*. Unless and until a successor is appointed, the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee or trustees had not died, become lunatic, been removed or resigned.”³⁰ It is not in every such case that a successor will be appointed, for where no duties remain to be performed, except to make certain payments, there is no need of a new trustee as the executor of the deceased trustee may be required to make them.³¹ The power to appoint a successor is not confined to the case of a single or sole trustee, but the court may appoint one or more successors to several trustees who have resigned.³² It is the better practice not to appoint the successor until the completion of the accounting of the present trustee and an order entered directing the turning over of the estate; otherwise, some difficulty may be encountered in fixing the penalty of the new trustee’s bond.³³ But, as a matter of jurisdiction, the surrogate has the power to make such appointment even before the entry of the order discharging the predecessor.³⁴ It should also be noted that when a person, who is also executor and trustee, resigns his authority as trustee, and his resignation is accepted, this does not affect the exercise of his function as executor. His powers in the latter capacity, including a power

³⁰ Co. Civ. Proc., § 2818. An executor required by the terms of the will to pay the income of a fund semi-annually to a beneficiary during his life is a testamentary trustee: upon his death the appointment of a successor is necessary, and the surrogate may make it under Code Civ. Proc., § 2818. (Matter of Hecht, 71 Hun, 62; 24 N. Y. Supp. 540.) As to the appointment of the beneficiary as suc-

cessor, see *People ex rel. Collins v. Donohue*, 70 Hun. 317; *Losey v. Hanley*, 147 N. Y. 560.

³¹ *Boyer v. Decker*, 5 App. Div. 623; 40 N. Y. Supp. 469.

³² *Royce v. Adams*, 123 N. Y. 402; 33 St. Rep. 622.

³³ See *Matter of McWhaley*, N. Y. Law J., April 8, 1892.

³⁴ *Conant v. Wright*, 22 App. Div. 216; 48 N. Y. Supp. 422.

in trust to sell real estate, remain in him, and are not vested in the new trustee appointed in his place.³⁵

§ 455. **Qualification of successor.**— Where a decree removing a trustee, or discharging him on his resignation, does not name his successor, or the person designated therein does not qualify, the successor must be appointed and must qualify in the manner prescribed for the appointment and qualification of an administrator with the will annexed.³⁶

³⁵ *Greenland v. Waddell*, 116 N. Y. 234. *Tompkins v. Moseman*, 5 Redf. 402; *Lane v. Lewis*, 4 Dem. 468; *Matter of*

³⁶ Co. Civ. Proc., § 2818, as amended 1884. He must give a bond. (*Russak v. Tobias*, 12 Civ. Proc. Rep. 390; *Whitehead*, 3 id. 227; 1 How. Pr. (N. S.) 90.)

CHAPTER XV.

OFFICIAL BONDS OF OFFICERS SUBJECT TO THE SURROGATE'S JURISDICTION; RIGHTS AND LIABILITIES OF SURETIES.

TITLE FIRST.

GENERAL PROVISIONS RELATING TO OFFICIAL BONDS.

§ 456. **General requisites of official bonds.**— We have already given the statute which requires a surrogate, after his election or appointment, to make and file a bond.¹ The Surrogate's Court, in the exercise of the jurisdiction conferred upon it by statute, may compel the filing of an official bond by any of several descriptions of officers, including executors, administrators, guardians, and other trustees, and may exercise certain supervisory powers in respect to the security so to be given. The statutory regulations, with regard to the bonds of all or most of such officers, are given here; those not generally applicable are separately considered.² Every official bond, given as prescribed in the Code, must be acknowledged or proved, and certified, in like manner as a deed to be recorded.³ The clerk of the Surrogate's Court has the power to take acknowledgment or proof of the execution of any bond to be filed in the court of which he is clerk.⁴ A bond re-

¹ See *ante*, § 28.

² It may be remarked here that the provisions of the present Code relating to the bonds of executors, administrators, etc., and the rights and liabilities of sureties, apply to representatives, guardians, etc., to whom letters were issued before or after the 1st of September, 1880, but the Code does not affect the liabilities of the sureties in the bond executed before this date. (Co. Civ. Proc., § 2610.) The change wrought by Co. Civ. Proc., § 2606, in reference to the method of establishing a *devastavit*, in an action upon the bond of a deceased administrator, merely affects the remedy,

not the liability, and so is not within the exception contained in section 2610. Accordingly, section 2606 is applicable to a case where the bond was given before its enactment, and, therefore, a decree against an administrator of the deceased administrator, rendered upon his accounting, had the same effect "as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's lifetime." (Potter v. Ogden, 136 N. Y. 384.)

³ Co. Civ. Proc., § 810; *id.*, § 2500, as amended 1893.

⁴ Co. Civ. Proc., § 2509, subd. 5.

quired to be given by or in behalf of a person does not necessitate his joining with the sureties in the execution thereof, unless the statute requires him to execute the same. The execution thereof by one surety is sufficient, although the word "sureties" is used, unless the provision expressly requires two or more sureties, and a bond executed by any surety or fidelity company, authorized by law to transact business, is equivalent to an execution by two sureties.⁵

§ 457. Number and qualifications of sureties.— A bond, executed by a surety or sureties, as prescribed in the Code, must, where two or more persons execute it, be joint and several in form; and, unless otherwise expressly prescribed, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of, and a householder or a freeholder within, the State, and is worth the penalty of the bond, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.⁶

Where the penalty of the bond is five thousand dollars or upwards, the surrogate may in his discretion allow the sum, in which a surety is required to justify, to be made up by the justification of two or more sureties, each in a smaller sum, but, in that case, a surety cannot justify in a sum less than five thousand dollars; and where two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them.⁷

Each surety should justify in the required penalty, that is, the penalty must be twice made up, either (1) by two persons, each fully qualified, or (2) by one such person and two or more persons else, unitedly sufficient, or (3) by two distinct sets of persons, each set being unitedly worth the full penalty.⁸

⁵ Co. Civ. Proc., § 811, as amended 1895 (L. 1895, c. 510).

⁶ Co. Civ. Proc., § 812. As to a husband's being surety on his wife's bond and *vice versa*, see *Matter of Grove*, 13 Civ. Proc. Rep. 267; *Matter of McMaster*, 12 id. 177.

⁷ Co. Civ. Proc., § 813, as amended 1885. Before the amendment of 1885, the penalty of the bond was required to be \$20,000, to authorize it to be made up by the justification of two or more sureties. See *Matter of Thompson*, 6 Dem. 56; 19 St. Rep. 900; *Matter of Hart*, 2 Redf. 156.

⁸ *Trask v. Annett*, 1 Dem. 171. In

that case a testamentary trustee, having been required to give security by a bond in a penalty of \$95,000, with two sureties, one of whom justified in a sum greater than the penalty, while the other fell far short of the statutory standard, it was contended that the deficiency in the justification of one was supplied by the excess in that of the other. Held, that the bond was insufficient, and that the second surety should be replaced by one capable of justifying in \$95,000, or by two or more, each worth at least \$10,000, and capable together of justifying in \$95,000. In New York county a special

§ 458. **Bond by a surety company.**— It is now provided that the execution of any bond required by the Code to be given may be executed by any fidelity or surety company authorized by the laws of this State to transact business. Its execution of such bond is equivalent to the execution of the bond by two sureties, provided the same is approved by a judge of the court in which such bond is given; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law. Any such company may execute such bond as surety, by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution under the seal of said company shall be filed with each bond or undertaking.⁹

§ 459. **Bonus to sureties.**— It was held, before 1892, that a fee paid by a representative to a surety company as a consideration for becoming his surety, was not a necessary or reasonable expense, which would be allowed him on his accounting;¹⁰ but, now, he "may include, as part of his lawful expenses, such reasonable sum, not exceeding 1 per cent. per annum upon the amount of such bond paid his sureties thereon, as such court or judge allows."¹¹

§ 460. **Deposit of securities to reduce penalty of bond.**— In accordance with a practice which prevailed to some extent before the Code, of reducing the penalty of a bond by a deposit of securities, or the funds belonging to the estate, in a trust company, to the credit of the proceeding, to be withdrawn only upon the order of the court, the Code¹² now prescribes that where a bond, or new sureties to a bond, are "required by a surrogate from an executor, administrator, guardian, or other trustee, if the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be deposited with him, to be delivered to the county treasurer, or be deposited, subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same. After such a deposit has been

rule (No. 17, March, 1888) is adopted for the examination of sureties in an official bond coming within the cognizance of the surrogate.

⁹ Co. Civ. Proc., § 811, as amended 1886.

¹⁰ Jenkins v. Shaffer, 6 Dem. 59.

¹¹ Co. Civ. Proc., § 3320, as amended 1892. See Matter of Gill, 21 Misc. 281.

¹² Co. Civ. Proc., § 2595, as amended 1885. See Rule 15, N. Y. Surr. Ct.

made, the surrogate may fix the amount of the bond, with respect to the value of the remainder only of the estate or fund.

A security thus deposited shall not be withdrawn from the custody of the county treasurer or trust company, and no person, other than the county treasurer or the proper officer of the trust company, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate, entered in the appropriate book. Such an order can be made in favor of the trustee appointed, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund."

§ 461. Approval and filing of bond.— The bond is, in every case, subject to the approval of the surrogate, to be indicated by his indorsement thereupon, to that effect,¹³ and must be filed with the surrogate or the clerk of his court.¹⁴ Every bond filed in his office must be carefully preserved by him and delivered to his successor when his term expires.¹⁵

§ 462. Petition, by person interested, for new bond or new sureties.— Any person, interested in the estate or fund, may present to the Surrogate's Court a written petition, duly verified, setting forth that a surety in any bond, taken as prescribed in the eighteenth chapter of the Code, "is insufficient, or has removed, or is about to remove, from the State, or that the bond is inadequate in amount, and praying that the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties as the case requires; or, in default thereof, that he may be removed from his office, and that letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate that there is reason to believe that the allegations of the petition are true, he must cite the principal in the bond to show cause why the prayer of the petition should not be granted."¹⁶

¹³ Co. Civ. Proc., § 812.

¹⁵ Co. Civ. Proc., § 2500.

¹⁴ Co. Civ. Proc., § 816. But failure to file it is no defense to the sureties in an action thereon. (*Haywood v. Townsend*, 4 App. Div. 246; 38 N. Y. Supp. 517.)

¹⁶ Co. Civ. Proc., § 2597. Service of the citation out of the State, on a nonresident principal, is good. (*Stevens v. Stevens*, 3 Redf. 507.) A surety's dying is not removing from

The only persons who can apply are, either those interested in the estate or fund, under this section, or one or more of the sureties, under section 2600; the principal cannot apply for an order releasing one of the sureties.¹⁷

§ 463. **Order granting or denying application.**—Upon the return of such a citation, “the surrogate must hear the allegations and proofs of the parties; and if the objections, or any of them, are found to be valid, he must make an order, requiring the principal in the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such a reasonable time, not exceeding five days, as the surrogate fixes; and directing that, in default thereof, his letters be revoked.”¹⁸

“If a bond with new or additional sureties, or in a larger penalty, is approved and filed in the surrogate’s office, as required by such an order, the surrogate must make a decree dismissing the proceedings upon such terms, as to costs, as justice requires; otherwise, he must make a decree, removing the delinquent from office, and revoking the letters issued to him.”¹⁹

§ 464. **Petition by sureties to be released.**—Any or all of the sureties in any bond, taken as prescribed in the eighteenth chapter of the Code, “may present a petition to the Surrogate’s Court, praying to be released from responsibility, on account of any future breach of the condition of the bond; and that the principal in the bond be required to give new sureties and to render and settle his account, and that a citation issue to said principal to attend on such application. The surrogate must thereupon issue a citation accordingly.”²⁰

the State, within the meaning of this section. The statute makes no provision for the renewal of the bond on the death of a surety. (*Stevens v. Stevens*, 2 Dem. 469.)

¹⁷ *Matter of Haug*, N. Y. Law J., Feb. 26, 1892.

¹⁸ Co. Civ. Proc., § 2598.

¹⁹ Co. Civ. Proc., § 2599. A bond, reciting the former bond and executed by the single new surety, is in proper form. (*Matter of Patullo*, 1 Tuck. 140.)

²⁰ Co. Civ. Proc., § 2600, as amended 1901 (L. 1901, c. 524). As to applicability of this section to a bond given in 1878, see *Shook v. Goddard*, 2 Dem. 201. By L. 1881, c. 654, “the surety or sureties of any trustee, committee, or guardian appointed by, or account-

able to, the Supreme Court. * * * or to a County Court,” was authorized to apply to those courts, to be relieved, etc., and the course and method of the proceeding were prescribed. By L. 1892, c. 568, the substance of this statute was tacked on to Co. Civ. Proc., § 512, as an amendment thereof; but the remedy is given to “the surety or sureties, or the representatives of any surety or sureties upon the bond of any trustee, committee, guardian, assignee, receiver, or executor,” to petition “the court that appointed him, or that approved or accepted such bond,” etc. We do not think this section of the Code applies to the case of bonds taken and approved by a Surrogate’s Court; a special remedy for the relief of sureties on such bonds

It will be noted that this provision is only applicable to such bonds as are "prescribed" by the eighteenth chapter; consequently a surety in a bond not so prescribed — *e. g.*, a bond given by a life tenant to secure the preservation of the fund and its distribution among the remaindermen, required by the court under its incidental power to protect those ultimately entitled to the fund — cannot avail himself of this means to secure a release.²¹

The fact that the surety and his relatives are indebted to the estate, and that his object in making the application is to procure the administration to be transferred to a person who will refrain from enforcing payment of such debts by him and them, are not grounds for refusing the application.²² It is improper to combine a petition of a surety to be released, with a petition of the next of kin for a new bond or removal. The practice in the two cases is different.²³

§ 465. Releasing sureties on filing new bond.— Upon the return of such a citation, "if the principal in the bond does not file a new bond in the usual form, with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time not exceeding five days as the surrogate fixes. Should the principal file such new bond upon the return of such citation or within the time fixed by such order, the surrogate must thereupon make a decree, releasing the petitioner from liability upon the bond for any subsequent act or default of the principal, and requiring the principal to render and settle his account to and including the date of such decree and to file such account within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree, revoking the delinquent's letters."²⁴

being furnished by section 2600, above. Special provision is likewise made for the enforcement of their liability, no other than which can be pursued. Hence section 814 has no application to an executor's bond. (*Haight v. Brisbin*, 100 N. Y. 219.)

²¹ *Matter of Hein*, N. Y. Law J., May 27, 1892. *It seems*, that the remaindermen have the right to apply to a court of equity to compel the life tenant to give security for the safety of the proceeds of the sale of realty in the hands of such life tenant, and for its forthcoming at the proper time. (*Matter of Blauvelt*, 131 N. Y. 249; 43 St. Rep. 285.) Compare *Matter of Shipman*, 53 Hun. 511; *Matter of McDougall*, 141 N. Y. 21; 56 St.

Rep. 579. The right of a surety upon the bond of an administrator in proceedings to sell real estate for the payment of debts, was questioned in *Matter of McCormick*, 25 Misc. 136.

²² *Lewis v. Watson*, 3 Redf. 43. Nor can a guardian of an infant interested in the estate, object to the release of sureties on the administrator's bond, on the ground of an error overcharging him on the accounting, where he has received more than the amount of such overcharge in excess of what was due to his ward. (*Altman v. Wile*, 141 N. Y. 574; 60 St. Rep. 324.)

²³ *Biek v. Murphy*, 2 Dem. 251.

²⁴ Co. Civ. Proc., § 2601, as amended 1901 (L. 1901, c. 524).

§ 466. **Extent of liability on bond.**—"A person to whom letters are issued is liable for money or other personal property of the estate, which was in his hands, or under his control, when his letters were issued; in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him, in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the prior letters, and those upon the official bond given upon the subsequent letters, the latter are liable over the former."²⁵

The sureties remain liable until they can show payment by their principal to the parties legally entitled to receive the assets. Hence when the sole defense to an action upon an administrator's bond is a technical and constructive transfer of liability from himself, as such, to himself, as guardian, this must be clearly established, so as to leave no doubt of the liability of the sureties upon his bond as guardian.²⁶

²⁵ Co. Civ. Proc., § 2596. See *id.*, § 2593; *ante*, § 324. This is an adoption of the rule established by *Gottberger v. Taylor* (19 N. Y. 150), that the sureties of a special administrator were liable for money belonging to the estate, received by him before his appointment, and as the agent of a previous administrator to whom he succeeded. See also, *Williams v. Kiernan*, 25 Hun, 355; *Haines v. Meyer*, *id.* 414; *Trust & Deposit Co. v. Pratt*, *id.* 23; *Hood v. Hood*, 85 N. Y. 561, cases under the Revised Statutes. In *Scofield v. Churchill* (72 N. Y. 565), the bond was conditioned, among other things, that the executor should "obey all orders of the surrogate touching the administration of the estate committed to him." Held, that the sureties could not limit their liability to deficiencies or defalcations of the executors occurring after the giving of the bond. The surety, however, was held, where the condition of the bond was that the representative shall account for all moneys "that shall come into his hands." (*Thomson v. American Surety Co.*, 170 N. Y. 109.) Where the administrator personally owed his intestate, but was not able to pay, such debts

are not, as to his bondsmen, assets of the estate for which they would be liable, nor are such sureties bound by recitals in a decree, on such administrator's accounting, that he should have accounted for such debts and was able to pay them. (*Keegan v. Smith*, 33 Misc. 74; 67 N. Y. Supp. 281; *affd.*, 60 App. Div. 168.) Where the evidence did not show that interest had been received by a trustee, and the substituted trustee was authorized, by the order appointing him, to receive the principal only of the fund.—Held, that he could not recover interest from the surety on the trustee's bond from the date of the former trustee's appointment. (*People ex rel. Collins v. Donohue*, 70 Hun, 317; 24 N. Y. Supp. 437.)

²⁶ *Potter v. Ogden*, 136 N. Y. 384. Upon due proof being made that, upon the settlement of the accounts of defendant's principal, an amount of money remained in his hands which he had failed to pay over, the burden is upon the defendant to show that this has been paid over. The presumption is that it has not been paid, and, to escape liability, the presumption must be rebutted by proof that it has been. (*Dayton v. Johnson*, 69 N.

The sureties on the bond of co-principals will become liable for the joint acts of the principals, as well as for the individual defaults of each; the bond being considered as if each principal had executed a separate bond, with the same sureties.²⁷

§ 467. **Remedies available on the bond.**—Three successive sections of the Code (§§ 2607, 2608, 2609) provide for three classes of actions upon the official bonds of representatives, guardians, and testamentary trustees. The remedies given are distinct, and are governed, in some respects, by different rules. The *first* is an action provided for by section 2607, which may be maintained upon the bond, by and in the name of any person in whose favor the decree was made,²⁸ provided an execution issued upon a surrogate's decree has been returned, wholly or partly unsatisfied.

The *second* is an action provided for by section 2608, which may be maintained by the successor of an executor, administrator, or guardian, whose letters have been revoked; in which action "he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury sustained by the estate of the decedent or of the infant, as the case may be, by any act or omission of the principal."²⁹

It is not made a condition of such right of action that an execution, issued against the principal, on a surrogate's decree, should be first returned, wholly or in part unsatisfied.³⁰

The *third* remedy is an action under section 2609 "by any person aggrieved," where the principal's letters have been revoked, but *no successor* has been appointed. Such an action can only be maintained "upon obtaining an order from the surrogate granting him leave to do so." It is, likewise, not a condition of main-

Y. 419.) Compare *Matter of Noll*, 10 App. Div. 356; 41 N. Y. Supp. 765; *affd.*, 154 N. Y. 765.

²⁷ *Nanz v. Oakley*, 120 N. Y. 84; 30 St. Rep. 885. An administrator may, therefore, bring action against sureties on the joint bond of himself and a defaulting coadministrator, in his representative capacity. (*Sperb v. McCoun*, 110 N. Y. 605.)

²⁸ See *Prentiss v. Weatherly*, 68 Hun, 114; 22 N. Y. Supp. 680; *affd.*, 144 N. Y. 707. See *Allen v. Kelly*, 171 *id.* 1.

²⁹ *Flanagan v. Fidelity, etc., Co.*, 32 Misc. 424; *Dunne v. American Surety Co.*, 43 App. Div. 91; 59 N. Y. Supp. 429. "The money recovered in such

an action is regarded as part of the estate in the hands of the plaintiff, and must be distributed or otherwise disposed of accordingly; except that, a recovery for an act or omission respecting a right of action, or other property, appropriated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person, is for the benefit of the person or persons so entitled thereto." (*Co. Civ. Proc.*, § 2608.)

³⁰ *Co. Civ. Proc.*, § 2606; *Hood v. Hayward*, 124 N. Y. 1; 26 Abb. N. C. 271; *Van Zandt v. Grant*, 67 App. Div. 70; 73 N. Y. Supp. 600.

taining such an action, that an execution should have been issued on a surrogate's decree and been returned unsatisfied. As in the action by the successor of a removed representative or guardian, the plaintiff in this action "may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent, by any act or omission of the principal;" and the money recovered "must be paid by the sheriff or other officer who collects it, into the Surrogate's Court; and the surrogate must distribute it to the creditors or other persons entitled thereto."³¹

§ 468. Condition of surety's liability.— But whichever of these remedies is sought to be availed of, the rule is settled, with few exceptions, that the default of the principal must be established in a proper proceeding against him, in the Surrogate's Court, before the sureties on his bond can be prosecuted, and that, as the statutes have prescribed the steps necessary to be taken, the right of action against the sureties only arises upon compliance with those requirements. No action at law can be maintained on the bond, save in case of the principal's disobedience of some order of the surrogate; nor can the requirement of the statute be disregarded, even in an equitable action, where the statutory remedies can be pursued.³²

But the order disobeyed must have been one touching the administration of the estate, under which the principal was obligated to pay a certain sum of money or the like to a party. A mere order imposing a fine, as for a contempt, upon an administrator for not appearing when cited, in a proceeding to compel his accounting, is not such an order.³³

³¹ Co. Civ. Proc., § 2609. The proceedings for such a distribution are the same as prescribed for the distribution of the proceeds of a sale of real property of a decedent, for the payment of his debts or funeral expenses. (Ib.) This section has no application to an action brought by a guardian on the administrator's bond. (*Prentiss v. Weatherly*, 68 Hun. 114; *affd.*, 144 N. Y. 707.)

³² *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 id. 219; *Perkins v. Stimmel*, 114 id. 359. See *Stilwell v. Mills*, 19 Johns. 304; *People v. Barnes*, 12 Wend. 492; *Salisbury v. Van Hoesen*, 3 Hill, 77; *Peo-*

ple v. Corlies, 1 Sandf. 228; *Annett v. Kerr*, 28 How. Pr. 324. Compare *Scharmann v. Schoell*, 23 App. Div. 398; 48 N. Y. Supp. 306; also s. c., 38 App. Div. 528; 56 N. Y. Supp. 498; *Otto v. Van Riper*, 164 N. Y. 536 (where previous accounting was impossible); *Bischoff v. Engel*, 10 App. Div. 240; 41 N. Y. Supp. 815; *Yates v. Thomas*, 35 Misc. 552; 71 N. Y. Supp. 1113. The right of action does not accrue until failure to pay in the manner and at the time directed by the decree. (*Betts v. Avery*, 46 App. Div. 342; 61 N. Y. Supp. 525.)

³³ *Loop v. Northup*, 59 Hun. 75; 35 St. Rep. 522. So an executor's

It is, however, a general rule that all final decrees of a surrogate adjudging moneys of the estate in the hands of a representative or guardian, due and payable to parties entitled, run against him personally and *de bonis propriis*. All that is necessary in order to hold the sureties upon his bond, is that the proceedings show that the judgment was rendered for an official default.³⁴

It is only in regard to the third class of actions, above referred to, that the surrogate's leave is made a condition of the right to sue on the bond.³⁵ The provision of the former statute providing for an assignment of the bond by an order of the surrogate for the purpose of being prosecuted, is omitted from the present statute.³⁶

§ 469. Defenses of sureties.— The statute declares that an action against the sureties is not barred, suspended, or otherwise affected by the levy, upon the principal's property, of an execution, or by his imprisonment in contempt proceedings under a surrogate's decree rendered against him by reason of the default.³⁷

The ignorance of the sureties, when they executed the bond, of the real nature of the administration, is not available as a defense in an action upon the bond; nor is the fact that they were misled or deceived by those at whose request they executed it, as against one who was in no way connected with the deception; nor will an unauthorized insertion, in the recital of the bond, by the clerk, after its execution, of words descriptive of the office of the principal obligor, change the legal force and character of the bond, so as to relieve the obligors from liability under it, as originally executed.³⁸

sureties are not liable for his failure, through inability, to pay over the amount of his debt due to the testator, as so much money in his hands. (*Baucus v. Barr*, 45 Hun, 582.)

³⁴ *Power v. Speckman*, 126 N. Y. 354; 37 St. Rep. 474. Liability of sureties for costs in a decree (*Phillips v. Liebmann*, 10 App. Div. 128; 41 N. Y. Supp. 1020; *Matter of Gall*, 42 App. Div. 255; 59 N. Y. Supp. 254); for allowance to special guardian (*Beckett v. Place*, 12 Misc. 323; 33 N. Y. Supp. 634).

³⁵ *Seofield v. Adriance*, 1 Dem. 196; 3 Civ. Proc. Rep. 323; *Hood v. Hayward*, *supra*.

³⁶ For some cases under the former statute, see *Gerould v. Wilson*, 16 Hun, 530; *affd.*, 81 N. Y. 573; *Baggott v. Boulger*, 2 Duer, 160; *Cridler v. Curry*,

66 Barb. 336; *Thayer v. Clark*, 48 Barb. 243; *affd.*, 4 Abb. Ct. App. Dec. 391; *Field v. Van Cott*, 15 Abb. Pr. (N. S.) 349; *Matter of Van Eps*, 56 N. Y. 599; *People v. Struller*, 16 Hun, 234; *Bramley v. Forman*, 15 id. 144; *People v. Falconer*, 2 Sandf. 81; *People v. Downing*, 4 id. 189; *People v. Barnes*, 12 Wend. 492.

³⁷ Co. Civ. Proc., § 2555, last clause.

³⁸ *Casoni v. Jerome*, 58 N. Y. 315. In *Brewster v. Balch* (41 N. Y. Supr. 63), upon the appointment of C. as administratrix, and D. as administrator, of the estate of an intestate, they having executed a bond, with two sureties, conditioned that "the above bounden C. and D. shall faithfully execute the trust reposed in her, as administratrix and administrator of all and singular the goods," etc., of

In the absence of fraud or collusion between the plaintiff and the principal, the decree of the surrogate is conclusive in the action upon the sureties in the bond. By their contract they have made themselves privy to the proceedings against their principal, and when he is concluded, they, in the absence of fraud or collusion, are concluded also,³⁹ even though they may not have been made parties thereto.⁴⁰

The sureties are estopped even from denying the jurisdiction of the surrogate to render the decree, for the disobedience of which the action on the bond is brought.⁴¹

The appointment, letters, and oath of the principal may, of course, be proved by the record; but, irrespectively of this, they may be proved by a recital in the bond, of an intent to apply for letters, with evidence that the principal acted as if he had been appointed and had qualified.⁴²

If judgment is recovered in the action, upon payment of the judgment by one of the sureties, he becomes subrogated to the decree, and has the right to have the same assigned to himself, or to some other person designated by him; and, upon such assignment, may enforce the decree against the principal;⁴³ and may also compel a contribution by his co-surety.⁴⁴

the decedent, "and obey all orders of the surrogate, touching the administration of the estate committed to her," the sureties were held liable for a breach of the condition of the bond by D.

³⁹ Scofield v. Churchill, 72 N. Y. 565; Casoni v. Jerome, 58 id. 315, 322; Thayer v. Clark, 4 Abb. Ct. App. Dec. 391; Harrison v. Clark, 87 N. Y. 572; Bearns v. Gould, 8 Daly, 384; 77 N. Y. 455; Johnston v. Smith, 25 Hun, 171; Martin v. Hann, 32 App. Div. 602; 53 N. Y. Supp. 186; McMahon v. Smith, 24 App. Div. 25; 49 N. Y. Supp. 93; Eberle v. Schilling, 32 Misc. 195; affg. Same v. Bryant, 31 id. 814; Keegen v. Smith, 60 App. Div. 168; 70 N. Y. Supp. 260. See Douglass v. Howland, 24 Wend. 35; Jackson v. Griswold, 4 Hill, 522; Annett v. Terry, 35 N. Y. 256; Douglass v. Ferris, 138 id. 192. The decree on a judicial settlement of the account of a deceased administrator, in favor of the administrator *de bonis non*, should take cognizance of a note made in favor of the former, by the inter-

tate, and reserve recourse against the estate thereon, or allow the sureties on the administrator's bond to set it up against their liability. (Matter of Lawson, 42 App. Div. 377; 59 N. Y. Supp. 152.)

⁴⁰ McMahon v. Smith, 24 App. Div. 25; 49 N. Y. Supp. 93; Eberle v. Schilling, 32 Misc. 195; 65 N. Y. Supp. 728.

⁴¹ Field v. Van Cott, 15 Abb. Pr. (N. S.) 349. But compare Browning v. Vanderhoven, 4 Abb. N. C. 166; Mahoney v. Gunter, 10 Abb. Pr. 431; Behrle v. Sherman, 10 Bosw. 292; Brewster v. Balch, 41 N. Y. Supr. 63.

⁴² Dayton v. Johnson, 69 N. Y. 419. Compare People v. Hascall, 22 id. 188; Rowe v. Parsons, 6 Hun, 338; Gerould v. Wilson, 16 id. 530.

⁴³ Townsend v. Whitney, 75 N. Y. 425.

⁴⁴ And where the co-surety is deceased, his representatives may be compelled to contribute. See Cornes v. Wilkin, 14 Hun, 428; affd., 79 N. Y. 129; Boyle v. St. John, 28 Hun, 454.

TITLE SECOND.

PARTICULAR CLASSES OF BONDS.

§ 470. **Bond of administrator.**—A person appointed an administrator must, before letters are issued to him, “execute to the people of the State, and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty, fixed by the surrogate,⁴⁵ not less than twice the value of the personal property of which the decedent died possessed, and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law. The sum, to be fixed as the amount of the penalty, must be ascertained by the surrogate, by the examination, upon oath, of the applicant for the decree granting letters, or any other person, or otherwise, as the surrogate thinks proper.⁴⁶ The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such, and obey all lawful decrees and orders of the Surrogate’s Court, touching the administration of the estate committed to him.”⁴⁷

The provision prescribing the minimum penalty, twice the value of the decedent’s personal property, embraces property personally possessed, as well as choses in action, and all other property to the actual possession of which the decedent was entitled as the legal owner thereof; but cannot be intended to cover any property of which he, in his lifetime, had divested himself of the legal title, whether the transfer was procured by fraud or otherwise.⁴⁸

⁴⁵ In *Matter of Fattosini* (33 Misc. 18; 67 N. Y. Supp. 1119), the surrogate of Westchester county dispensed with a bond upon granting letters of administration to the consul-general, upon the property of an alien intestate; but the precedent was not followed in *Matter of Logiorato*, 34 Misc. 31 (N. Y. Surr.). In *Matter of Lobrasciano* (38 Misc. 415), the former surrogate adhered to his previous ruling, in a well-considered opinion.

⁴⁶ The amount of an administrator’s bond is to be fixed not with regard to the debts of the estate but the value of the personality. (*Matter of Govan*, 2 Misc. 291; 23 N. Y. Supp. 766.)

⁴⁷ Co. Civ. Proc., § 2664, as amended 1893, being former § 2667. The administrator’s bond being joint and several, an action thereon will lie against

two of four obligors therein. It is no longer necessary to bring the action against either one or all. (*Cridler v. Curry*, 66 Barb. 336.) The sureties upon an administrator’s bond only insure his faithful management of the personal effects of the intestate, and their liability cannot be extended to his acts in reference to a fund which in law is to be deemed real property. (*Matter of Woodworth*, 5 Dem. 156.) The penalty of the bond may be increased by the surrogate so as to include property not embraced in the inventory, but which is claimed to belong to the estate. (*Matter of Goundry*, 57 App. Div. 232; 68 N. Y. Supp. 155.) See also *Berkeley v. Kennedy*, 62 App. Div. 609; 70 N. Y. Supp. 762.

⁴⁸ *Peck v. Peck*, 3 Dem. 548.

§ 471. **Modified security on limited letters.**—"Where a right of action is granted to an executor or administrator by special provision of law,⁴⁹ if it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered, the surrogate may, in his discretion, accept modified security and issue letters limited to the prosecution of such action, but restraining the executor or administrator from a compromise of the action and the enforcement of any judgment recovered therein, until the further order of the surrogate on additional further satisfactory security."⁵⁰

§ 472. **Modified security on consent of next of kin.**—"In cases where all the next of kin to the intestate consent, the penalty of the bond need not exceed double the amount of the claims of creditors against the estate presented to the surrogate, pursuant to a notice to be published twice a week for four weeks in the official State paper, and in two newspapers published in the city of New York, and once a week for four weeks in two newspapers published in the county where the intestate usually resided, and in the county where he died, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for a less sum than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin."⁵¹

§ 473. **Bond of executor.**—Unlike an administrator, an executor is not, in general, required to give bonds, unless the will so directs,⁵²—the maxim being that whom the testator trusted the court may trust also. But there are certain exceptions to the rule. Thus, a person named as executor in a will can entitle himself to letters testamentary only by giving a bond where either

⁴⁹ See *Matter of Mallon*, 13 Civ. Proc. Rep. 205; *Kirwin v. Malone*, 45 App. Div. 93; 61 N. Y. Supp. 844.

⁵⁰ Co. Civ. Proc., § 2664, as amended 1893. See *Matter of Malloy*, 1 Dem. 421, and *ante*, § 360. The provision as to further satisfactory security is directory only. (*Murzynowski v. Del. L. & W. R.*, 39 St. Rep. 299.) An administratrix having power to "prosecute," but not "to collect or compro-

mise," cannot issue a valid execution, though her power be afterward extended. (*Lambert v. Metropolitan St. Ry. Co.*, 33 Misc. 579; 68 N. Y. Supp. 877.)

⁵¹ Co. Civ. Proc., § 2664, as amended 1893 (former § 2667). See *Curtis v. Williams*, 3 Dem. 63; § 332, note 35, *ante*.

⁵² See *Sullivan's Estate*, 1 Tuck. 94.

of the following objections have been established against him to the satisfaction of the surrogate: (1) That his circumstances are such that they do not afford adequate security to the creditors or persons interested in the estate, for the due administration of the estate; or (2) That he is not a resident of the State, although he is a citizen of the United States.⁵³ "But a person against whom there is no objection, except that of nonresidence, is entitled to letters testamentary without giving a bond, if he has an office within the State, for the regular transaction of business in person; and the will contains an express provision to the effect that he may act without giving security."⁵⁴ And where, after letters testamentary have issued, it appears, upon the application for revocation of the letters, made by a creditor or person interested, that the circumstances of an executor, who has not given a bond, are such as not to afford adequate security for the due administration of the estate, he can prevent a revocation only by giving a bond.⁵⁵ Where a bond is required from an executor, pursuant to the statute, he must, before letters are issued to him, qualify as prescribed by law, with respect to an administrator upon the estate of an intestate; except that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property or of the proceeds thereof, which may come to his hands by virtue of any provision contained in the will.⁵⁶ The surrogate has no authority to exact from an executor a bond or impose on him any condition, neither directed by law nor by the will. Thus, where the Surrogate's Court directed an executor to pay to himself, as life tenant, the residuary estate, on his giving security to protect the interests of the remaindermen, and, also, that in case of his refusal to do so, he should give a bond as executor for retaining it, or in default thereof, he should deposit the whole fund with the city chamberlain, it was held error, as the court had no right to impose any such condition.⁵⁷

§ 474. Bond of administrator with will annexed.— An administrator with the will annexed, inasmuch as no confidence has been reposed in him by the testator, stands, as regards security, in the position of an administrator in intestacy; and, accordingly, it is required that he should, in all cases, before letters are issued to

⁵³ Co. Civ. Proc., § 2638. See § 302. *ante*.

⁵⁴ Co. Civ. Proc., § 2638, last clause.

⁵⁵ See Co. Civ. Proc., § 2685, subd. 5; *id.*, § 2687, subd. 3.

⁵⁶ Co. Civ. Proc., § 2645.

⁵⁷ *Matter of Shipman*, 53 Hun, 511. See § 464, note 21, *ante*. As to how far the bond of a nonresident executor is affected by a subsequent statute extending surrogate's powers, see *Hood v. Hayward*, 48 Hun, 330; 124 N. Y. 1.

him, give a bond such as is required from an executor who is compelled to give security pursuant to the statute.⁵⁸

§ 475. **Bond of temporary administrator.**—A temporary administrator, appointed upon the estate either of a decedent or of an absentee, is required, before letters are issued to him, to qualify in the same manner as an administrator in chief in a case of intestacy.⁵⁹

§ 476. **Bond of administrator de bonis non.**—An administrator *de bonis non*.—*i. e.*, a person appointed to complete the administration of the estate of an intestate, where all the administrators, to whom letters have been issued, die or become incapable, or the letters are revoked as to all of them,—is required to qualify in the same manner as if he were an original administrator in chief, and give the same security, except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former administrator, fix as the penalty of the bond a sum not less than twice the value of the assets remaining unadministered.⁶⁰

§ 477. **Bond of ancillary executor or administrator.**—A person to whom ancillary letters testamentary, or of administration, are issued from a Surrogate's Court of this State, is required, before the letters are issued, to qualify in the same manner as a domestic administrator upon the estate of an intestate; "except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the State, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the State, or within the jurisdiction where the principal letters were issued."⁶¹ Where an ancillary administrator has qualified by giving a bond in an amount exceeding the assets here, he will not be required to give additional security, in a penalty of double the amount of the debts due resident creditors.⁶²

⁵⁸ Co. Civ. Proc., § 2645. See § 332, *ante*.

⁵⁹ Co. Civ. Proc., § 2670, superseding § 2671.

⁶⁰ Co. Civ. Proc., § 2693, as amended 1889.

⁶¹ Co. Civ. Proc., § 2699. See § 316, *ante*.

⁶² Matter of Govan, 2 Misc. 291; 23 N. Y. Supp. 766.

§ 478. **Bond of general guardian of infant's property.**— Before letters of guardianship of an infant's property are issued, the person appointed must "execute to the infant, and file with the surrogate, his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust; and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so to do by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property and of the rents and profits of the real property for the term of three years." ⁶³

§ 479. **Amount of security on limited letters.**— In a case where it appears "to be impracticable to give a bond to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, to be approved by him, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive." In that case, the surrogate may issue letters thereon, *but "limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate, on additional further satisfactory security."* ⁶⁴

§ 480. **Continuation of sureties' liability.**— Where the general guardian of an infant is discharged upon his own resignation, the sureties in his official bond continue to be liable, with respect to all matters connected with his trust, until his account is judicially settled at the instance of his successor or of the ward. ⁶⁵

§ 481. **Bond of guardian of infant's person.**— Before letters of guardianship of an infant's person are issued, "the surrogate may

⁶³ Co. Civ. Proc., § 2830, first clause. See *Rieck v. Fish*, 1 Dem. 75. A general guardian who has given the bond required by Co. Civ. Proc., § 2830, must, before receiving a legacy or distributive share of the estate coming to the minor, also execute a bond under section 2746. (*Matter of Milier*, 29 Misc. 272.) As to liability of the

sureties on a guardian's bond, for the proceeds of realty sold in proceedings brought for that purpose, and paid to the guardian, see *Allen v. Kelly*, 171 N. Y. 1; 63 N. E. 528.

⁶⁴ Co. Civ. Proc., § 2830, as amended 1892.

⁶⁵ Co. Civ. Proc., § 2837. See § 466, *ante*.

require the person appointed to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come into his hands, as directed by the Surrogate's Court."⁶⁶

§ 482. **Bond of guardian by will or deed.**— Where a guardian of an infant's person or property has been duly appointed by the will or deed of the father or mother of the infant, the Surrogate's Court in which the will was admitted to probate, or of the county in which the deed was recorded, is authorized, upon the petition of the infant or any relative or other person in his behalf, to make a decree requiring the guardian to give security for the performance of his trust, in any case where a person named as executor in a will can entitle himself to letters testamentary only by giving a bond.⁶⁷ The security to be given by such a guardian, when required, must be a bond to the same effect and in the same form as the bond of a general guardian appointed by the Surrogate's Court. Each provision of the eighteenth chapter of the Code, applicable to the bond of a general guardian so appointed, and to the rights, duties, and liabilities of the parties thereto, or any of them, including the release of the sureties and the giving of a new bond, applies to the bond given by a guardian appointed by will or deed, and the parties thereto.⁶⁸ If the guardian fails to give a bond as required by the decree of the surrogate, it is a ground for his removal.⁶⁹

§ 483. **Special guardians, or guardians ad litem.**— The Code contains a provision in respect to the guardian *ad litem* appointed for an infant party to *an action*, to the effect that such a guardian shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security approved by a judge of the court or a county judge; and prescribing the form of the security, to wit, a bond, with at least two sureties; and permitting proceedings to be taken for a renewal of the bond.⁷⁰ But there appear to be no corresponding provisions relating to special guardians of infants, appointed by a surrogate in proceedings in his court, although he has authority to appoint such officers.⁷¹

⁶⁶ Co. Civ. Proc., § 2831.

⁶⁷ Co. Civ. Proc., § 2853.

⁶⁸ Co. Civ. Proc., § 2854.

⁶⁹ Co. Civ. Proc., § 2858.

⁷⁰ Co. Civ. Proc., §§ 474, 475.

⁷¹ See Co. Civ. Proc., §§ 2527, 2530.

§ 484. **Bond of testamentary trustee.**—Upon the petition of any person beneficially interested in the execution of a trust created by will, the surrogate is authorized to make a decree requiring a testamentary trustee to give security for the performance of his trust, in any case where a person named as executor in a will can entitle himself to letters testamentary only by giving a bond.⁷² The security to be given by a testamentary trustee, when required, must be a bond to the same effect and in the same form as an executor's bond. Each provision of the eighteenth chapter of the Code, applicable to the bond of an executor, or to the rights, duties, and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, applies to the bond so given and to the parties thereto.⁷³ If the testamentary trustee fails to give a bond as required by the decree of the surrogate, it is ground for his removal.⁷⁴ Notwithstanding that by the Code (§ 2514) "testamentary trustee" is declared to include a person designated by a will, *or by any competent authority*, to execute a trust created by will, the provision of section 2815, allowing a surrogate to require security from a testamentary trustee, in the cases therein specified, applies only to one named in a will.⁷⁵ The surrogate can compel a testamentary trustee to give a bond only in a case where an executor may be required to give security; a breach of the trustee's trust is not sufficient ground.⁷⁶

§ 485. **Bond on selling real property to pay debts.**—The statutory provisions in regard to the giving of a bond by the person, whether executor, administrator, or other person, who is directed by the surrogate's decree to sell, mortgage, or lease a decedent's real estate, will be found in the chapter which treats of the special proceeding in which such a decree is obtained.⁷⁷

⁷² Co. Civ. Proc., § 2815.

⁷³ Co. Civ. Proc., § 2816.

⁷⁴ Co. Civ. Proc., § 2817.

⁷⁵ Matter of Whitehead, 3 Dem. 227.

⁷⁶ Matter of Lawrence, 6 Dem. 342.

⁷⁷ See c. XVIII, *post*.

CHAPTER XVI.

INVENTORY AND APPRAISAL OF ASSETS.

TITLE FIRST.

DUTY TO MAKE AND FILE INVENTORY.

§ 486. "Property" and "assets" defined.—Strictly speaking, the word "assets," which is commonly used in connection with the duty of a representative to make and file an inventory of his decedent's estate, has a more restricted meaning than "personal property," the former signifying personal property applicable to the payment of the debts of the decedent,¹ and thus not including the property which is exempt from seizure by creditors, and which is to be set apart for the use of the widow and minor children. But, as we shall have occasion to point out hereafter, *all* the personal property of the decedent, whether exempt from seizure or otherwise, passes to the executor or administrator, who is entitled to its possession and custody, in order to inventory the articles and set aside those which are exempt. It is said to be *the duty* of such a representative to make an inventory of the personal estate, because, first, it is his interest that he should know, at the outset of his administration, with what property (and so far as possible its value) he is likely to be charged on the debtor side, when he is called upon to make up his account. If he sees fit to postpone the ascertaining of the sum for which he is chargeable, as the value of the personal property coming into his hands, until he is called upon to account, he is at liberty to do so, unless (and this is the second ground of duty), he is called upon by the court, at the instance of some party interested, to make and file an inventory; in other words, the making and filing of an inventory is either voluntary or compulsory. It is said, however, to be a strong circumstance to show improper conduct, that the representative failed voluntarily to make and return an inventory.²

¹ See Co. Civ. Proc., § 2514, subd. 2. 62; revd. on another point, 1 Cow.

² Hart v. Ten Eyck, 2 Johns. Ch. 743.

§ 487. Penalty for not joining in inventory.—The statute expressly provides, however, that where there are several representatives (any one or more of whom, on the neglect of the others, may return an inventory) those of them who so neglect, cannot thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator so returning an inventory has the whole administration, until the delinquent return and verify an inventory as provided by the statute.³

§ 488. Statutory enumeration of assets.—Whether the inventory is made voluntarily or on compulsion, the statute declares that certain property, enumerated in nine distinct classes, shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate, and shall be included in the inventory.⁴ It does not follow, however, that no other kinds of property than those thus enumerated are to be inventoried and accounted for by the executor or administrator. The revisers of the original statutes reported to the Legislature that the object of the enumeration was to apprise executors, etc., of the description of property which was committed to their charge, and to settle the law upon some disputed points, and that all those articles which were likely to occasion doubt were, therefore, enumerated. The present design is to consider assets only with reference to the duty of the representative, at the outset of his administration, to make an inventory of them, and to cause an appraisal of their value. Questions as to the nature and quantity of the representative's estate, what property is distributable by him and what not,—the conversion, in equity, of real property into money, and of money into real property, which frequently arise during the course of the administration, or on the judicial settlement of the representative's accounts, are more pertinent to subjects treated on subsequent pages.

§ 489. Interests in land.—The first three classes, which require no particular comment, embrace certain interests in the lands which do not amount to a freehold, and which are designated in the statute to be: “(1) Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person. (2) The interest remaining in the deceased, at the time of

³ Co. Civ. Proc., § 2715, as amended 1893; adopting 2 R. S. 86, § 23. See *Jeroms v. Jeroms*, 18 Barb. 24.

⁴ Co. Civ. Proc., § 2712, as amended 1893; adopting 2 R. S. 82, §§ 6, 7, 8.

his death, in a term of years, after the expiration of any estate for years therein, granted by him or any other person. (3) The interest in lands devised to an executor for a term of years, for the payment of debts.”⁵ The interest of a decedent in a church-pew, being limited and usufructuary merely,⁶ is not within the statute, but is real estate which the heir or devisee takes.⁷ The proceeds of property in which the decedent had a base or determinable fee is likewise real estate.⁸ But where the decedent, shortly before his death, rented premises for three years, by parol, a lease being drawn but not signed, and he entered and made improvements, the whole term is an asset.⁹ And where premises are leased for the term of one year and an indefinite period thereafter, at an annual rent which the lessee agrees to pay, and he enters and occupies for several years, he is the owner of an estate as tenant from year to year, which, on his death, passes to his personal representatives, who hold it by virtue of the demise to him.¹⁰ The law treats as personal property, and, therefore, within the power of the representative, any interest in the proceeds of real property, which was sold by authority of law before the decedent’s death, and after he had become of full age.¹¹

§ 490. **Fixtures.**—Fixtures constitute the fourth class of assets specified in the statute; that is, “things annexed to the freehold or to any building, for the purposes of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.” Except fixtures falling within this description, things annexed to the freehold or to any building, do not go to the executor, but pass with the freehold to the heirs or devisees.¹² Notwithstanding the apparent intention of the Legislature to abolish, by this section, the well-established distinction between the rights of a tenant to remove certain kinds of fixtures which he had himself annexed to the freehold, and those of the heirs or devisees, the courts have found it necessary to resort to the principles of the

⁵ Co. Civ. Proc., § 2712, as amended 1893.

⁶ *Freligh v. Platt*, 5 Cow. 494. See *Heeney v. St. Peter’s Church*, 2 Edw. 608; *Vielie v. Osgood*, 8 Barb. 130; *Wheaton v. Gates*, 18 N. Y. 395.

⁷ *McNabb v. Pond*, 4 Bradf. 7.

⁸ *Stillwell v. Melrose*, 15 Hun. 378.

⁹ *Green v. Green*, 2 Redf. 408.

¹⁰ *Pugsley v. Aikin*, 11 N. Y. 494.

¹¹ See *Bogert v. Furman*, 10 Paige, 496; *Swezey v. Willis*, 1 Bradf. 495; *Cox v. McBurney*, 2 Sandf. 561; *Hor-*

ton v. McCoy, 47 N. Y. 21; *Swezey v. Thayer*, 1 Duer. 286; *Foreman v. Foreman*, 7 Barb. 215; *Davidson v. De Freest*, 3 Sandf. Ch. 456; *Hoey v. Kinney*, 10 Abb. Pr. 400. As to the proceeds of a partition sale, see *Robinson v. McGregor*, 16 Barb. 531; *Shumway v. Cooper*, id. 556; *Matter of Gedney*, 33 Misc. 160; 68 N. Y. Supp. 627.

¹² Co. Civ. Proc., § 2712, as amended 1893, subds. 4 and 9.

common law, to ascertain what is a substantial part of the freehold and what is a thing annexed thereto for the purpose of trade and manufacture;¹³ the result of the decision being, that as between the heir and the personal representative of the decedent, the rule still is, that whatever is annexed or affixed to the freehold by being let into the soil or annexed to it, or to some erection upon it, to be habitually used there — particularly if for the purpose of enjoying the realty, or some profit therefrom — is a part of the freehold, and goes to the heir or devisee.¹⁴ As to such fixtures, the rule obtains in New York, as elsewhere, which treats as identical the rights of heirs and personal representatives, grantor and grantee, and mortgagor and mortgagee; while, in regard to certain annexations for purposes of trade and manufacture, and growing crops, the rule is the same in the case of the heir and personal representative as in that of landlord and tenant.¹⁵ In applying this distinction, however, it is to be observed that the contract under which the article may have been affixed to the freehold, or the will from which the executor derives his authority, may modify the rights of the parties interested in the estate.¹⁶

§ 491. **Crops and produce.**—The statute also declares that “the crops growing on the land of the deceased at the time of his death,” and “every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered,” shall be regarded

¹³ House v. House, 10 Paige, 158; Ford v. Cobb, 20 N. Y. 344; Voorhees v. McGinnis, 48 id. 278; McRea v. Central Nat. Bank of Troy, 66 id. 489; Coey's Estate, 1 Tuck. 125; Livingston v. Sulzer, 19 Hun, 375; McKeage v. Hanover Fire Ins. Co., 16 id. 239; Wells v. Maples, 15 id. 90.

¹⁴ In Buckley v. Buckley (11 Barb. 43), it was accordingly held, that all erections connected with a cotton factory and other mills propelled by water power, including the dams, water wheels and gearing, and machinery fastened to the ground or buildings, are *prima facie* a part of the realty, and descend to the heir, and do not pass to the executor or administrator. And see Lockwood v. Lockwood, 3 Redf. 330, 336. In Hovey v. Smith (1 Barb. 372), the court held, that whether a pump and pipe, balance and scales, and a beer pump were annexed to the freehold, was a matter of fact which belonged to the surrogate to decide.

¹⁵ For illustrations of the text, see the cases *supra*, and also Murdock v. Gifford, 18 N. Y. 28, 33; Potter v. Cromwell, 40 id. 287; Miller v. Plumb, 6 Cow. 665; Walker v. Sherman, 20 Wend. 636; Farrar v. Chauffetête, 5 Den. 527; Vanderpoel v. Van Allen, 10 Barb. 157; Laflin v. Griffiths, 35 id. 58; Tabor v. Robinson, 36 id. 483; Freeland v. Southworth, 24 Wend. 191.

¹⁶ In Downing v. Marshall (1 Abb. Ct. App. Dec. 525), the court observed, that, although it might be true that a testator could not by his will withdraw fixtures from the effect of the statute, where such property was necessary to pay debts, yet it seems the statute did not interfere with the right of the testator to relieve such property from the payment of debts or distribution, in case there remained other property sufficient to pay the debts, though it might be disposed of in specific legacies.

as assets,¹⁷ which is simply declaratory of the common law. A distinction has always been taken between growing crops of grain and vegetables, such as wheat, corn, and potatoes, the annual produce of labor in the cultivation of the earth, and growing trees, fruit, and grass, the natural produce of the earth, which grow spontaneously and without cultivation. The former have always been considered to be chattels, which the executor is entitled to take; while the latter are, until severed, parcel of the land, and descend to the heir.¹⁸ If severed, they become chattels, though, to have that effect, the severance need not be an actual physical severance. Thus, a valid sale of growing trees, etc., to one having no interest in the land, has, in law, the effect to sever them from the land; and, in that case, it seems, they go to the executors of the purchaser, as personal property.¹⁹ But where land, upon which a crop of wheat is growing, is devised in such form as to convey it to the devisee, the crop is put upon the footing of a chattel specifically bequeathed, and the executor, though he may take the crop primarily as trustee for creditors, cannot sell it to pay general legacies; and where it appears that there are no creditors, there being no longer any trust purpose to serve, the whole title, legal and equitable, vests in the devisee, who can compel a delivery, or in case it has been converted by the executor or any other person, may maintain an action to recover its value.²⁰

§ 492. **Rents.**—"Rents reserved to the deceased, which had accrued at the time of his death," go to the representative as assets, and not to the heir.²¹ This means rents which had become due to the deceased, and were *payable* upon or before his death.²² If the rent was not only accruing, but was due, before the decedent's death, the fact that, by the terms of the contract, the time of payment was postponed until a day before which he died, does not

¹⁷ Co. Civ. Proc., § 2712, as amended 1893, subds. 5, 6. Growing grass belongs to the heir or devisee. (Matter of Chamberlain, 140 N. Y. 390; 55 St. Rep. 665.)

¹⁸ Bank of Lansingburgh v. Crary, 1 Barb. 544; Kain v. Fisher, 6 N. Y. 597.

¹⁹ Warren v. Leland, 2 Barb. 613. And see McIntyre v. Barnard, 1 Sandf. Ch. 52.

²⁰ Stall v. Wilbur, 77 N. Y. 158; Bradner v. Faulkner, 34 id. 347; Matter of Kick, 11 St. Rep. 688; Matter

of Clemans, 29 id. 813; 9 N. Y. Supp. 474.

²¹ Co. Civ. Proc., § 2712, as amended 1893, subd. 7. Sums due a lessee for the storage of goods, on the premises leased, are distributable assets. (Harris v. Meyer, 3 Redf. 450.) As to rents from lands held under lease from the Indians, see Matter of McKay, 33 Misc. 520; 68 N. Y. Supp. 925.

²² Marshall v. Moseley, 21 N. Y. 280; Matter of Foulds, 35 Misc. 171; 71 N. Y. Supp. 473. Compare 1 R. S. 747, § 21; Kohler v. Knapp, 1 Bradf. 241. See § 532, *post*.

affect the executor's right to take the rent.²³ As rents of land, due and payable *after decedent's death*, go, according to the common law, to the heir or devisee, they are not assets to be inventoried by the representative. This rule has not been affected by the statute²⁴ which provides for the apportionment of rents upon the determination of an estate in lands; the object of that statute being not to apportion rents between those entitled to take the real and those entitled to take the personal estate, but to apportion them between successive takers of the realty.²⁵ Consequently an executor cannot maintain an action against a lessee for a portion of rent reserved to his testator which had not accrued, *i. e.*, had not become due, at the time of the latter's death.²⁶

§ 493. Things in action and other property.—"Debts secured by mortgage, bonds, notes, or bills; accounts, money,²⁷ and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association,"²⁸ and "goods, wares, merchandise, utensils, furniture, cattle, provisions, moneys unpaid on contracts for the sale of lands,²⁹ and every other species of per-

²³ Wadsworth v. Allecott, 6 N. Y. 64.

²⁴ L. 1875, c. 542; now (1893) made Co. Civ. Proc., § 2720. As carried into the Code, the original statute was amended, by adding, that "this section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description." See L. 1896, c. 547, § 192. Under the English statute, from which our own is copied, the words "expressly stipulated," as applied in a will, have been held to require either an express direction that there shall be no apportionment, or language so express in the terms of the gift that apportionment is clearly impossible, consistently with it. Inference from the whole tenor and context of the will is not sufficient. (Tyrell v. Clark, 2 Drew. 86.)

²⁵ Matter of Weeks, 5 Dem. 194; disapproving Matter of Eddy, 10 Abb. N. C. 396. But compare, to the contrary, Miller v. Crawford, 26 id. 376; 16 N. Y. Supp. 358.

²⁶ Niles v. Chace, 29 Hun, 200. In that case, the tenant was the devisee of the premises. The court adds: "Very possibly, in such a case, upon a complaint properly framed, an action might be maintained by the exec-

utor against the heir or devisee who had been tenant of the deceased."

²⁷ As to moneys deposited by decedent in trust. (Matter of Snyder, 37 Misc. 59; 74 N. Y. Supp. 832.) Joint deposits in name of decedent and another. (Matter of Lent, 1 Misc. 264; 22 N. Y. Supp. 917.) Moneys given to the wife at the time of her husband's death must be treated as part of his estate, in the absence of proof as to the reason for such payment or the purpose for which they were received and used. (Matter of James, 78 Hun, 121; 28 N. Y. Supp. 992; *affd.*, 146 N. Y. 78.) As to moneys deposited by executor in testator's bank account and subsequently withdrawn in his representative capacity, see Matter of Shipman, 82 Hun, 108; 31 N. Y. Supp. 571.

²⁸ As to apportionment of dividends, see Co. Civ. Proc., § 2620; Matter of Kane, 64 App. Div. 566; 72 N. Y. Supp. 333.

²⁹ The price of land contracted to be sold by a decedent, but not received by him before his death, goes to the representative, and not to the heir or devisee. On the other hand, a vendee's interest in an executory contract for the purchase of lands is real estate, and at his death passes to his heirs. (Palmer v. Morrison, 104 N. Y. 132.)

sonal property and effects, not hereinafter excepted," are also declared by the statute to be personal assets.³⁰

§ 494. **The appraisal.**— For the purpose of completing the inventory, the surrogate must, upon application of the executor or administrator, as often as occasion requires, appoint two disinterested appraisers to estimate and appraise the personal property.³¹ Each appraiser is entitled, in addition to his actual expenses, to a sum, to be fixed by the surrogate, not exceeding five dollars for each day actually and necessarily occupied by him in making the appraisal.³² The number of days' services, and the expenses, if any, must be proved by the affidavit of the appraiser; and the sums payable therefor taxed by the surrogate, and paid by the executor or administrator.³³ The appraisement cannot be made until after five days' notice of the time and place of making it shall have been served on the legatees and next of kin residing in the county where the property to be appraised is situated, and the notice must also be posted in three of the most public places in the town.³⁴ Service of the notice may be either personal or by mail, but in the latter event, ten days' notice of the appraisal must be given.³⁵ An appraisement made without the previous posting of notice thereof, is invalid, vitiates the inventory, and entitles the appraiser to no fees.³⁶ If the assets are in several different and distant places within the State, several inventories may be made. Before acting, the appraisers must take and subscribe, before any officer authorized to administer oaths, an oath, inserted in the inventory, that they will truly, honestly, and impartially appraise the personal property, which shall be exhibited to them, according to the best of their knowledge and ability. The appraisal of the property in the inventory must be made in presence of such of the next of kin, legatees, or creditors as may attend.³⁷

§ 495. **Contents of inventory.**— A convenient method of enumeration is to designate the articles in successive classes: first, those, if

³⁰ Co. Civ. Proc., § 2712, as amended 1893, subds. 8 and 9. The exceptions referred to are "things annexed to the freehold," etc.

³¹ Co. Civ. Proc., § 2711, as amended 1893, adopting 2 R. S. 82, §§ 1-5, as amended by L. 1873, c. 225, § 1. The clause in the latter act that no clerk or other person employed in the surrogate's office was eligible, is dropped out of the statute as transferred to the Code, and the statute is repealed.

³² Appraisers have no right, no mat-

ter how large the estate, to demand or receive more than the statute allows, unless the parties interested consent. (Matter of Harriot, 145 N. Y. 540; 65 St. Rep. 528.)

³³ Co. Civ. Proc., § 2565.

³⁴ Co. Civ. Proc., § 2711, as amended 1893.

³⁵ Co. Civ. Proc., § 2711, as amended 1901; id., §§ 797, subd. 1, 798.

³⁶ Salomon v. Heichel, 4 Dem. 176.

³⁷ Co. Civ. Proc., § 2711, as amended 1893.

any, which, by the statute, are absolutely exempt; then, in a second class, the articles which it is proposed the appraisers shall set apart as allowable, in their discretion, upon their valuation; then, thirdly, assets consisting of things in possession having an ascertainable money value. After these, things in action which are supposed to be good and collectible; and, lastly, bad debts and other things in action or in possession, which have no ascertainable value. Each article must be set down separately, with its money value, distinctly in figures, opposite.³⁸ If the value is unknown or doubtful, it should be so stated. The surrogate has no authority, under the statute, to direct the appraisers as to the manner in which they shall estimate the value of the property; and there is no requirement that the representative shall make any estimate of the value of the property inventoried.³⁹ The representative must act upon his own responsibility in this regard; the statute does not contemplate any interference by legatees or next of kin with this action which, aided by appraisers, he is required to take. Consequently, an application by interested parties for an order directing the representative to produce certain papers for the information of the appraisers, will not be granted. The proper practice in preparing an inventory is to postpone, until an accounting, all disputed questions respecting the existence or valuation of a decedent's assets.⁴⁰

In respect to things in action, the statute requires a particular statement of all bonds, mortgages, notes, and other securities for the payment of money, belonging to the deceased, which are known to the executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collectible on each. All moneys in whatever form, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which have come to the hands of the representative, must be included; and if none shall have come to his hands, the fact must be so stated.⁴¹

§ 496. Representative's debt to decedent.—The statute expressly directs that any claim which the deceased had against the executor or administrator himself (unless, of course, it be one which abated by death), must be included in the inventory. A testator does not,

³⁸ Co. Civ. Proc., § 2711, as amended 1893; 2 R. S. 83, § 5. Proc. Rep. 231; Matter of Goundry, 57 App. Div. 232; 68 N. Y. Supp. 155.

³⁹ Matter of McCaffrey, 50 Hun, 371.

⁴⁰ Vogel v. Arbogast, 4 Dem. 399; 1893; adopting 2 R. S. 84, §§ 11, 12. s. c. as Estate of Arbogast, 9 Civ.

by naming his debtor as executor, discharge any just claim he had, but the executor is liable for it, as so much money in his hands, at the time the demand becomes due; and must apply the amount as assets.⁴² And if the testator has by his will given a discharge of a debt due him, or bequeathed it to the debtor, this can take effect only as a specific bequest; and cannot avail as against creditors. The demand must be included in the inventory, and, if necessary for the payment of debts, will be collected and applied; if not necessary for that purpose, the provision of the will will have effect as a specific legacy, in the same manner and proportion as other specific legacies.⁴³ Where an intent is manifested, on the face of the will, that a claim against an executor is to be enforced only by a deduction from a bequest to his wife, he is not chargeable with it as assets.⁴⁴

§ 497. **Foreign assets.**— These may be included, and the executor may be compelled to include them in his inventory, although they are subject to administration in the foreign jurisdiction.⁴⁵ But an executor appointed exclusively to administer property in this State is only bound to account for such property as is situated here, and is not chargeable with, or liable to account for, the property of the testator situated without this State, and which never came into his actual possession, nor is he bound to enter such property upon the inventory filed by him here.⁴⁶

§ 498. **Return of inventory.**— Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other returned to the surrogate within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money, bank bills, and other circulating medium belonging to the deceased, and of all just claims of the deceased against him,

⁴² Co. Civ. Proc., § 2714, as amended 1893; adopting 2 R. S. 84, § 13; *Decker v. Miller*, 2 Paige, 149. Before the statute, the appointment of a person as executor discharged a debt due from him to the testator.

⁴³ Co. Civ. Proc., § 2714, as amended 1893; adopting 2 R. S. 84, § 14. See *Adair v. Brimmer*, 74 N. Y. 540; *Free-*

man v. Freeman, 4 Redf. 211; *Decker v. Miller*, 2 Paige, 149; *Baucus v. Stover*, 89 N. Y. 1.

⁴⁴ *Stevens v. Stevens*, 2 Redf. 265.

⁴⁵ *Matter of Butler*, 38 N. Y. 397; 1 Tuck. 87.

⁴⁶ *Sherman v. Page*, 21 Hun, 59; *affd.*, 85 N. Y. 123.

according to the best of his knowledge.⁴⁷ The inventory may be corrected at any time before it is filed by inserting or striking out an item which may have been omitted or included by mistake.⁴⁸

§ 499. Supplemental inventory.—Whenever personal property or assets of any kind, not mentioned in an inventory already made, come to the possession or knowledge of an executor or administrator, he must cause such property to be appraised in the manner before described, and an inventory returned within two months after the discovery, and the making of the inventory and return may be enforced in the same manner as in the case of the first inventory.⁴⁹

TITLE SECOND.

COMPELLING RETURN OF INVENTORY.

§ 500. Application and order to show cause.—A creditor, or person interested in the estate, may present to the Surrogate's Court, proof by affidavit, that an executor or administrator (including a temporary administrator)⁵⁰ has failed to return an inventory, or a sufficient inventory, within three months from the date of his letters. Thereupon, if the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory; or, in default thereof, to show cause, at a time and place therein specified, why he should not be attached.⁵¹ The petitioner, if a creditor, must either distinctly declare himself to be such a creditor, or set forth facts showing that he is entitled in that character.⁵² It seems to be clear that where no person interested

⁴⁷ Co. Civ. Proc., § 2715, as amended 1893; adopting 2 R. S. 84, §§ 15, 16. An unverified list of assets cannot be treated as an inventory (*Loesche v. Griffin*, 3 Dem. 358); although a verified statement, if accompanied by an appraisal, may be deemed sufficient; and such an appraisal may be had even without actual inspection of assets. (*Silverbrandt v. Widmayer*, 2 Dem. 263.)

⁴⁸ *Matter of Payne*, 78 Hun. 292; 28 N. Y. Supp. 911; *affd.*, 151 N. Y. 654.

⁴⁹ Co. Civ. Proc., § 2714, as amended 1893; adopting 2 R. S. 86, § 24.

⁵⁰ Co. Civ. Proc., § 2672, third sentence; *Matter of Gartner*, 2 Law Bul. 76.

⁵¹ Co. Civ. Proc., § 2716, as amended 1893, in part; being part of former

section 2715. This section confers no new power on the surrogate, but is merely declaratory of the law as already adjudged. (*Matter of McIntyre*, 4 Redf. 489.) A request in a codicil that "my executors and trustees be not obliged or compelled to file with the surrogate any inventory of my estate" is against public policy; the clause is invalid and of no effect. So held on application for probate. (*Potter v. McAlpine*, 3 Dem. 108.) See *Brainerd v. Birdsall*, 2 id. 331.

⁵² *Pendle v. Waite*, 3 Dem. 261. Although a surrogate may not have jurisdiction to decide a disputed claim, he must grant an order for an inventory to a creditor, on proof that one has not been made within the time prescribed. (*Creamer v. Waller*, 2

makes the application, it is within the power of the surrogate to proceed to compel a return, on his own motion.⁵³

§ 501. Application, when to be made.—There is no fixed limit within which the application must be made, after a failure to voluntarily return an inventory; but after a sufficient lapse of time a presumption arises that the estate has been properly administered. The lapse of thirty years affords such a presumption, and the application in such a case was accordingly denied.⁵⁴ The statute does not state how many days before its return the order must be served, nor when it is to be returnable, but the form of the order will be such as to allow the necessary steps to be taken for the appointment of appraisers, the notice of the appraisal, and other proceedings for the completion of the inventory before the return day.

§ 502. Punishment for contempt for disobeying order.—The statute directs that "upon the return of the order," which of course implies proof of due service thereof, "if the delinquent has not filed a sufficient inventory, the surrogate must issue a warrant of attachment against him, upon which the proceedings are the same as upon a warrant issued for disobedience to an order, as prescribed in title twelfth, of chapter seventeenth, of " the Code of Civil Procedure.⁵⁵ The order requiring the respondent to make

Dem. 351.) See Co. Civ. Proc., § 2514, subd. 11. He may properly investigate the status of the petitioner before proceeding with the merits. (Matter of Comins, 9 App. Div. 492; 41 N. Y. Supp. 323.) As to the right of an illegitimate child, whose parents intermarried prior to the Domestic Relations Law, to apply, see Matter of Barringer, 29 Misc. 457; 61 N. Y. Supp. 1090.

⁵³ Thomson v. Thomson, 1 Bradf. 24.

⁵⁴ Thomson v. Thomson, 1 Bradf. 24. See also Leroy v. Bayard, 3 id. 228. In Matter of Wetmore (N. Y. Law J., Feb. 28, 1893), the surrogate held that the receiver of the property of a legatee was a party interested in the estate of decedent, and as such entitled to institute the proceeding. It appearing, however, that the estate was distributed by the executors in the course of administration long previous to the appointment of the receiver, the application to compel the executors to file an inventory was denied.

⁵⁵ Co. Civ. Proc., § 2716, as amended 1893; formerly section 2715, in part.

The proper construction of this clause is somewhat obscure. The title mentioned is that relating to "proceedings supplementary to an execution against property." It may be presumed that the reference is to the section of the Code which provides that a person who refuses, or, without good cause, neglects, to obey an order therein specified, may be punished as for a contempt, although it may be argued that the reference is to section 2440, which authorizes an immediate commitment. (Co. Civ. Proc., § 2457.) It is difficult, however, to understand why reference was not made directly to title third, of chapter 17, which treats of proceedings to punish as for a contempt of court. The doubt is increased by the fact that the original draft of the section contained the clause in question, as framed by the revision commissioners, did refer to the last-named title (first draft of Rev. Stat., § 2493). Again, by section 2440 of the Code, also contained in c. 17, tit. 12, it is provided that where a

a return, or show cause why he should not be attached, is one of those mandates which must be issued as the result of a judicial determination, and not one which can be properly issued, as of course, by the clerk of the court; it must be personally served upon the delinquent.⁵⁶

§ 503. **Excusing failure to return inventory.**—It is no excuse for failing to make and return an inventory that the assets have no present existence, that is, have been disposed of by the representative;⁵⁷ nor is it an answer to the application to compel the return of an inventory that the representative has assets largely in excess of the debts of decedent, and that he offers to give security for the payment of any debts: or that it would be troublesome and expensive to make an inventory: or to allege that the petitioner is actuated by curiosity and a design to abuse the process of the court.⁵⁸ It is, however, a good answer that the petitioner has released his interest, or has waived his right,⁵⁹ for notwithstanding the mandatory words of the section, the court is not deprived of discretion and the power to pass upon the right of the petitioner to demand an inventory. It is its duty to deny the application, where it appears that the petitioner is not, on the face of the proceedings, entitled to the order,—as where it ap-

judgment debtor has been ordered to give an undertaking, "if he fails to comply with the order, the judge may forthwith, by warrant, commit him to prison, there to remain until the close of the examination, or the giving of the required undertaking."—which bears a striking resemblance to the portion of the Revised Statutes for which the clause is a substitute. viz.: "the surrogate shall issue an attachment against him, and commit him to the common jail of the county, there to remain until he shall return such inventory." (2 R. S. 85, § 17.) The note of Mr. Commissioner Throop, to section 2715 of the Code, states that the purpose of the clause was "to apply to the proceedings the ordinary rules applicable to cases of contempt." There was an inconsistency between the provisions of the original clause and the general provisions of the statute in regard to attachments issuing from the Surrogate's Court, which provided for the delinquent being brought before the court to answer for his alleged disobedience, instead of being committed to jail at once. But, as the directions

of the former were explicit and direct, the better opinion was that they must prevail, and the commitment issue at once, without any opportunity for the executor to excuse his alleged neglect. But now, it would seem, reference must be had to the provisions of the new Code prescribing the proceedings where a warrant of attachment issues to punish for a contempt.

⁵⁶ White v. Lewis, 3 Dem. 170.

⁵⁷ Silverbrandt v. Widmayer, 2 Dem. 263. It had been held, before this decision, that no *appraisal* was possible in such a case: that where an administratrix, without filing an inventory, had disposed of all the assets of the estate, in the payment of funeral expenses and debts, she could not be compelled to file a statutory inventory; and the only remedy, in such a case, was to require her to make, under oath, a statement of the property that came into her hands, its value and its disposition, and what had become of the proceeds. (Matter of Robins, 4 Redf. 144.)

⁵⁸ Forsyth v. Burr, 37 Barb. 540.

⁵⁹ Matter of Barnes, 1 Civ. Proc. Rep. 59.

pears, on the petition of the administrator of a deceased legatee, that the latter, in his lifetime, had received his legacy, and executed a release.⁶⁰ So where all the parties interested were of full age, and one of them, with the assent of the others, undertook to administer upon the estate without the issuing of letters of administration, which he did by settling all claims against the estate, and stating an account and distributing the balance shown to be on hand for distribution, and each of the other parties interested took his share; in such a case no one of them can, therefore, claim, through a formal administration, an inventory and a new distribution.⁶¹ Where the application is to compel the filing of *a further inventory*, and the representative denies the existence of further assets, the application will be refused,⁶² inasmuch as the court has no power to require the examination of parties or witnesses for the purpose of testing the correctness of the inventory as returned; any errors therein must be corrected on a future accounting.⁶³ I do not understand by this that the court is without power to correct an inventory which is insufficient either in form or in substance. It is not only the return of some inventory, but the return of "a sufficient inventory" which the court is authorized to compel, and what is a sufficient inventory in a particular case depends upon the facts of that case. When the fact of insufficiency does not appear on the face of the inventory, it is difficult to understand why the court may not take proof of extrinsic facts, with a view of ascertaining whether an allegation of insufficiency is supported.⁶⁴ The original statute expressly permitted the sur-

⁶⁰ Matter of Wagner, 119 N. Y. 28; 28 St. Rep. 266. Compare Schmidt v. Heusner, 4 Dem. 275; Matter of Barnes, 1 Civ. Proc. Rep. 59.

⁶¹ Ledyard v. Bull, 119 N. Y. 62. See Weatherwax v. Shields, 45 App. Div. 109; 61 N. Y. Supp. 594.

⁶² Matter of McIntyre, 4 Redf. 489. The surrogate, upon an application of this kind, has no power to determine the ownership of property, the title to which is disputed. Accordingly, where the applicant seeks to have inserted, in an inventory filed, property which the executor claims as belonging to himself, the motion should be denied. (Greenhough v. Greenhough, 5 Redf. 191.) To the same effect, Matter of Goundry, 57 App. Div. 232; 68 N. Y. Supp. 155. And a surrogate's order, directing an administrator to inventory certain bonds as assets of the estate, does not estop the latter from

claiming the bonds as his own. (Young v. Young, 5 Week. Dig. 109.)

⁶³ Vogel v. Arbogast, 4 Dem. 399; 9 Civ. Proc. Rep. 231; Matter of McIntyre, *supra*.

⁶⁴ Under the Revised Statutes, which contained nothing with reference to the court's power to amend an inventory, it was held that the surrogate might require an executor or administrator to show cause why the inventory filed should not be amended, and in a proper case—*e. g.*, where no exemption was made of articles for the widow's use—he might order the inventory to be amended. This power was not derived from the provisions of the statutes specially relating to the return of inventories, but from the clauses thereof which authorized surrogates to direct and control the conduct, and settle the accounts, of executors and administrators, and to ad-

rogate to grant, for reasonable cause, to an executor or administrator in default, "further time, not exceeding four months," within which to return the inventory. Though this provision is omitted from the present statute, there is no reason to doubt the power of the court to grant further time, in a proper case.

§ 504. **Costs.**—The surrogate may, in his discretion, award costs to any party to the proceeding, not exceeding ten dollars, besides necessary disbursements, if any, for printing and referee's fees;⁶⁵ but in New York county the matter is governed by court rule, that no costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator, unless such executor or administrator shall have unreasonably delayed to make and file such inventory after having been duly requested to do so by or in behalf of the petitioner.⁶⁶

§ 505. **Discharge of imprisoned representative, and revoking letters.**—A person committed to jail, upon the return of a warrant of attachment, issued as above prescribed, "may be discharged by the surrogate, or a justice of the Supreme Court, upon his paying and delivering under oath, all the money and other property of the decedent, and all papers relating to the estate, under his control, to the surrogate, or to a person authorized by the surrogate to receive the same."⁶⁷ Where, by reason of his default in returning an inventory, he has remained committed to jail, under the surrogate's order, for thirty days, the surrogate is required to revoke the letters issued to him, without a petition or the issuing of a citation. The statute provides for a like revocation in case the citation cannot be served personally, by reason of the executor or administrator absconding or concealing himself.⁶⁸

TITLE THIRD.

ARTICLES SET APART FOR THE FAMILY OF THE DECEASED.

§ 506. **Estate of representative in exempted articles.**—The law, upon the same grounds of humanity on which it exempts certain articles of a debtor from seizure by creditors under execution,

minister justice in all matters relating to the affairs of deceased persons. (Sheldon v. Bliss, 8 N. Y. 31.) In Matter of Haley (1 Law Bul. 32 [N. Y. Surr. Ct., Feb., 1879]), on an application by an interested party for an amended inventory on allegations of omissions of some articles, and undervaluation of others, Calvin, S.,

ordered a reference to take proof and report to the court. See Co. Civ. Proc., § 2546, and § 117, *ante*.

⁶⁵ Co. Civ. Proc., §§ 2556, 3236, 3251, subd. 3.

⁶⁶ Rule XIII, March, 1888.

⁶⁷ Co. Civ. Proc., § 2716, last clause.

⁶⁸ Co. Civ. Proc., § 2691, subds. 3, 4. See § 428, *ante*.

sets apart certain of the goods, etc., of a decedent, for the use and benefit of a widow or minor children, or both. These articles are enumerated by the statute. They are as much assets as any part of the personal estate, and as such would pass under the will, or be applicable to the payment of debts, but for the statutory provision exempting them from the operation of the laws relating to administration of estates. In the eye of the law, therefore, these, like other personalty, pass to the executor, for the purposes of the trust vested in him; and he has a right to their possession and custody, in order to inventory the articles, and set apart those which the statute exempts.⁶⁹ His authority in this respect, however, is that of a trustee for the widow or family; and if he refuses or neglects to set apart the articles, the surrogate may cite him to show cause why he should not be compelled to do so,⁷⁰ or may rectify the omission upon the accounting.⁷¹ If he sells the articles, the proceeds constitute a trust in his hands, which the surrogate may compel him to pay over, if the widow affirms the sale.⁷² It seems also that in case of willful neglect, he is liable to an action.⁷³

§ 507. The interest of widow, etc., in exempted articles.—The effect of the statute is to give the widow and children of a person owning personal property of the character specified therein, at least a beneficial interest in so much as the statute specifies, subject only to the right of the executor or administrator to take possession for the purpose of inventorying it; and (so far at least as the selection of the articles is not made dependent on the discretion of the appraisers) the widow may sell them immediately, subject, however, to the aforesaid right.⁷⁴ The testator cannot by his will defeat this provision which the law makes for the family.⁷⁵ To entitle the widow to the possession of articles enumerated (*e. g.*, sheep and swine) the deceased husband must have had, or his personal representatives must have, such an ownership and possession of them at the time of the making of the inventory, as will permit of their delivery to the widow. When he had but a half interest

⁶⁹ *Voelekner v. Hudson*, 1 Sandf. 215. counting. (*Clayton v. Wardell*, 2 Bradf. 1.)

⁷⁰ *Sheldon v. Bliss*, 8 N. Y. 31. And see *Lockwood v. Lockwood*, 3 Redf. 330, 336. ⁷³ *Voelekner v. Hudson*, 1 Sandf. 215.

⁷¹ *Matter of Maaek*, 13 Misc. 368; 35 N. Y. Supp. 109; Co. Civ. Proc. § 2724. ⁷⁴ *Fox v. Burns*, 12 Barb. 677.

⁷² *Sheldon v. Bliss*, 8 N. Y. 31. And an error in this matter may be corrected by a proper credit on an ac- ⁷⁵ *Vedder v. Saxton*, 46 Barb. 188; *Matter of Tobin*, 40 St. Rep. 366; 16 N. Y. Supp. 462. A woman may, by antenuptial agreement, waive her rights to the exempt articles. (*Young v. Hicks*, 92 N. Y. 235.) See *Matter of Allen*, 36 Misc. 398.

therein, they cannot be delivered to her, nor can any allowance be made therefor.⁷⁶

§ 508. **Exempt articles enumerated.**—The enumeration given by the Revised Statutes of the articles to be inventoried and appraised, and of the articles which are exempted for the benefit of decedent's widow and children, was, with doubtful propriety, carried into the Code of Civil Procedure by the Legislature of 1893.⁷⁷ The statute provides that "if a man, having a family, die, leaving a widow or minor child or children," certain enumerated articles "shall not be deemed assets, but must be included and stated in the inventory of the estate, without being appraised;"⁷⁸ and "if

⁷⁶ *Baucus v. Stover*, 24 Hun. 109; *revd.* on another point, 89 N. Y. 1; *Matter of Perry*, 38 Misc. 167. Compare *Matter of Williams*, 31 App. Div. 617; *Matter of Hembury*, 37 Misc. 454, where the estate contained none of the articles specified in the section.

⁷⁷ Co. Civ. Proc., § 2713, as amended 1893; adopting 2 R. S., §§ 9, 10, as amended L. 1874, c. 470; L. 1887, c. 630, etc.

⁷⁸ The articles enumerated by the statute are as follows:

"1. All spinning wheels, weaving looms, one knitting machine, one sewing machine, and stoves put up or kept for use by his family.

"2. The family bible, family pictures, and school books used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

"3. All sheep to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same, one cow, two swine and the pork of such swine, and necessary food for such swine, sheep or cow, for sixty days, and all necessary provisions and fuel for such widow, child or children for sixty days after the death of such deceased person.

"4. All the necessary wearing apparel, beds, bedsteads and bedding, necessary cooking utensils, the clothing of the family, the clothes of the widow and her ornaments proper for her station; one table, six chairs, twelve knives and forks, twelve plates, twelve tea-cups and saucers, one sugar dish, one milk-pot, one tea-pot and twelve spoons, and other household furniture which shall not exceed one hundred and fifty dollars in value.

"5. Other necessary household furniture, provisions or other personal

property in the discretion of the appraisers, to the value of not exceeding one hundred and fifty dollars.

"Such articles and property shall remain in the possession of the widow, if there be one, during the time she lives with and provides for such minor child or children. If she ceases so to do, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same, and the property specified in subdivision five; and the other articles so exempted shall then belong to such minor child or children. If she lives with and provides for such minor child or children until it or they become of full age, all the articles and property in this section mentioned shall belong to the widow. If there be a widow and no minor child, all the articles and property in this section mentioned shall belong to the widow. If a married woman die, leaving surviving her a husband, or a minor child or children, the same articles and personal property shall be set apart by the appraisers with the same effect for the benefit of such husband or minor child or children."

The fifth subdivision, above, was taken from L. 1889, c. 406, § 2. All the remainder of that statute was repealed by L. 1890, c. 173, § 2. The cases under the Act of 1889, such as *Daggett v. Daggett*, 37 St. Rep. 810; 14 N. Y. Supp. 182; *Matter of Steward*, 30 St. Rep. 438; 10 N. Y. Supp. 24; *Matter of Tipple*, 13 id. 263; *Matter of Koch*, 31 St. Rep. 963; 9 N. Y. Supp. 814; 24 Abb. N. C. 468; *Matter of Hildebrand*, 1 Misc. 245; *Matter of Mulligan*, 4 id. 361, are of interest only where that statute is applicable.

a married woman die, leaving surviving her a husband or a minor child or children, the same articles and personal property shall be set apart by the appraisers, with the same effect, for the benefit of such husband or minor child or children.”⁷⁹ It will be noted that the widow or the husband, as the case may be, are entitled *absolutely* to the articles specified in the first four subdivisions of the section, and to \$150 worth of household furniture beyond; whereas, under the fifth subdivision he or she is entitled, “in the discretion of the appraisers, to \$150 worth of furniture, provisions, or other personal property.” It is proper to treat cash as “personal property,” and where the furniture and provisions are not of sufficient value to make up the \$150, cash may be allowed to make up the deficiency.⁸⁰ The appraisers’ discretion can obviously be exercised only as to what particular articles they will set apart;⁸¹ and they may set apart a portion in furniture or other articles, or the whole in money. The exemption of “household furniture which shall not exceed one hundred and fifty dollars in value,” is *in addition to* the other exempt articles.⁸² The appraisers’ estimate of the value of the articles is not regarded as the exercise of an absolute discretion, but is subject to review by the surrogate, who may correct, not only any irregularity or mistake, but also an improper valuation. And if they set apart articles which exceed the statute limit, and this appears on the face of the inventory, the proceedings may be deemed void, unless the items are separable.⁸³

⁷⁹ Co. Civ. Proc., § 2713, as amended 1893, last sentence; adopting, as modified, L. 1887, c. 630. The right of a husband under this statute is not defeated by a provision in his favor in the wife’s will, which is not specified to be in lieu of such interest. (Matter of Harris, 2 Connolly, 4; 20 N. Y. Supp. 68.) The ornaments of a deceased wife suitable for her station cannot be set aside for the husband but must be included in the assets belonging to her estate. (Matter of Whiting, 19 Misc. 85; 43 N. Y. Supp. 969.)

⁸⁰ Matter of Durscheidt, 65 Hun, 136; 19 N. Y. Supp. 973. If the appraiser fails to set apart the furniture, the widow is entitled to its cash value. (Matter of Bidgood, 36 Misc. 516; 73 N. Y. Supp. 1061.) A piano is household furniture, within the statute. (Matter of Allen, 36 Misc. 398; 73 N. Y. Supp. 750.)

⁸¹ Matter of Bidgood, *supra*.

⁸² Lyendecker v. Eisemann, 3 Dem.

72; Kelly v. Moore, 18 Abb. N. C. 468; Matter of Miller, 1 Law Bul. 48. The testator gave his widow “all of the household property in the dwelling-house and the use of the dwelling-house during her life.” In the dwelling-house, at the time of the testator’s death, was a quantity of coal and wood, provided for family use, and a shotgun. Held, that these articles were properly allowed to the widow; that the shotgun might have been provided for the defense of the house, and, in the absence of proof, the court was not required to presume the contrary. The appraisers also set apart as exempt and for the use of the widow, a horse, phaeton, and harness, of the value of \$150. Held, that the gift of the household property did not preclude this allowance; that “other personal property” was available for the exemption and might be necessary. (Matter of Frazer, 92 N. Y. 239.)

⁸³ Applegate v. Cameron, 2 Bradf. 119. The widow’s dower right is not

Beyond the articles thus provided for the family, the family are not entitled to their support from the estate pending administration;⁸⁴ and whatever payments the executor or administrator makes to them, and whatever portion of the assets they are allowed to consume, must be accounted for, on the settlement of the estate.⁸⁵ The widow's right, under the statute,⁸⁶ to tarry in the chief house of her husband forty days after his death, without liability for rent, and to have, during that time, her reasonable sustenance out of the estate, will be mentioned hereafter.⁸⁷

§ 509. "Having a family."—As these words are used in the statute, they do not necessarily mean having children. If a man has a wife and relatives, living with him at the time of his death, he has a family within the meaning of the statute, although he has no children.⁸⁸ It is not even necessary that he should have been living with his wife and children at the time of his death, or have contributed to their support prior to that time.⁸⁹ It is not necessary that the decedent should have been a householder, or that he or his widow and children should have been inhabitants of this State, to entitle the latter to the possession of the exempted articles.⁹⁰

§ 510. Compelling the setting apart, etc., of exempt articles.—"Where an executor or administrator has failed to set apart property for a surviving husband, wife, or child, as prescribed by law, the person aggrieved may present a petition to the Surrogate's Court, setting forth the failure, and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it had been lost, injured, or disposed of, to pay the value thereof, or the amount of the injury thereto; and that he be cited to show cause why such a decree should not be made." If the surrogate is of the opinion that sufficient cause is shown, he must issue a citation accordingly. On the return of the citation, the surrogate must make such a decree in the premises as justice requires. In a proper case, the decree may require the executor

to be considered in estimating the value of the personality. (*Matter of Steward*, 90 Hun, 94; 35 N. Y. Supp. 366.)

⁸⁴ *Hennessy's Estate*, 1 Tuck. 335.

⁸⁵ See *Heidenheimer v. Wilson*, 31 Barb. 636.

⁸⁶ 1 R. S. 742, § 17.

⁸⁷ See c. XVII, *post*.

⁸⁸ *Kain v. Fisher*, 6 N. Y. 597.

⁸⁹ In *Matter of Shedd* (60 Hun,

367; 14 N. Y. Supp. 841; *affd.*, 133 N. Y. 601), the decedent had lived apart from his wife for ten years preceding his death, and did not contribute to her support, but provided clothing for his daughter, until she became of age. Held, that he had a family within the statute.

⁹⁰ *Kapp v. Public Adm'r*, 2 Bradf. 258.

personally to pay the value of the property, or the amount of the injury thereto. The decree, made upon a judicial settlement of the account of an executor or administrator, may award to a surviving husband, wife, or child, the same relief which may be awarded, in his or her favor, on a petition presented as above.⁹¹

TITLE FOURTH.

EFFECT OF INVENTORY AS EVIDENCE.

§ 511. **Impeaching inventory.**—The making and filing of an inventory and appraisal of the effects of a deceased person is as well for the protection of the executor or administrator as for the legatees, next of kin, and creditors. The inventory is only presumptive evidence against the person filing it. The statute provides, that in “any action or special proceeding, to which an executor or administrator is a party, wherein the question, whether he has administered the estate of the decedent, or any part thereof, is in issue, or is the subject of inquiry, and the inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either (1) that any property was omitted in the inventory, or was not returned therein at its true value; or (2) that any property has perished or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.”⁹² But these provisions were not designed

⁹¹ Co. Civ. Proc., § 2724, as amended 1893; consolidating former sections 2720, 2721; Matter of Maack, 13 Misc. 368; 35 N. Y. Supp. 109. It has been held that, on the accounting of an administratrix, she cannot be allowed for the articles which she might, as widow, have claimed to be exempt by law in her favor, on making the inventory, if they were not so allowed; especially where there is evidence that she had possession of assets not inventoried; and that if, through ignorance or mistake, she omitted to claim the exemption at the proper time, the remedy is a special application to correct the mistake, on notice to the creditors and next of kin. (Cornwell v. Deck, 2 Redf. 87.)

⁹² Co. Civ. Proc., § 1832: extending the original to special proceedings by or against, and to actions by, an executor or administrator.

The former statute applied only to actions against the representative. A construction of the original section, which appears to be applicable to the revised provision, was given in *Underhill v. Newburger* (4 Redf. 499): “Where the executors or administrators give the inventory in evidence, to fix their liability, the plaintiff may show the omission of property therefrom, or an undervaluation, or an enhanced value. While, if the plaintiff shall give it in evidence, to fix their liability, they shall be at liberty, in order to overcome it, to show that the property has perished or been lost without their fault; that it has been fairly sold at private or public sale, at a less price, or that it has deteriorated; and that these conditions must be affirmatively shown in order to overcome the presumption

to operate, upon an accounting, where an administrator's management of his trust is upon trial;⁹³ and an inventory has not the effect of binding, even presumptively, a successor in office of the executor filing it.⁹⁴ It is also provided, that "in such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appear that the same has been collected, or might have been collected, with due diligence."⁹⁵ But the Code declares that "the last two sections⁹⁶ do not vary any rule of evidence, respecting any proof, which an executor or administrator may now⁹⁷ make."⁹⁸ An inventory filed by co-executors, though evidence of the joint possession of securities and receipt of moneys by them, will not preclude either of them from proving, on the accounting, that they were in fact held and received exclusively by one of their number.⁹⁹

§ 512. **Conclusive effect of inventory.**—The inventory is, however, *prima facie* evidence of the value of the property, as well as of what assets have come into the hands of the executors; and if they have disposed of any of the property, they are *prima facie* liable for the amount of money at which it was inventoried.¹ If it is shown that assets were disposed of for more than the inventory price, they are of course liable for that amount. And where assets are taken by an administrator at the inventory price, if it is shown that they are of greater value than that price, he must answer for the true value.² There was formerly no way in which an inventory could be impeached in a proceeding in relation to the inventory itself, but it might be surcharged or falsified on

raised by the inventory, by the parties seeking to overcome it." Compare *Woodhouse v. Woodhouse*, 5 Redf. 131.

⁹³ *Matter of Woodworth*, 5 Dem. 156. See *post*, c. XIX, art. 5, subd. 2.

⁹⁴ *Solomons v. Kursheedt*, 3 Dem. 307.

⁹⁵ Co. Civ. Proc., § 1833. See *Thorne v. Underbill*, 1 Dem. 306. As to what is "due diligence," see *Smith v. Collamer*, 2 Dem. 147.

⁹⁶ Sections 1832, 1833, *supra*.

⁹⁷ That is, under the law prevailing prior to September 1, 1880. See Co. Civ. Proc., § 3343, subd. 22; *id.*, § 3356.

⁹⁸ Co. Civ. Proc., § 1834. See *Wilmington v. McCluer*, 2 Wend. 608. In *Bellinger v. Potter* (36 St. Rep. 601), the testator bequeathed a certain sum described as due him from his exec-

utor. The latter in his inventory charged himself therewith. Held, that the presumption arising from the inventory, that the sum was actually due, was not overcome by proof of a sealed undertaking of the executor with testator to pay said sum upon a certain contingency which had failed, where it did not appear that such undertaking contained the whole agreement with the testator.

⁹⁹ *Taylor v. Shuit*, 4 Dem. 528.

¹ *Ames v. Downing*, 1 Bradf. 321; *Matter of Shipman*, 82 Hun. 108; 31 N. Y. Supp. 571; *Matter of Childs*, 26 id. 721; *Matter of Maack*, 13 Misc. 368; *Matter of Mullan*, 145 N. Y. 98; 64 St. Rep. 551.

² *Zilkin v. Carhart*, 3 Bradf. 376. See *Matter of Mullan*, 145 N. Y. 98; 64 St. Rep. 551.

an accounting.³ The unexplained omission of an administrator to make any claim of set-off or defense to a demand against himself in the inventory, is evidence against the validity of such a defense.⁴ Where an executor, in preparing an inventory of the estate, included therein a promissory note given by him to the testator, which note was then outlawed, this was held a sufficient acknowledgment in writing to remove the bar of the Statute of Limitations.⁵ Where a bank deposit is inventoried as cash, but the money is not actually collected before the bank fails, the administrator is not absolutely concluded, but the inventory may be shown to be incorrect,—*e. g.*, upon a final accounting.⁶ So, too, the fact that a donee of certain property, handed it to the executor on his demand that it should be inventoried, does not preclude a subsequent claim therefor.⁷

³ *Montgomery v. Dunning*, 2 Bradf. 220. And see *Thomson v. Thomson*, 1 id. 24. But the rule seems now to be changed. See Co. Civ. Proc., § 1832, *supra*.

⁴ *Lloyd v. Lloyd*, 1 Redf. 399.

⁵ *Ross v. Ross*, 6 Hun. 80; *Matter of Daggett*, 1 Misc. 248; 22 N. Y. Supp. 911.

⁶ *Sheerin v. Public Adm'r*, 2 Redf. 421.

⁷ *Matter of Van Slooten*, 76 Hun. 55; 27 N. Y. Supp. 666. This case was subsequently reversed (145 N. Y. 327), on the ground that the taking of the property by the executor was his individual act, and did not constitute a claim against the estate as such.

CHAPTER XVII.

ADMINISTRATION OF ESTATE AND PERFORMANCE OF WILL.

TITLE FIRST.

THE OFFICE AND ESTATE OF EXECUTORS, ADMINISTRATORS, AND TESTAMENTARY TRUSTEES.

ARTICLE FIRST.

THE TITLE AND OBJECT OF THE OFFICE.

§ 513. **The office of executor.**— We have, in preceding chapters, given in detail an account of the proceedings in the Surrogate's Court by which executors and administrators, and, in certain cases, testamentary trustees, acquire authority to act as such; and have also pointed out certain specific duties prescribed by statute, with respect to executors and administrators, as to appraising the assets of their decedent, and making and filing an inventory. The duties and powers of the officers above mentioned, in the management and disposition of the estate in their hands, their rights of action, and their accountability in law and equity for the faithful performance of their obligations, are subjects of large importance, not strictly within the scope of this volume, and can be treated, in a single chapter, in only the most general way.

An executor has been defined to be one to whom the execution of a last will and testament — that is, the application of the estate pursuant to the directions of a will — is, by the testator's appointment, confided. The term was originally employed in a sense sufficiently broad to include an administrator upon the estate of an intestate, a distinction being taken between *executor testamentarius* and *executor dativus*,¹ but this usage is obsolete. He can derive his office from a testamentary appointment only, though it is not necessary that he be expressly named as such. If, by any word or circumlocution, the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it

¹ Wms. on Exrs. (6th Am. ed.) 266.

amounts to as much as the ordaining or constituting him or them to be executors.² And, as has been before noted, it is not even requisite that the testator should constructively name the executor, for he may delegate to another the power to make the nomination.³ At common law, although an executor could not assign the executorship, yet he might continue it by his will; and in case of the death of the sole executor, the executor of such executor was, to all intents and purposes, the executor and representative of the first testator. But our statutes have abrogated this rule.⁴ So, at common law, one who, not being either executor or administrator, intermeddled with the goods of the deceased, or did any other act characteristic of the office of executor, was thereby an executor of his own wrong, called more usually an executor *de son tort*.⁵ But our law does not recognize such an executor, and one who is neither executor nor administrator cannot acquire any title to the assets, as a representative of the deceased.⁶

§ 514. **Testamentary trustees.**—A distinction is made between the office of executor and that of a testamentary trustee. The duty of an executor as such, and his duty, as a trustee of an express trust under the will, are entirely different. As executor, it is his duty to collect the property, and pay the debts and general legacies; while, as trustee, it is his duty to invest and manage the particular fund or trust estate in accordance with the directions of the will.⁷ *The quality* of an executor's title necessarily depends upon the language of the will which he is to perform. A will, for example, which gives the executor power to collect and pay over dividends on the stock of an incorporated company, does not necessarily vest in him title to the stock; such a power may be lodged with one person while the title is in another.⁸

² See *Humbert v. Wurster*, 22 Hun, 405; 1 Wms. on Exrs. (6th Am. ed.) 280.

³ *Hartnett v. Wandell*, 60 N. Y. 346; § 291, *ante*.

⁴ See *Fosdick v. Delafield*, 2 Redf. 392.

⁵ *Anderson v. Daley*, 38 App. Div. 505; 56 N. Y. Supp. 511; appeal dismissed, 159 N. Y. 146. See *Mills v. Mills* (115 id. 80; 23 St. Rep. 604), where it was held, that one who was a mere debtor of a decedent, in his lifetime, and had in no way interfered with the decedent's estate since his death, could not be treated as an executor *de son tort*, simply because he assumed to make a settlement with

the only child of the decedent, where the party asserting the claim sought to repudiate the settlement. Compare *Ahrens v. Jones*, 169 N. Y. 555.

⁶ See 2 R. S. 81, § 78; *id.*, 449, § 17; § 130, *ante*.

⁷ See §§ 319, 449. A release executed to executors does not discharge them as trustees. (*Dority v. Dority*, 40 App. Div. 236; 57 N. Y. Supp. 1073.)

⁸ *Onondaga Trust & D. Co. v. Price*, 87 N. Y. 542. See *Matter of Underhill*, 35 App. Div. 434; 54 N. Y. Supp. 967; *affd.*, 158 N. Y. 721; *Robinson v. Adams*, 30 Misc. 537; 63 N. Y. Supp. 816.

§ 515. **The office of administrator.**—At an early period in England, the sovereign, as *parens patriæ*, took possession of the goods of an intestate, it being presumed that the deceased, by his neglect to make a will, acknowledged that he was without a rightful heir. Subsequently the crown conceded the right to distribute the effects to the near relatives of the deceased, but this was to be done under the direction of the church. The ecclesiastical authorities were not slow to realize the benefits of this supervisory power, and, before the lapse of much time, the privilege of administering the goods of an intestate was exercised by the bishops instead of the crown. The abuses of this power — amounting almost invariably to the confiscation of the whole estate for the benefit of the bishop or his order — grew to be so great, that Parliament interfered at last, and deprived the church of its power to administer the estates of deceased persons. Such administration in this country has always been conferred by law upon some one of the nearest of kin of the deceased, upon the order and under the authority of a civil tribunal. In general, it may be said there is no distinction between the rights, powers, and duties of executors and administrators as such.⁹

§ 516. **Representative character of executors, etc.**—An executor or administrator is said to be the *representative* of the testator or intestate in respect to his personal estate, the whole of which vests in the one on the death of the testator, and in the other on the grant of letters of administration, which relate back to the time of the decease of the intestate.¹⁰ The interest thus vested in such personal representatives is for the benefit of the estate, to discover and collect the effects, preserve them from waste, pay the debts in their legal order, and to distribute the surplus, if any, according to the will of the testator or the Statute of Distributions, as the case may be. To this end they are invested with every power and remedy which belonged to the deceased while living, within the jurisdiction of the State in which the letters were granted.¹¹ Nevertheless, they are not the mere representatives of their testator or intestate, but are, under the statutes of this State, *trustees* for the benefit of the persons interested in the estate;¹² and they may,

⁹ Douglass v. Satterlee, 11 Johns. 16; Murray v. Blatchford, 1 Wend. 583; Jackson v. Robinson, 4 id. 436.

¹⁰ Valentine v. Jackson, 9 Wend. 302; Babcock v. Booth, 2 Hill, 181; Kaufman v. Schoeffel, 46 Hun, 571. See § 364, *ante*.

¹¹ Schultz v. Pulver, 11 Wend. 361. Compare Babcock v. Booth, 2 Hill, 181.

¹² Dox v. Backenstose, 12 Wend. 542. And see *post*, tit. 6, art. 1 of this chapter.

for the benefit of creditors or others interested in the estate, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of such persons' rights.¹³

§ 517. **Foreign executors and administrators.**—The term "foreign," as applied to executors or administrators, more properly distinguishes the personal representatives of one dying domiciled without the State, whose authority is solely evidenced by letters issued from a tribunal of the decedent's domicile. But it has already appeared that the Surrogates' Courts of this State have jurisdiction, in certain instances, to issue original letters upon the estate of a nonresident decedent; thus giving rise, where the foreign court has also acted, to what has been termed a "conflicting grant of letters."¹⁴ And, finally, the Code provides for the issuing, from our Surrogates' Courts, of letters upon the estate of such a decedent, in aid of letters granted by a tribunal of his domicile, and at the instance of the person or persons holding the same.¹⁵

§ 518. **Their rights and liabilities here.**—It is pertinent to remark, in this place, upon the rights and liabilities of foreign representatives, in the sense above indicated, in the courts, and otherwise, within the limits of this State. The general rule is, that the authority of a foreign executor or administrator is strictly local, and is not recognized outside of the jurisdiction in which his letters were granted.¹⁶ His appointment by a court of a foreign country,—and, for this purpose, the several States regard each other as foreign countries,—puts him in no different position from that which he would occupy if no letters had ever

¹³ L. 1858, c. 314, § 1, as amended L. 1889, c. 487. See *post*, tit. 1, art. 3, subd. 2 of this chapter.

¹⁴ See *Stone v. Scripture*, 4 Lans. 186.

¹⁵ As to such letters,—called ancillary letters testamentary and of administration,—and the object of the office so created, see §§ 312, 371, *ante*; *Parsons v. Lyman*, 20 N. Y. 103; *Palmer v. Phoenix Mut. L. Ins. Co.*, 84 id. 63. In *Cummings v. Banks* (2 Barb. 602), it was held that one appointed here administrator with the will annexed, of a testator dying domiciled in a foreign country, pursuant to a power of attorney given by the foreign executors, was not independent of, but ancillary to, them, and was bound by a decree rendered against them by a court of the testator's domicile. Where the ancillary executor

brings an action in a court of this State, it is not necessary for him to allege probate of the will in a tribunal of the testator's domicile. (*Leland v. Manning*, 4 Hun. 7.)

¹⁶ See *Isham v. Gibbons*, 1 Bradf. 69; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Doolittle v. Lewis*, 7 id. 45; *Williams v. Storrs*, 6 id. 353; *Ulster Co. Sav. Inst. v. Fourth Nat. Bank*, 28 St. Rep. 24; 8 N. Y. Supp. 162. A trust created in this State, of which a married woman is trustee, remains valid although she subsequently removes to another State, by the law of which she is incapable of acting as a trustee; such removal will not divest her title to the fund, which remains in her so long as no one is appointed to take it from her. (*Schulter v. Bowery Sav. Bank*, 117 N. Y. 125; 26 St. Rep. 922.)

been granted to him. But these general propositions must be taken with some modifications, in respect to which it will be convenient to distinguish between acts involving litigation and those where no judicial action is taken. As to the latter, it is to be observed that the courts have, in some cases, allowed foreign representatives to do certain acts here, as to take possession of goods, receive voluntary payment of debts, dispose of assets situated here, foreclose, by advertisement under our statutes, a mortgage of real property situated in this State, and otherwise exercise authority so far as possible without bringing suit.¹⁷ Even as to acts of this character, however, it has been held that a distinction is to be made between cases where there is a conflicting grant of letters, and those where such a circumstance does not exist.¹⁸ But such representatives have no standing as parties plaintiff in the courts of this State, without taking out letters here;¹⁹ although the assignee of a foreign executor may maintain an action in a court of this State, upon a cause of action transferred to him by the latter, since, in such a case, he sues in his own right, notwithstanding that his title may be derived from a representative.²⁰ The exemption of foreign executors and administrators from liability to prosecution in our courts is not coextensive with their disability to sue therein. They cannot be so proceeded against in a purely legal action,²¹ nor can they be substituted in such an action, pending against the decedent here at the time of his death;²² but they are liable to an action in equity, under certain circumstances, and

¹⁷ Thus a bank is protected in paying decedent's deposit to his foreign administrator upon presentation of letters. (*Schulter v. Bowery Sav. Bank*, 49 Hun. 607; 16 St. Rep. 784; *Maas v. German Sav. Bank*, 73 App. Div. 524.) See *Vroom v. Van Horne*, 10 Paige, 549; *Brown v. Brown*, 1 Barb. Ch. 187; *Middlebrook v. Merchants' Bank*, 14 Abb. Pr. 462, note; 24 How. Pr. 267; 41 Barb. 481; 3 Keyes, 135; *Williams v. Storrs*, 6 Johns. Ch. 353; *Doolittle v. Lewis*, 7 id. 45; *Averill v. Taylor*, 5 How. Pr. 476.

¹⁸ *Stone v. Scripture*, 4 Lans. 186. Where original administration was granted, first in New York and afterward in New Hampshire, upon the estate of one dying domiciled in the latter State; and, an action having been brought here by the New York administrator, to foreclose a mortgage upon lands here, given to secure payment of a bond made by a resident of

this State, it was held that the satisfaction of the mortgage by the foreign administrator was no defense. See *Co. Civ. Proc.*, § 2478; § 145, *ante*.

¹⁹ *Parsons v. Lyman*, 20 N. Y. 103; *Middlebrook v. Merchants' Bank*, 24 How. Pr. 267; *Matter of Butler*, 38 N. Y. 397; *Matter of Webb*, 11 Hun, 124. Compare *Holyoke v. Union Mut. L. Ins. Co.*, 22 id. 75; *Palmer v. Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63; *Philippe v. Levy*, 56 Super. Ct. (J. & S.) 606; 16 St. Rep. 889.

²⁰ *Peterson v. Chemical Bank*, 32 N. Y. 21; *Smith v. Tiffany*, 16 Hun, 552. See *McBride v. Farmers' Bank*, 26 N. Y. 450.

²¹ *Field v. Gibson*, 56 How. Pr. 232; *Matter of Webb*, 11 Hun, 124; *Vermilya v. Beatty*, 6 Barb. 429; *Metcalf v. Clark*, 41 id. 45; *Ferguson v. Harrison*, 27 Misc. 380; 58 N. Y. Supp. 850.

²² *Matter of Webb*, 11 Hun, 124; *Flandrow v. Hammond*, 13 App. Div. 325; 43 N. Y. Supp. 143.

upon proper allegation, to prevent waste of property brought within the jurisdiction, and secure its application to the payment of the debts of the testator according to the law of the State whence they derived their authority.²³ Their responsibility extends to assets shown to have been in their possession within this State, no matter where they have been received.²⁴ And their character as foreign executors or administrators furnishes no objection to an action by them²⁵ or against them, in a court of equity of this State in their character as trustees. Thus, an action may be maintained against them where the alleged liability is not that of the decedent or his estate, but is predicated upon their own wrongful use or misapplication of trust funds which have come to their hands,²⁶ or on a breach of contract made by them in their representative character.²⁷

23 *Field v. Gibson*, 56 How. Pr. 232. See *Sere v. Coit*, 5 Abb. Pr. 481; *Duffy v. Smith*, 1 Dem. 202; *Farmers' L. & T. Co. v. Ferris*, 67 App. Div. 1; 73 N. Y. Supp. 475; *Stone v. Demarest*, 67 App. Div. 549; 73 N. Y. Supp. 903; *Collins v. Stewart*, 2 App. Div. 271; 37 N. Y. Supp. 891; *Campbell v. Tousey*, 7 Cow. 64. The last case, with other cases, holding that a foreign executor or administrator, who comes into a State in which he has not been appointed, bringing with him assets collected in such foreign jurisdiction, may be held liable to creditors in the State to which he comes, to the extent of such assets, has been questioned in *Judy v. Kelly* (11 Ill. 211; 50 Am. Dec. 455) and in *Story on Conflict of Laws*, § 514b, and is commented on in 34 Alb. L. J. 286. See *Hardenberg v. Manning*, 4 Dem. 437; *Smith v. Central Tr. Co.*, 7 App. Div. 278; 40 N. Y. Supp. 152.

24 *Gulick v. Gulick*, 33 Barb. 92. In that case it appeared that the decedent was a resident of California, and died, leaving personal property there, and holding a demand against J., his brother. The latter possessed himself of the property, and died in a foreign country, and his administratrix, appointed in California, took possession of his assets, and brought the same into this State. Held, that the surrogate here had jurisdiction to appoint an administrator of the estate of the first-mentioned decedent; and that such administrator could maintain an action in the courts of this State against the administratrix of J., to recover the indebtedness of the

estate of J. to the estate of R. In *Sedgwick v. Ashburner* (1 Bradf. 105) an executor of a decedent who was domiciled in Massachusetts, took out letters in India and collected the debt there and transmitted to S. a coexecutor, who resided in New York, but had taken out letters in Massachusetts, bills for the amount of a share thereof belonging to A. under the will, with directions to indorse them without recourse, and deliver them. Held that, although the executor S. took out letters in New York, and named the bills in the inventory, and although A., the legatee, refused to accept the bills in release of the foreign executor's liability, neither the bills nor their proceeds were assets in the hands of S., and that he must be deemed to have received them as the agent of the foreign executor or of the legatee. See *Parsons v. Lyman*, 20 N. Y. 103; *Sherwood v. Wooster*, 11 Paige, 441; *Vermilya v. Beatty*, 6 Barb. 429; *Kohler v. Knapp*, 1 Bradf. 241; *Ordronaux v. Helie*, 3 Sandf. Ch. 512; *Gray v. Ryle*, 50 Super. Ct. (J. & S.) 198; *Ferguson v. Harrison*, 27 Misc. 380; *Jones v. Jones*, 8 id. 660; 30 N. Y. Supp. 177.

25 *Bloodgood v. Mass. Ben. L. Assn.*, 19 Misc. 460; 44 N. Y. Supp. 563.

26 *Montalvan v. Clover*, 32 Barb. 190.

27 Thus an action may be maintained against a foreign executor to compel the specific performance of a contract made by him to assign a judgment belonging to the estate. (*Johnson v. Wallis*, 112 N. Y. 230.)

ARTICLE SECOND.

THE SURROGATE'S CONTROL AND SUPERVISION.

§ 519. **Surrogate's general control.**—In all matters relating to the estate, the surrogate granting letters testamentary or of administration has a general supervision and control of the executor or administrator. The Code expressly declares that he has jurisdiction to direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees.²⁸ His power over the last-named officers is shared by other courts of record, and is not so extensive as that possessed in respect to executors and administrators, though it has been much enlarged by the Code of Civil Procedure.²⁹ It is not to be inferred, however, that the surrogate has authority to control the conduct of executors or administrators relative to proceedings in other courts, affecting the estate, *e. g.*, to prohibit an executor from contesting the payment of promissory notes, given by the testator, in an action at law brought thereon.³⁰ Nor can he control their actions as to property which, as executors or administrators, they had no right to take possession of.³¹ So he cannot compel an executor to treat a legacy as a charge upon, and satisfy the same out of, the testator's real property,³² or compel an executor to exercise a power of sale given by the will,³³ or to set aside, for fraud, a sale of land made by an executor.³⁴ And, in general, he cannot interfere with the representative, to control him while in the orderly discharge of his duties.³⁵ Hence the discretion of executors con-

²⁸ See Co. Civ. Proc., § 2472, subd. 3; § 44, *ante*.

²⁹ See Brown's Accounting, 16 Abb. Pr. (N. S.) 457, and §§ 319, 449, *ante*.

³⁰ Matter of Parker, 1 Barb. Ch. 154.

³¹ Calyer v. Calyer, 4 Redf. 305; holding that a surrogate has no jurisdiction to compel an administrator with the will annexed, to pay over to the devisee rents from real estate devised to the latter for life, or to restrain the further collection of such rents by the administrator.

³² Bevan v. Cooper, 72 N. Y. 317, 328.

³³ Peyser's Estate, 20 Daily Reg. No. 151.

³⁴ Matter of Valentine, 23 N. Y. Supp. 289.

³⁵ Wood v. Brown, 34 N. Y. 337, 343; Morse v. Tilden, 35 Misc. 560; 72 N. Y. Supp. 30. Upon an account-

ing by one executor, who had exclusive possession of all the funds and property of the estate, his coexecutor objected to the accounts and asked the court to direct the accounting party to transfer to him so much of the funds as would enable him to compensate his counsel for their services in the contest. The application was denied for want of power. (Thompson v. Mott, 1 Dem. 32.) See also Walton v. Howard, 1 id. 103; Jenkins v. Jenkins, 1 Paige, 243. An order requiring certain securities, held by executors, to be deposited in a trust company, to remain until the further order of the surrogate — was held to be authorized under the Revised Statutes, on proof of facts showing a persistent indisposition on the part of such executors to comply with the law concerning their official duties, and

ferred upon them by the will, to determine what part of the principal of the estate may be necessary to be applied to the support of the beneficiary, is subject to review by the surrogate to the extent, at least, of ascertaining whether it has been exercised honestly and in good faith; powers formerly exercised by courts of equity in this regard, are now possessed also by the surrogate. The surrogate is powerless, however, to overrule the decision of the trustee, except upon proof that he has abused his discretion or that his conduct has been inconsistent with the honest and faithful discharge of his duties; but not on the ground that he has reached an erroneous conclusion.³⁶ An application by a trustee for instructions as to the manner of the execution of his trust is beyond the power of the surrogate to grant.³⁷

§ 520. Disagreement between representatives.—It is obviously desirable that Surrogates' Courts should possess authority to direct the conduct of two or more executors or administrators where there is a disagreement between them as to the custody of money, or management of the estate. As the law formerly stood, it was doubtful if any such authority existed in either the Surrogate's Court or the Supreme Court; and it certainly did not, unless it clearly appeared that the interests of the beneficiaries were jeopardized by reason of the disagreement;³⁸ or the application was made by a majority of such beneficiaries.³⁹ This defect is remedied by the present Code in a section⁴⁰ which extends also to testamentary trustees and guardians, and provides that "where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the application of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts,

showing danger as to the safety and preservation of the estate. And such order is not invalidated by containing a provision that the deposit should be for the individual shares or interests of the petitioners. (*Matter of Gilman*, 41 Hun, 561.)

³⁶ *Banning v. Gunn*, 4 Dem. 337. See *Merritt v. Corlies*, 54 St. Rep. 215; 24 N. Y. Supp. 561. In *Matter of Buel* (23 id. 283), the testator directed the executor to hold certain bank stock in trust for a legatee. The bank becoming insolvent, an assess-

ment was levied on its stockholders. On the application of its receiver, on the executor's accounting, the latter was ordered to sell the stock to pay the assessment.

³⁷ *Matter of Foster*, 30 Misc. 573; 63 N. Y. Supp. 1102. See *Crawford v. Winston*, 34 App. Div. 457; 54 N. Y. Supp. 246.

³⁸ *Burt v. Burt*, 41 N. Y. 46.

³⁹ *Quackenboss v. Southwick*, 41 N. Y. 117.

⁴⁰ Co. Civ. Proc., § 2602.

make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion, make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators, guardians, or testamentary trustees, as the case requires, or subject to their joint order; or that the money of the estate be deposited in a specified safe, bank, or trust company, to their joint credit, and to be drawn out upon their joint order. Disobedience to such a direction may be punished as a contempt of the court." Inasmuch as each of two or more executors or administrators has full control of the assets, and may dispose of the same without the co-operation of his associate, the enjoyment of this right cannot be lawfully restrained by the surrogate, merely because of a disagreement between executors or administrators as to the time when, or the circumstances under which, such right can be most advantageously exercised.⁴¹

ARTICLE THIRD.

THE ESTATE OF EXECUTORS, ADMINISTRATORS, AND TESTAMENTARY TRUSTEES.

SUBDIVISION 1.

THE NATURE OF THE ESTATE.

§ 521. **Vesting of title, on owner's death.**—The effect of the death of an owner of property is to vest the title thereto at once in some other person. The property is never for one moment

⁴¹ *Brennan v. Lane*, 4 Dem. 322 (s. c. as *Estate of Brennan*, 9 Civ. Proc. Rep. 56). Where there is nothing in the will indicating that the testator reposed greater trust and confidence in one executor than in the other, and nothing tending to show that it would impair the security of the property of the estate to take it from the sole custody of an executor who had first qualified and taken possession of the entire estate, and place it in the joint custody of himself and a subsequently qualifying associate with whom he could meet without inconvenience, whenever conference or combined action was necessary, and where it was not shown that the interests of the estate would be prejudiced by requiring a joint custody of its assets,—the fact that the excluded executor would be deprived of commissions if no services were rendered by him, and he was competent and willing to perform his full share of the duty confided by the will, while the acting executor would receive practically a double commission, was held to be a consideration making such joint custody desirable. (*Chambers v. Cruikshank*, 5 Dem. 414 [s. c. as *Matter of Delaplaine*, 19 Abb. N. C. 413].) *Guion v. Underhill*, 1 Dem. 302. As to granting one executor the right to inspect books and papers in possession of his co-executor, see *Matter of Stein*, 33 Misc. 542; 68 N. Y. Supp. 933.

without an owner. The estate which an executor or administrator has in the goods of the deceased is not the absolute interest which every one has in his own property; nevertheless, for many purposes, the law treats the executor or administrator as the absolute owner, and, as such, capable of disposing of the goods of his decedent, as if they were his own. But, speaking generally, the estate of an executor or administrator, as such, is in *autre droit*, and the decedent's property in his possession, if distinguishable from his own, is not subject to his debts.⁴² Hence, a general assignment by an executor of all his property, or a release of all actions and demands which he has for any cause whatever, does not extend to or embrace the property or demands which he holds as executor.

§ 522. **Representative's qualified title.**— As to the property which they hold in a representative capacity, executors and administrators are, in equity, to be treated as trustees for the legatees or next of kin, and creditors.⁴³ Hence, while, at law, the executor or administrator has absolute power to dispose of, or to pledge, the assets, and to give a valid title,⁴⁴ equity will always intervene in a case of fraud or misapplication, and will follow the assets or their proceeds into the hands of a purchaser affected with notice of their misapplication, and the trust will attach on the property.⁴⁵ As to personalty, an executor is a trustee of the per-

⁴² The statute declares that the real property which belonged to any decedent is not bound or in any way affected by any judgment against his executor or administrator, and is not liable to be sold by virtue of any execution issued upon such judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof. (Co. Civ. Proc., § 1823.)

⁴³ An executor, as such, takes unqualified legal title of all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed. He holds as a trustee for the benefit (1) of the creditors of the testator, and (2) of those entitled to distribution. (Blood v. Kane, 130 N. Y. 514; 42 St. Rep. 549.) It was also held, in that case, that the trust estate of a sole executor, who is also sole legatee and devisee, is for the benefit of the testator's creditors, only; and when they are paid, the trust estate merges in the beneficial

interest, and the sole legatee and devisee becomes vested with the legal title of all the testator's estate. (Thomas v. Troy City Nat. Bank, 19 Misc. 470; 44 N. Y. Supp. 1039; Hauptmann v. First Nat. Bank, etc., 83 Hun. 78; 31 N. Y. Supp. 364.) Hence, such executor, on proof that all the debts of the testator have been paid, may avail himself of a demand, due the estate as a counterclaim in an action against him. See Matter of Van Houten, 18 App. Div. 301; 46 N. Y. Supp. 190.

⁴⁴ Hunnier v. Rogers, 55 Barb. 85.

⁴⁵ Sacia v. Berthoud, 17 Barb. 15; Cooper v. Weston, 16 St. Rep. 937; Cooper v. Illinois Cent. R. Co., 38 App. Div. 22; 57 N. Y. Supp. 925; First Nat. Bank, etc. v. National, etc., Bank, 156 N. Y. 459; Marshall v. De Cordova, 26 App. Div. 615; 50 N. Y. Supp. 294. See Matter of Holmes, 37 App. Div. 15; 55 N. Y. Supp. 708; affd., 159 N. Y. 532; Van Vleck v. Enos, 88 Hun. 348; 34 N. Y. Supp. 754; Isham v. Post, 71 Hun. 184;

sons entitled to it, and the next of kin have always the right to file a bill to enforce the trust, even if the rights which they assert depend on the invalidity of the will under which the executor qualified.⁴⁶ So, an executor who purchases land with trust funds, when no such power is given him in the will, is, nevertheless, invested with the full legal title, though, between the executor and his beneficiaries, it is impressed with a trust which they can enforce; and since the title does not come to him under the will, his want of power to mortgage under that instrument does not apply, and a mortgage executed by him on the property is valid.⁴⁷

§ 523. **Merger of title.**—Notwithstanding the representative character of an executor or administrator, the property held by him at first in that character may become his own to his own use, by intermixing it with, so as to become indistinguishable from, his own property — *e. g.*, money of the decedent deposited in bank, in common account with his own funds.⁴⁸ Such moneys are subject to the executor's individual debts, and in case of the insolvency of the bank, the loss is his own and not that of the estate. So, at common law, an executor who is a creditor of the deceased, or who pays the debts of the deceased with his own money, acquires and becomes vested with the absolute ownership of the assets in his hands, to the extent of the debt owed to, or money paid by, him,—in the first case, the title vesting at his election, in the latter, by operation of law.⁴⁹ This principle does not, however, warrant the con-

reved., on other points, 141 N. Y. 100; *Suarez v. Montigny*, 1 App. Div. 494; *affd.*, 153 N. Y. 678. Thus an executor or administrator cannot make a valid sale or pledge of the assets, as a payment of or security for his own debt, since the very nature of the transaction implies notice to the purchaser or mortgagee, of his participation in the misapplication. (*Sutherland v. Brush*, 7 Johns. Ch. 21; *Field v. Schieffelin*, *id.* 153.)

⁴⁶ *Read v. Williams*, 27 St. Rep. 505; 8 N. Y. Supp. 24; *affd.*, 125 N. Y. 560.

⁴⁷ *McLean v. Ladd*, 66 Hun. 341; 21 N. Y. Supp. 196. See *Butler v. Walsh*, 48 App. Div. 459; *Roarty v. McDermott*, 146 N. Y. 296.

⁴⁸ Where the trustee, having mingled the money with his own, without making distinction, died;—Held, that there was no necessity for the appointment of a new trustee, for the trust fund had not been kept separate,

and nothing remained but to compel the executor of the deceased trustee to pay the indebtedness of the estate to the distributees. (*Graham v. De Witt*, 3 Bradf. 186.)

⁴⁹ In *Abell v. Bradner* (39 St. Rep. 5; 15 N. Y. Supp. 64), an administrator had purchased, at a foreclosure, property belonging to the estate, declaring that he did so in the interest of himself and the heirs. Held, that he had a right, in order to protect himself as a creditor of the estate, to retain the title until his just demands upon it were satisfied, and that his accountability was limited to the fair rental value of the property. See *Livingston v. Newkirk*, 3 Johns. Ch. 312. In *Haberman v. Baker* (128 N. Y. 253), upon the foreclosure of a mortgage belonging to the estate, the mortgaged premises were bought in by the administrator. Held, that the premises so acquired took on the character of the mortgage indebtedness

clusion that an executor or administrator can give himself a preference over other creditors. Under the existing statute, he must include his liability in the accounting, and he makes any such appropriation meanwhile at his peril.⁵⁰

§ 524. **Joint tenancy of representatives.**— Every estate vested in two or more executors or administrators, as such, is held by them in joint tenancy.⁵¹ They are to be considered as one person, and as having but one joint and entire estate in the property of the decedent. The death of either does not change the quality of the estate; the survivor is vested with the interest of his deceased companion. Therefore, the acts of any one of them relating to the management and disposition of the assets are to be deemed the acts of all.⁵² Thus, two executors, against the will of their co-executor, may compromise, and release a mortgage or other debt of the estate.⁵³ But where the will requires an act to be done by the executors jointly, the death of one of them prevents performance.⁵⁴ Where two executors or administrators take an obligation to themselves jointly as representatives of their decedent, for a debt belonging to his estate, one of them can receive payment and lawfully discharge the obligation.⁵⁵ Two or more qualifying testamentary trustees cannot, like executors, act separately, but all must join in receipts and conveyances. A deed by two, while a third, who is qualified to act, is living, is not valid.⁵⁶ But when the founder of the trust expressly authorizes a majority to act and to execute their acts, their execution of the duties of the trust, in good faith, is valid and effectual.⁵⁷ If one or more of the executors, on whom is conferred a power of sale, fail to take upon him

and were to be regarded as personalty which the administrator could dispose of and must account for as personalty. To pass a good title it was not necessary that the heirs of the decedent nor his residuary devisee should join in the administrator's conveyance, and this, although the decedent had, as mortgagee, taken possession of the premises in his lifetime in order to satisfy the mortgage debt out of the property mortgaged, but had not held it long enough to gain a title by adverse possession.

⁵⁰ See Co. Civ. Proc., § 2719 (former § 2739).

⁵¹ 1 R. S. 727, § 44; L. 1896, c. 547, §§ 56, 146, 154. See *Davis v. Kerr*, 3 App. Div. 322; 38 N. Y. Supp. 387.

⁵² *Wheeler v. Wheeler*, 9 Cow. 34; *Bogert v. Hertell*, 4 Hill, 492; 9 Paige,

52; *Murray v. Blatchford*, 1 Wend. 583; *Jackson v. Robinson*, 4 id. 436; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Douglass v. Satterlee*, 11 Johns. 16; *Gardner v. Miller*, 19 id. 188; *Brennan v. Lane*, 4 Dem. 322, and cases cited.

⁵³ *Murray v. Blatchford*, 1 Wend. 583. Compare *Wheeler v. Wheeler*, 9 Cow. 34; *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

⁵⁴ *Herriott v. Prince*, 87 Hun. 95; 33 N. Y. Supp. 970; *affd.*, 155 N. Y. 5.

⁵⁵ *People v. Keyser*, 28 N. Y. 226.

⁵⁶ *Ridgeley v. Johnson*, 11 Barb. 527; *Earle v. McGoldrick*, 15 Misc. 135; 36 N. Y. Supp. 803; *Egbert v. McGuire*, 36 Misc. 245; *Wilder v. Ranney*, 95 N. Y. 7, and cases cited.

⁵⁷ *Crane v. Decker*, 22 Hun. 452. See *House v. Raymond*, 3 id. 44.

the execution of the will, then any sale made by those who take upon themselves the execution thereof is valid, as if the others had joined.⁵⁸ This is merely declaratory of the common law.⁵⁹ The statute applies as well to the case of a mere power of sale, or where there is a discretion given to the executors to determine whether the land shall be sold or not, as to the case of a positive order that the land be sold.⁶⁰ The refusal of one of the executors to act may be proved like any other matter *in pais*; a renunciation is not necessary.⁶¹

§ 525. **Suits between co-executors, etc.**—As two or more representatives are joint tenants, each having the same right to the possession of the fund, it follows that, *at law*, one executor or administrator cannot sue his co-executor or administrator, to recover a debt due from the latter to the testator or intestate. It is otherwise in equity, where such an indebtedness can be ascertained, and such disposition of the fund made as justice and equity require.⁶² Hence, in a case where a mortgagor, being appointed one of the executors of the will of the mortgagee, accepts the trust and qualifies, his co-executor having accepted and qualified, may proceed to revive the suit against the mortgagor co-executor.⁶³ But one executor cannot maintain an action against his co-executor to compel the latter to place the securities and papers of the estate in his possession in the custody of a bank, or that both he and the plaintiff deposit all moneys thereafter collected therein, to be drawn out only on their joint check; and it is no ground for such an action that the defendant maintains exclusive manual possession of the securities belonging to the estate, and refuses to deliver over any portion thereof to the custody of his co-executor, it not ap-

⁵⁸ 2 Rev. Stat. 109, § 55: *Sullivan v. Fosdick*, 10 Hun. 181; *Barber v. Barber*, 17 id. 73.

⁵⁹ *Davoue v. Fanning*, 2 Johns. Ch. 252; *Ogden v. Smith*, 2 Paige, 195; *Niles v. Stevens*, 4 Den. 399; *Bunner v. Storm*, 1 Sandf. Ch. 357; *Conover v. Hoffman*, 1 Bosw. 214.

⁶⁰ *Taylor v. Morris*, 1 N. Y. 341; *Leggett v. Hunter*, 19 id. 445.

⁶¹ *Roseboom v. Mosher*, 2 Den. 61. And see *Sharp v. Pratt*, 15 Wend. 610; *Matter of Stevenson*, 3 Paige, 420. The renunciation or disclaimer of a devisee in trust need not be in such form as to pass an estate in the property devised. In the absence of proof to the contrary, such devisee is pre-

sumed to accept the trust estate; but he cannot be vested with it against his will. Where it was in writing, and acknowledged so as to be received in evidence without further proof, it was held sufficient. (*Burritt v. Silliman*, 13 N. Y. 93.)

⁶² *Rogers v. McGuire*, 75 Hun. 133; 27 N. Y. Supp. 276.

⁶³ *McGregor v. McGregor*, 35 N. Y. 218. And see *Decker v. Miller*, 2 Paige, 150; *Smith v. Lawrence*, 11 id. 206; *Wurts v. Jenkins*, 11 Barb. 546. As to a suit by one executor against another, who is a surviving partner of decedent, for an accounting, see *Simpson v. Simpson*, 44 App. Div. 492.

pearing that the interests of the beneficiaries under the will are jeopardized by such exclusive possession.⁶⁴

§ 526. **Survivorship.**— In case of the death of one of several executors, the surviving executor and trustee, or a surviving administrator, has the right to the exclusive possession of the property.⁶⁵ It is not unusual for a will to confer upon the survivor of two or more executors or trustees the power of appointing a successor. In such a case, it is not imperative that such appointment should be made, and if none is made, the trust may be carried out by the survivor alone.⁶⁶

§ 527. **Substituted trustees.**— Where all the trustees decline the trust, or die, or are removed, the trust is not defeated, nor the title to the real property affected,⁶⁷ but the execution of the trust devolves upon the court, which may appoint others in their place,⁶⁸ and the trust estate vests in the appointees, as fully as if they had been originally named in the will.⁶⁹

It is well settled that the court has power to clothe the substituted trustee with all the powers of the one superseded by death or removal.⁷⁰

A trust, conferred upon the executor or “whoever shall execute this my will” is not a personal trust, or confidence, but can be exercised by any person lawfully appointed to execute the will.⁷¹

A trustee cannot continue the trust after his death by will, whether the trust be of real or personal estate.⁷² The old rule that a trust of personal property, upon the death of the trustee, devolved upon his personal representatives, is now abrogated by stat-

⁶⁴ *Burt v. Burt*, 41 N. Y. 46, limiting *Wood v. Brown*, 34 id. 337. And see *Quackenboss v. Southwick* (41 id. 117) as to the remedy in such a case of the beneficiaries under the will. But now, the Code expressly confers upon the Surrogate's Court ample power to interfere in such cases. (See § 520, *ante*.)

⁶⁵ *Shook v. Shook*, 19 Barb. 653; *House v. Raymond*, 3 Hun. 44; *Davis v. Kerr*, 3 App. Div. 322; 38 N. Y. Supp. 387.

⁶⁶ *Belmont v. O'Brien*, 12 N. Y. 394.

⁶⁷ See *Paget v. Stevens*, 143 N. Y. 172; 62 St. Rep. 193.

⁶⁸ *King v. Donnelly*, 5 Paige, 46; *De Peyster v. Clendining*, 8 id. 295; *McCosker v. Brady*, 1 Barb. Ch. 329; *Quackenboss v. Southwick*, 41 N. Y. 117. See Co. Civ. Proc., § 2818; §§ 322, 454, *ante*.

⁶⁹ See *Myers v. McCullagh*, 63 App. Div. 321. Provision is made by statute (Co. Civ. Proc., § 2814) for the resignation of trustees upon petition. Independently of the statute, the court has no power, upon a mere petition, to discharge a trustee without consent of all parties. (*Matter of Van Wyck*, 1 Barb. Ch. 565; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Cruger v. Halliday*, 11 Paige, 314.) As to the power to remove a trustee on good cause shown, and to substitute another in his stead, see §§ 449–455, *ante*.

⁷⁰ *Leggett v. Hunter*, 19 N. Y. 445; *Ross v. Roberts*, 2 Hun. 90.

⁷¹ *Royce v. Adams*, 123 N. Y. 402; 33 St. Rep. 622. As to the powers and duties of an administrator with the will annexed, see § 334, *ante*.

⁷² *Fonda v. Penfield*, 56 Barb. 503.

ute. All unexecuted express trusts now vest in the Supreme Court.⁷³

In respect to real property, inasmuch as a power to sell lands, conferred upon executors, is derived from the will and not the probate, it was always doubtful whether, in any case, a power relating to realty would pass to an administrator with the will annexed. It is true that the statute confers, upon administrators with the will annexed, "the same duties, rights, and powers as if they had been named executors in the will;"⁷⁴ but the weight of authority is in favor of the view that the statute has reference only to personalty,⁷⁵ and is not applicable to realty or to a discretionary power, or to a gift in trust, or to a power inseparably connected therewith.⁷⁶

SUBDIVISION 2.

THE QUANTITY OF THE ESTATE.

§ 528. **In general.**— The whole personal estate of the deceased, both at law and in equity, including debts, accounts, things in action, and every species of personal property, not expressly excepted by the statute, vests in the executor or administrator. He alone is entitled to represent the deceased in respect of his personal property,⁷⁷ and he has the same right to the possession of the estate as the decedent would have, if living, and the same remedies for its recovery and protection.⁷⁸

On the other hand, it may be stated, as a general rule, that all rights in the real estate are represented solely by the heir or devisee, who alone can sue in respect of injuries done to it. There

⁷³ L. 1882, c. 185; L. 1897, c. 417, § 8, as amended by L. 1902, c. 150; L. 1896, c. 547, § 91, as amended by L. 1902, c. 151. For former rule, see *Bunn v. Vaughan*, 1 Abb. Ct. App. Dec. 253; 3 Keyes, 345. See *Brink v. Layton*, 2 Redf. 79; *Robinson v. Schmitt*, 17 App. Div. 628; 45 N. Y. Supp. 253.

⁷⁴ 2 R. S., 72, § 22.

⁷⁵ *Conklin v. Egerton*, 21 Wend. 430.

⁷⁶ *Dominick v. Michael*, 4 Sandf. 374; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; *Beekman v. Bonsor*, 23 id. 298; *Roome v. Philips*, 27 id. 357; though, in the latter case, *Davies, J.*, said, that if the question were new, he should say the statute applied to real property. The trust, in such a case, devolves upon the Supreme Court, which will appoint a trustee to ex-

cute the trust power under the will. For a case where an imperative power of sale was held properly exercised by an administrator *c. t. a.*, see *Clifford v. Morrell*, 22 App. Div. 470. See § 335, *ante*.

⁷⁷ While it is true that the appointment of an executor vests in him all the personal estate of the testator, yet if it can be collected, from any circumstance or expression in the will, that the testator intended his executor to have only the office, and not the beneficial interest, equity will give effect to such an intention, and the executor will be deemed a trustee for those on whom the law would have cast the surplus, in case of a complete intestacy. (See *Story's Eq. Jur.*, § 1208.)

⁷⁸ *Patchen v. Wilson*, 4 Hill, 57.

are two classes of representatives therefore: *personal representatives*,—that is, executors or administrators; and *real representatives*,—that is, the heir or devisee. By the use of the term “representative,” it is not meant to imply that a man, regarded as an individual, and apart from his rights in and to property, continues his existence by representation. By death, all the accrued rights of an individual as such are extinguished; and strictly personal causes of action, as for attacks upon his life, his liberty, or his reputation, do not survive him, even though suit has been commenced on them; and actions against him for the like causes perish in like manner, according to the maxim, *actio personalis moritur cum persona*.⁷⁹

§ 529. **What are assets to be accounted for.**—We had occasion, in connection with the subject of the inventory and appraisal of the estate, to give the statutory enumeration of the classes of articles which ought to be inventoried, but reserved, for subsequent consideration, the subject of what are assets for which an executor or administrator is accountable, so far, at least, as the adjudications of our own courts have settled the principles involved. Personal property may be either in possession, that is, where the deceased had not only the right to enjoy, but also the actual enjoyment; or in action,—that is, where he had not the occupation, but merely a right to occupy the thing in question, the possession whereof may, however, be recovered by action; from whence the thing so recoverable is called a thing or chose in action.⁸⁰

The executor or administrator may enter upon premises descended to the heir, for the purpose of removing the goods, and it is his duty to acquire possession of such books of account and title deeds or papers of the deceased as will inform him of the nature and amount of the estate.⁸¹ In an accurate and legal sense,

⁷⁹ Executors and administrators represent, in all matters in which the personal estate is concerned, the person of the testator or intestate, as the heir does that of the ancestor. (Lee v. Dill, 39 Barb. 516; disapproving McCray v. McCray, 12 Abb. Pr. 1.) For the meaning of the term “legal representatives,” as used in the Statute of Distribution, see *post*, tit. 8, of this chapter.

⁸⁰ Wms. on Exrs. (6th Am. ed.) 862.

⁸¹ Prior to the marriage of deceased she owned a farm and the personal property thereon. Held, that evidence

that deceased at times made incidental statements that the increase of the farm belonged to her husband, was not sufficient to overcome the presumption that the property remained hers, and that her administrator should include such personal property in his inventory. (Matter of Wheeler, 28 St. Rep. 638; 8 N. Y. Supp. 385.) Moneys contributed by the heirs to produce an annuity given by the will, are not to be accounted for by the executor. (Matter of Collins, 144 N. Y. 522; 64 St. Rep. 48.) Nor are securities, given by testator in his lifetime to one named as executor in his will, to

all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets; but, in a larger sense, all the property of the deceased which is chargeable with his debts or legacies, and is applicable to that purpose, is to be deemed assets.

Where a question arises, as to whether certain effects are assets of the estate, or are the individual property of the representative, the latter may, by his own acts, be concluded from claiming them.⁸² Personal property of a nonresident testator may vest in the executor, under a will which would be void if the former had resided here.⁸³

distribute the proceeds thereof. (Matter of Cooper, 6 Misc. 501; 27 N. Y. Supp. 425.) But where, in such case, specified amounts are to be paid out of the proceeds, the surplus, if any, must be accounted for. (Bliss v. Fossdick, 76 Hun. 508; 27 N. Y. Supp. 1053.) Evidence that the intestate gave to his wife money with which to purchase furniture, which she did, without further evidence tending to show a gift, either of the money or furniture, to her as her separate property, is not enough to exonerate her from accounting for it as administratrix. (Matter of Ward, 2 Redf. 251; S. P., Matter of James, 78 Hun. 121; 28 N. Y. Supp. 992; affd., 146 N. Y. 78.) The mere handing of property, by the alleged donee thereof, to the executor on his claim that it should be inventoried, without any intent to make a gift thereof to the estate, does not work a transfer of title so as to make it assets. (Van Slooten v. Wheeler, 70 Hun. 55; 27 N. Y. Supp. 666; revd., on another point, 145 N. Y. 327.) And see Gannon v. McGuire, 160 id. 476; Matter of Farmers' L. & T. Co., 47 App. Div. 448.

⁸² Garvey v. McCue, 3 Redf. 313; revd. on another point, 14 Hun. 562. In that case, one who, having received letters of administration upon the estate of his wife, swore that she left an estate, and filed his account, in which certain moneys were returned as constituting the whole estate, was held estopped, as against a creditor of the estate, from claiming the moneys as his own individual property. See Butler v. Weeks, 12 Misc. 192; 33 N. Y. Supp. 1090; Dorland v. Dorland, 59 App. Div. 37; 69 N. Y. Supp. 179.

⁸³ Despard v. Churchill, 53 N. Y. 192. In that case, a resident of Cali-

fornia dying seized of certain leasehold estates for years, in lands situated in this State, left a last will and testament, void, in its material provisions, under the statutes of this State, but valid by the laws of California. A portion of the executors named in the will were residents of this State, and these were charged with the care and administration of the property here. Held, that the leasehold estates were to be treated as personalty, and to be governed by the law of the testator's domicile; but that the courts of this State would not aid in carrying out here bequests contrary to its statute laws, and that the assets here, after paying therefrom certain legacies, valid under the laws of this State, and directed to be paid by the executors here, should be remitted to California, to be there distributed. To the same effect. Simonson v. Waller, 9 App. Div. 503.

Foreign assets.—Personal property has no status or locality, except as it follows the owner's person; and wherever situate, the representative is the proper person to collect and receive it. Hence, assets belonging to a deceased resident, situated in another State, must be included in the inventory of the assets filed by his executor, to whom letters testamentary are issued here, unless an executor has been appointed in the foreign State. (Sherman v. Page, 85 N. Y. 123.) It is not sufficient for the appraisers to include only such property as "shall be exhibited to them," but *all* the property of which they have any knowledge should be included. (Matter of Butler, 38 N. Y. 397.) Where a policy of insurance issued by a New York company, to a resident of another State, was at the time of the

The complicated questions growing out of the doctrine of equitable conversion cannot be considered here;⁸⁴ nor is it necessary to enlarge upon the subject of the different kinds of chattels, real and personal, which is fully treated in standard works of authority.⁸⁵

§ 530. **Real property.**— With respect to the real estate, unless it is devised to the executor upon an express trust, the heir or devisee is the only person who has the right to its possession and enjoyment, except where it may be required to satisfy the debts of the deceased.⁸⁶ The same is true of an interest in a contract for the purchase of lands by the decedent.⁸⁷ Such an interest descends to the heirs of the purchaser,⁸⁸ and the purchase-money passes to the executor of the vendor as part of the assets.⁸⁹

insured's death, and had since been, in a foreign jurisdiction in the possession of the insured or of his administrator.—Held, that a public administrator in this State, never having obtained the title to the policy, or a right to its possession, could not enforce its payment. (*Morrison v. Mut. L. Ins. Co.*, 57 Hun, 97; 32 St. Rep. 846.) See *Holyoke v. Mutual Ins. Co.*, 22 Hun, 75; *affd.*, 84 N. Y. 648; *Sulz v. Mutual Reserve, etc., Assn.*, 145 id. 563; *Simonson v. Waller*, 9 App. Div. 503.

⁸⁴ On this subject see § 269, n. 33, *ante*, and in addition to the cases there cited, the following: *Hatch v. Bassett*, 52 N. Y. 359; *Ross v. Roberts*, 63 id. 652; *affg.*, 2 Hun, 90; *Gourley v. Campbell*, 66 N. Y. 169; *Fisher v. Banta*, id. 468; *Newell v. Nichols*, 75 id. 78; *affg.*, 12 Hun, 604; *Betts v. Betts*, 4 Abb. N. C. 317; *Barnes v. Hathaway*, 66 Barb. 452; *Sage v. Lockman*, 53 How. 276; *Power v. Cassidy*, 54 id. 4; *Gano v. McCunn*, 56 id. 337; *Shumway v. Harmon*, 4 Hun, 411; *Graham v. Livingston*, 7 id. 11; *Kelly v. Hoey*, 35 App. Div. 273; *Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Hope v. Brewer*, 136 id. 126; *Matter of Tatum*, 169 id. 514; *Miller v. Gilbert*, 144 id. 68; *Matter of Young*, 145 id. 535; *Salisbury v. Slade*, 160 id. 278; *McDonald v. O'Hara*, 144 id. 566; *Thompson v. Hart*, 58 App. Div. 439; *Mansbach v. New*, id. 191; *affd.*, 170 N. Y. 585; *Merritt v. Merritt*, 32 App. Div. 442; *affd.*, 161 N. Y. 634; *Matter of Hosford*, 27 App. Div. 427; *Mutual L. Ins. Co. v. Bailey*, 19 id.

204; *Baker v. Baker*, 18 id. 189; 157 N. Y. 671; *Matthews v. Studley*, 17 App. Div. 303.

⁸⁵ See *Wms. on Exrs.* (6th Am. ed.) 746–817; 3 *Redf. on Wills*, 351.

⁸⁶ See *Matter of Tompkins*, 154 N. Y. 634; *Butler v. Townsend*, 84 Hun, 100; 31 N. Y. Supp. 1094; *Craver v. Jermain*, 17 Misc. 244; 40 N. Y. Supp. 1056. The heir has a property in the monuments of his ancestors, but not in their ashes. (*Matter of Brick Presbyterian Church*, 3 Edw. 155.) On the death of a tenant *pour autre vie*, the estate becomes a chattel real, and goes to the personal representative. (1 R. S. 722, § 62; id., 82, § 6; *Reynolds v. Collin*, 3 Hill, 441.) An equitable estate of the wife for the life of the husband belongs, on her death, to her administrators, and, therefore, goes to her husband without administration. (*Norton v. Norton*, 2 Sandf. 296.) Where a will confers a power of sale on the executor and gives the proceeds to persons named therein, the executor takes no title to the real estate and cannot maintain ejectment. (*Smith v. Chase*, 90 Hun, 99; 35 N. Y. Supp. 615.)

⁸⁷ See § 492, *ante*.

⁸⁸ If, however, the administrator of the purchaser receives rents for such land accruing after the death of the intestate, he must account for them, as well as for the sum realized by him upon a sale of his intestate's interest in the land. (*Griffith v. Beecher*, 10 Barb. 432.)

⁸⁹ See *Williams v. Haddock*, 145 N. Y. 144; 64 St. Rep. 564.

An administrator, as such, has no authority or control over the real estate of his intestate, and owes no duty to the heirs.⁹⁰ He is not, therefore, precluded from purchasing such real estate, upon a foreclosure sale, in his own right.⁹¹

Where real estate, of which the decedent died seized, is incumbered by a mortgage which is foreclosed after his death, and the land is sold, any surplus arising on the sale is to be regarded as realty, and goes to the heirs or devisees, not to an administrator, although the mortgage provides that the surplus shall be paid to the mortgagor, his executors or administrators;⁹² and the same is true as to proceeds of lands sold in partition.⁹³ But land bought in by executors, on a foreclosure of a mortgage belonging to the estate, is to be treated as personal property,⁹⁴ and a Surrogate's Court has jurisdiction to direct an accounting in respect thereto, where the administrator, through a mesne conveyance, has acquired title in his individual name. It is not necessary to first proceed in equity for the imposition and declaration of a trust.⁹⁵

The payment, by an administrator, of debts secured by mortgage upon the decedent's real estate, is unauthorized; but where this was done to prevent an anticipated foreclosure and the expense thereof, it having become apparent that the equity of redemption would have to be sold, by order of the surrogate, to pay debts, it was held that the items might properly appear among the administrator's credits, since, presumptively, the land brought as much more at the sale, as the amount paid in discharge of the debt, and the amount was properly allowed, out of the proceeds, on the principle of subrogation.⁹⁶

On the same principle of subrogation, where the only property of the estate was certain land which the administrator redeemed from a sale for unpaid taxes, the amount of such payments may be allowed him as a preferred claim.⁹⁷

⁹⁰ Hollingsworth v. Spaulding, 54 N. Y. 636; Hillman v. Stephens, 16 id. 278; Brevoort v. McJimsev, 1 Edw. 551; Griffith v. Beecher, 10 Barb. 432; Matter of Woodworth, 5 Dem. 156.

⁹¹ Hollingsworth v. Spaulding, *supra*; Matter of Monroe, 142 N. Y. 484; 60 St. Rep. 102.

⁹² Dunning v. Ocean Nat. Bank, 61 N. Y. 497. This rule was not changed by the provisions of the act (L. 1867, c. 658; revised in Co. Civ. Proc., §§ 2798, 2799), which requires such surplus to be paid to the surrogate, to be disposed of, on the application of an executor or administrator, that

statute being designed merely to provide for the application of the surplus to the payment of debts, if required for that purpose, and not otherwise affecting the rights of heirs or devisees. (Ib.)

⁹³ Matter of Gedney, 33 Misc. 160; 68 N. Y. Supp. 627.

⁹⁴ Lockman v. Reilly, 95 N. Y. 64; Yonkers Sav. Bank v. Kinsley, 78 Hun, 186; 28 N. Y. Supp. 186.

⁹⁵ Matter of Gilbert, 39 Hun, 61.

⁹⁶ Stilwell v. Melrose, 15 Hun, 378. See § 523, note 49, *ante*.

⁹⁷ Jones v. Le Baron, 3 Dem. 37; 6 Civ. Proc. Rep. 62.

§ 531. **Land regarded as money, and money as land.**—A devise of realty to an executor, in trust to sell, will, of course, vest the title in him.⁹⁸ And as equity will consider as actually done that which ought to be done, land is, under some circumstances, regarded as money, and money as land—as where the will directs that the land shall be sold, or that money shall be laid out in land. A devise directing lands to be sold and the proceeds to be divided, etc., is, therefore, a disposition of money and not of land, and is good, as a power to the executors to sell, although they are not expressly named as the donees of the power. In selling under such a power, the executor acts in his character as such, and not as trustee,⁹⁹ and is accountable, in the Surrogate's Court, for the proceeds of any sale made by him, as he is also for the rents and profits.¹

A mere authority to executors to sell real estate in a certain contingency and divide the proceeds among certain specified persons, does not, however, vest the estate in the executors. It is simply a power, and the land passes at once to the devisees, subject only to the execution of the power.² So where the will devises lands, and, by a subsequent clause, gives power to the executors to sell the same for a minimum sum and invest the proceeds for the benefit

⁹⁸ *Glacius v. Fogel*, 88 N. Y. 434.

⁹⁹ *Meakings v. Cromwell*, 5 N. Y. 136.

¹ Co. Civ. Proc., § 2726, subd. 4, as amended 1893. See *Clark v. Clark*, 8 Paige, 152; *Stagg v. Jackson*, 1 N. Y. 206; *Bloodgood v. Bruen*, 2 Bradf. 8; *Matter of Collins*, 70 Hun, 273; 24 N. Y. Supp. 226; *affd.*, 144 N. Y. 522. As to proceeds of realty in another State, see *Peck v. Mead*, 2 Wend. 470; *Mead v. Merritt*, 2 Paige, 402. An opinion was intimated in *Bolton v. Jones* (6 Robt. 166, 228), that a trustee, named as such and also as executor, might execute a naked power as to real estate, without qualifying as executor. No allusion was made to the statute forbidding an executor's interference with the estate before letters granted. The case has been distinctly overruled, on another point (*Bolton v. Schriever*, 135 N. Y. 75), and discredited, on this point (*Humbert v. Wurster*, 22 Hun, 405; *Clapp v. Brown*, 4 Redf. 200.) See *Newton v. Bronson*, 13 N. Y. 587; *Judson v. Gibbons*, 5 Wend. 224; *Doolittle v. Lewis*, 7 Johns. Ch. 48. Where an executor, without authority, invests estate funds with his own in

the purchase of real estate, the surrogate may treat the land as personalty and compel him to account therefor. (*Matter of Leonhard*, 86 Hun, 289; 33 N. Y. Supp. 302.)

² *Scott v. Monell*, 1 Redf. 431; *Matter of Johnson*, 32 App. Div. 634; 52 N. Y. Supp. 1081; *Braunsdorf v. Braunsdorf*, 23 id. 722; *Matter of Collins*, 144 N. Y. 522; 64 St. Rep. 48. Compare *Re Vandervoort*, 1 Redf. 270. In *Vernon v. Vernon* (53 N. Y. 351), the testator gave to his wife an annuity, to be paid by the executors out of his share in the rents of certain stores of which he was part owner, and, if they proved insufficient, then from the interest of other property. The executors were also authorized to sell the stores at a minimum price stated. Held, that the power to receive rents and profits was necessarily implied from the duty enjoined, to apply them: that the executors took, as trustees, the legal title during the life of the wife, for the purpose of the trust, and—there being no residuary clause in the will—that the lands descended to the testator's heirs, upon his death, subject to the trust estate.

of the devisee during life, the executors take no title, but the devisee takes a fee, subject to the execution of the power of sale.³

A power in executors to sell lands will not be implied from the fact that the lands are charged with the payment of debts.⁴ But the proceeds of lands sold by an executor, even under a discretionary power of sale, although such sale was not necessary for the execution of the trust at the time it was made, may be regarded as assets in his hands, and applicable, when there is a deficiency of assets, to the payment of his own claim, established against the estate upon the judicial settlement of his account.⁵

§ 532. **Rents, etc., of real estate.**—Rent reserved to the deceased, in a lease, accrued at his death, may be recovered by the executor or administrator.⁶ But having no interest in the land, he cannot bring ejectment for condition broken.⁷ The statute⁸ also gives the executors or administrators the same remedy as the decedent had for the arrears of rent. But this statute is not applicable to the case of an action by husband and wife for rent of the wife's estate, payable to both, where the husband dies pending the suit. In such case, the cause of action survived to her.⁹

Where the will directs the sale of land by the executors, after a period named, it effects a conversion from that time, and the executors are thereafter entitled to the rents.¹⁰ But before execution of the power, they have no authority to collect the rents and profits; if they do so collect, they are accountable therefor, in the interest of the beneficiaries, and the insertion of the item in their account is properly made.¹¹

A gift for life of rents and income of real estate creates an

³ *Vernon v. Vernon*, *supra*. See (Priester v. Hohloch, 70 App. Div. Metzger v. Rankine, 69 App. Div. 264; 256: 75 N. Y. Supp. 405.)
⁷⁴ N. Y. Supp. 649.

⁴ *Matter of Fox*, 52 N. Y. 530.

⁵ *Matter of Powers*, 124 N. Y. 361; *O'Flynn v. Powers*, 21 N. Y. Supp. 905; *affd.*, 136 N. Y. 412.

⁶ *Co. Civ. Proc.*, § 2712, as amended 1893; §§ 489, 492, *ante*. As to the apportionment of rents, under L. 1875, c. 542 (*Co. Civ. Proc.*, § 2720, as amended 1893), see § 492, *ante*. See also, L. 1896, c. 547, § 192. The products of decedent's farm, worked on shares, which accrue after his death, do not constitute rent and are payable to the administrator. (*Matter of Strickland*, 10 Misc. 486; 32 N. Y. Supp. 171.) See *Matter of Foulds*, 35 Misc. 171; 71 N. Y. Supp. 473. Rent accruing after testator's death goes to the heir.

⁷ *Van Rensselaer v. Jones*, 5 Den. 449.

⁸ 1 R. S. 747, § 21.

⁹ *Jacques v. Short*, 20 Barb. 269.

¹⁰ *Shumway v. Harmon*, 4 Hun. 411. See *Smith v. A. D. Farmer, etc., Co.*, 16 App. Div. 438; 45 N. Y. Supp. 192.

¹¹ *Matter of Boyd*, 4 Redf. 154. A general devise to executors to sell and distribute, in a specified way, the proceeds of real estate, does not convert it into personalty, so as to make them accountable for such as has not been sold, as personalty, upon their final accounting, and, if a sale is not made within a proper time, the remedy is by application to the court to compel it. (*Matter of Hunter*, 3 Redf. 175.)

estate therein, and if no duties are charged upon executors with respect to their application, no estate or trust is created in them in respect thereto.¹²

§ 533. **Property in joint tenancy; partnership assets.**— In regard to joint property, or property which the decedent held jointly with another, the general rule is that the surviving joint tenant, and not the executor or administrator of the deceased joint tenant, takes it.¹³

But the law merchant makes an exception to this rule, in favor of the joint or partnership property of merchants and traders, and those engaged in undertakings in the nature of trade. Such property does not go to the survivor, but the share of the deceased partner goes to his executor or administrator.¹⁴ The surviving partner has power to settle the partnership concern with the representative, and the latter is responsible, in respect to the assets of the firm, only for the interest of the decedent in the surplus of the firm assets, after the settlement of the partnership accounts;¹⁵ and is not accountable for more than he received, unless error or fraud be shown. If he has made a voluntary settlement with the surviving partner, upon a statement of the partnership accounts, and received the amount found due to the decedent according to that statement, and there is nothing to show that he ought to have engaged in litigation to secure a settlement, the validity of the settlement may be sustained.¹⁶

¹² Matter of Blauvelt, 131 N. Y. 249; Macy v. Sawyer, 66 How. Pr. 381; Matter of Blow, 2 Connoly, 360; Matter of Goetschius, 2 Misc. 278; James v. Beesly, 4 Redf. 236; Carman v. Brown, 4 Dem. 96; Matter of Grant, 86 Hun. 617; 33 N. Y. Supp. 193; affd., 152 N. Y. 654. An equitable estate of a wife, for the life of her husband, is, on her death, assets. (Norton v. Norton, 2 Sandf. 296.)

¹³ Personal property owned jointly by husband and wife, *e. g.*, a bond and mortgage, at the death of one belongs to the survivor, and forms no part of the estate of the deceased. (Matter of Albrecht, 32 St. Rep. 193.) See Matter of Meehan, 59 App. Div. 156; 69 N. Y. Supp. 9 (joint deposit).

¹⁴ See Egberts v. Wood, 3 Paige, 517; Wilder v. Keeler, *id.* 166; Matter of Wormser, 51 App. Div. 441; 64 N. Y. Supp. 897. Whether property is a partnership asset is a question of the intention of the partners. (Mat-

ter of Hoagland, 51 App. Div. 347; affd., 164 N. Y. 573.) The several owners of a vessel are tenants in common, and must join or be joined in actions by or against them. If joined as defendants, and the death of one of them occurs, his executor or personal representative cannot be joined with the survivors. The executor is charged *de bonis testatoris*, the survivors *de bonis propriis*, and the judgment could not be thus rendered. (Wright v. Marshall, 3 Daly, 331.)

¹⁵ Thomson v. Thomson, 1 Bradf. 24.

¹⁶ Sage v. Woodin, 66 N. Y. 578; Montgomery v. Dunning, 2 Bradf. 220. Where the surviving partner is also the executor or administrator of the deceased partner, a statement of the partnership affairs is incidental to the settlement of the accounts of the executor or administrator, and, in a case of final accounting, is absolutely necessary. (Marre v. Ginochio, 2 Bradf. 165.) See Simpson v. Simp-

The surviving partner is entitled to the exclusive possession and management of the firm assets, for the purpose of selling and closing out the same, and is not required to file the books, to enable the next of kin to ascertain the interest of the decedent.¹⁷ He may, therefore, either with or without the consent of the representative of the deceased partner, make a general assignment for the benefit of the creditors of the business.¹⁸ Where a surviving partner dies, his executor takes the legal title to the partnership property for the purpose of settling his estate, but does not succeed him as surviving partner.¹⁹

On the other hand, real property of the partnership retains its character as realty between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations and the payment of

son, 44 App. Div. 492; 60 N. Y. Supp. 879. The books of the firm and the balance sheet, showing the amount due the estate, are evidence against him on his accounting. And if he claims that any deduction shall be made with reference to the uncertain value of the assets, the burden is upon him to show what corrections, if any, are to be made. (*Matter of Saltus*, 3 Abb. Ct. App. Dec. 243.) See *Matter of Ver Valen*, 24 N. Y. Supp. 133. As to the liability of the general estate for debts incurred by the representative in continuing decedent's business, see *Willis v. Sharp*, 113 N. Y. 586; 43 Hun, 434; s. c., 115 N. Y. 396; and tit. 5, art. 2 of this chapter, *post*.

¹⁷ *Waring v. Waring*, 1 Redf. 205; *Camp v. Fraser*, 4 Dem. 212. He is a trustee for the purpose of liquidation; and if he continues the business, and uses the assets of the old firm, he commits a breach of trust and misappropriates property upon which a lien has been impressed for the security of the representatives of the deceased partner. (*Hooley v. Gieve*, 9 Abb. N. C. 11.) See *Thomson v. Thomson*, 1 Bradf. 24; *Kastner v. Kastner*, 53 App. Div. 393; 65 N. Y. Supp. 756. And a purchaser of the interest of the survivor takes it subject to such trust which equity will enforce. (*Hutchinson v. Campbell*, 13 Misc. 152; 34 N. Y. Supp. 82.) Where, by the articles of copartnership the sur-

vivor has an option to purchase the interest of the other, the representatives of the deceased partner have a right to share in the profits up to the time the option is exercised. (*Hull v. Cartledge*, 18 App. Div. 54.) Where a testator bequeaths all the remainder of the stock, tools, machinery, and book accounts of a certain business, after payment of the debts and liabilities thereof, to certain legatees, an unsatisfied judgment obtained by testator in his lifetime for goods sold by him in the said business is an asset of the business, and not of the general estate. (*Matter of Quin*, 1 Connolly, 382.) Property which was the product of a business formerly carried on by the intestate, but after his death was conducted by an administrator in his own name,—Held not to be the property of the estate nor in the possession of the administrators to such an extent as to enable them to maintain conversion against third persons who acquired it. (*Kenyon v. Olney*, 39 St. Rep. 839; 15 N. Y. Supp. 416.) As to valuation of interest of deceased partner, see *Sands v. Miner*, 16 App. Div. 347; *Lowenstein v. Schiffer*, 38 id. 178.

¹⁸ *Beste v. Burger*, 110 N. Y. 644; 17 Abb. N. C. 162; *Williams v. Whedon*, 109 N. Y. 333; *Haynes v. Brooks*, 116 id. 487.

¹⁹ *McCann v. Hazard*, 36 Misc. 7; 72 N. Y. Supp. 45.

any balance found to be due from the one partner to the other, on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is, in equity, deemed to be changed into personalty.

On the death of either partner, his share of the land, if vested in both, or if in the survivor, his equitable title, descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected.²⁰

§ 534. **Goodwill of business.**—The goodwill of a decedent's business passes as an asset to his representative, and on his appropriating the business to his own use, he will be chargeable upon his accounting with the value thereof, but the right to use testator's name is not an asset for which a personal representative is accountable.²¹

§ 535. **Literary property.**—The executors or administrators of any person have also the same privileges as the person himself, to copyright a book, play, etc., of which he was the author, etc., and of vending a book copyrighted by him.²² But letters of correspondence are not assets in the hands of the receiver's personal representative, for the purpose of sale.²³

§ 536. **Life insurance moneys.**—Where the decedent had an insurance policy upon his life, payable to his executors or administrators, the fund is, of course, assets; so is an interest in a policy on the life of another.²⁴

Where a policy, payable to the widow or children, is issued by a company whose charter declares that such policies shall issue to the benefit of the payee, independently of the creditors of the person whose life is the subject of insurance, the fund is secured to the beneficiaries, and the husband or father cannot, by bequeathing the policy for other uses, defeat their right.²⁵ In case of such

²⁰ *Darrow v. Calkins*, 154 N. Y. 503; 49 N. E. 61.

²¹ *Kirkman v. Kirkman*, 20 Misc. 211; 45 N. Y. Supp. 373; *affd.*, 26 App. Div. 395; *Matter of Randell*, 8 N. Y. Supp. 652. Also held, in that case, that the representative was not liable for the value of the right to use the decedent's name in continuing his business, the right having been exercised illegally and not in accordance with L. 1880, c. 561.

²² U. S. R. S., p. 966, § 4952.

²³ *Eyre v. Higbee*, 35 Barb. 502; 22 How. Pr. 198. As to patent rights, see *Pitts v. Jameson*, 15 Barb. 310.

²⁴ *Johnson v. Smith*, 25 Hun. 171; *Matter of Miller*, 5 Dem. 381; *Gibbs v. Flour City Bank*, 86 Hun. 103; 34 N. Y. Supp. 195. See *Matson v. Abbey*, 70 Hun. 475; 24 N. Y. Supp. 284; 141 N. Y. 179.

²⁵ *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. 155. And see *Senior v. Ackerman*, 2 Redf. 302; *Matter of Wendell*, 3 How. Pr. (N. S.) 68.

a policy, as in the case of any life insurance for the benefit of the natural dependents of the deceased, the fund may, doubtless, be pursued as assets by creditors, but only in case, and so far as, it can be shown that it was procured by the payment of premiums in fraud of the creditors of the decedent.²⁶ Where a life policy is specifically bequeathed, the executor owes no duty to collect it.²⁷

§ 537. **Fire insurance policies.**— Such policies, on which moneys had become due by a loss before the decedent's death, are assets. Where the death occurs after insurance, and before a loss, the executor or administrator should give notice to the insurers to make the policy one for the benefit of "the estate," unless the property covered has clearly passed to particular persons as heirs or devisees, beyond any question of claim in favor of others. A policy thus continued by the personal representative, as well as one taken out by the deceased, and in terms payable to his personal representative, or one taken out in the first instance by the personal representative, will give him a right of action when a loss occurs;²⁸ but the question whether the fund accruing is assets or not will depend on the character of the property insured. The executor or the administrator, though he has no title to the realty — and the creditors have no lien thereon — nevertheless represents the creditors; and their interest, like that of a mortgagee, is insurable.²⁹

²⁶ By special statute, a wife may effect insurance on her husband's life, and if she survive, the insurance moneys will be payable to her or her children, except as to such part as may be secured by premium paid, in any year, out of the property of the husband, exceeding \$500. (L. 1840, c. 80; L. 1858, c. 187; L. 1866, c. 656; L. 1870, c. 277; L. 1873, c. 821.) See L. 1879, c. 248, as to the assignability or surrender of a wife's policy. Decedent had a policy of insurance upon his life which made the amount insured payable "to the said assured, his executors, administrators, or assigns, * * * for the benefit of his widow, if any." Held, that the money belonged to the widow and was received by the executor not as assets of the estate but as a trustee under the policy for the widow, and that a Surrogate's Court had, therefore, no jurisdiction to make an order directing the executor to pay such money over to the widow. (Matter of Van Dermoor, 42 Hun, 326.) See Matter of Gordon, 39 St. Rep. 909; 15 N. Y.

Supp. 502. The proceeds of a policy payable to one as trustee for her children do not, upon her death, pass to her executors. (Matter of McAleenan, 53 App. Div. 193; 65 N. Y. Supp. 907; *affd.*, 165 N. Y. 645.)

²⁷ Platt v. Moore, 1 Dem. 191.

²⁸ Lawrence v. Niagara Fire Ins. Co., 2 App. Div. 267; 37 N. Y. Supp. 811; *affd.*, 154 N. Y. 752.

²⁹ Wyman v. Wyman, 26 N. Y. 253; Herkimer v. Rice, 27 *id.* 163; Colburn v. Lansing, 46 Barb. 37; Clinton v. Hope Ins. Co., 45 N. Y. 454. The amount of a policy of insurance upon property which had been destroyed by fire was, with the assent of the life tenant of such property, deposited in bank to the credit of decedent and another who were joint owners of the remainder in such real estate after the life tenancy. Held, that the deposit of such money in the lifetime of the decedent constituted such insurance money personalty which would pass to decedent's personal representatives as assets. (Jagger v. Bird, 42 Hun, 423.) Moneys received on a policy of

§ 537a. **Benefit and trust funds.**— On the same principle a beneficiary-fund in a benefit association, to be paid to the family of a member after his death, does not form part of the assets of a deceased member.³⁰ They come within the scope of the statutes relating to the insurance of a man's life for the benefit of his family, and hence moneys which the executors had received thereunder are not assets in their hands, and cannot be disposed of as such, but should be applied in accordance with the terms of the trust, to the exclusion of the claims of decedent's creditors.³¹

So funds deposited by testator in a savings bank, in trust for another, belong to the latter, and are no part of such depositor's estate, and an action will lie against his executor in his individual capacity to recover such funds where it appears he has drawn the same from the bank.³²

§ 538. **Pension money.**— By the pension laws of Congress,³³ an accrued pension is declared not to be considered as a part of the assets of the pensioner's estate, nor liable to be applied to the payment of his debts, but shall inure to the sole benefit of the widow and children. This law of exemption is said to be founded on just views of human generosity, and should be liberally construed in favor of the debtor and his family.³⁴

fire insurance taken out after testator's death, and payable to his estate, are applicable to the payment of testator's debts. (Matter of O'Connell, 1 Misc. 50; 22 N. Y. Supp. 914.)

³⁰ Bown v. Supreme Council of Cath. Assn., 33 Hun. 263.

³¹ Matter of Palmer, 3 Dem. 129; Matter of Wendell, 3 How. Pr. (N. S.) 68. See Hellenberg v. B'nai Berith, 94 N. Y. 580. The disposition of moneys paid at a decedent's death by benefit associations of which he was a member, must be determined entirely by the constitution and by-laws of such associations, and such moneys are not assets of the decedent's estate for which his personal representatives are chargeable upon their accounting. (Matter of Brooks, 5 Dem. 326.) But where an administratrix has received such benefits from associations as funeral expenses, they must be deemed a reimbursement of amounts previously expended for that purpose. (Ib.) If the moneys are payable to the legal representatives of the member, of course the executor may receive them. (Sulz v. Mutual Reserve, etc., Assn., 145 N. Y. 563.)

³² Anderson v. Thomson, 38 Hun. 394. Compare Terry v. Bale, 1 Dem. 452; Crowe v. Brady, 5 Redf. 1; Seal-len v. Brooks, 54 App. Div. 248; 66 N. Y. Supp. 591; Robinson v. Appleby, 69 App. Div. 509; 75 N. Y. Supp. 1. The fact that decedent drew the interest on such deposit for several years does not overcome the presumption of a trust as to the principal, and where decedent, after a certain period, allows the interest to accumulate, it also should be included in the trust. (Matter of Collyer, 4 Dem. 24; Farleigh v. Cadman, 159 N. Y. 169.) See as to gifts *causa mortis*, tit. 4, art. 4 of this chapter.

³³ U. S. R. S., § 4718.

³⁴ Wilcox v. Hawley, 31 N. Y. 648; Shaw v. Davis, 55 Barb. 389; Lockwood v. Younglove, 27 id. 505; Van Beuren v. Loper, 29 id. 389. Moneys awarded by the Alabama Court of Claims on account of an "indirect claim" founded upon the payment of war premiums of insurance, being in the nature of a gratuity by the government, do not constitute assets which an administrator is entitled to distribute. They belong to the widow

Hence pension moneys received by a widow, and passing unexchanged for other property to her executor, are not liable for her debts, where she leaves children under sixteen years of age.³⁵ But otherwise, where the pensioner (decedent) received his pension money in his lifetime, and deposited it in bank, taking a certificate of deposit, which he had at the time of his death. The money collected on such certificate by the executor is assets applicable to the payment of debts.³⁶

§ 539. Damages by reason of decedent's death.— Where the death of a decedent who left, him or her surviving, a husband, wife, or next of kin, was caused by the wrongful act, neglect, or default of a natural person who, or a corporation which, would have been liable to an action therefor if death had not ensued, the executor or administrator may maintain an action to recover damages for the same, which are exclusively for the benefit of the decedent's husband or wife and next of kin, and when collected are to be distributed by the plaintiff among them, as if they were unbequeathed assets left in his hands, after payment of all debts and expenses of administration.³⁷

The damages, therefore, are not assets for the general purposes of administration. The expenses of the action, and the representative's commissions on the residue, are to be allowed by the surrogate, upon notice given in such a manner and to such persons as the surrogate deems proper.³⁸

§ 540. Property in action.— To entitle an executor or administrator to sue upon a contract, it is not necessary that he should be named in it. If, by the contract, money is payable to A., or to A. and his assigns, A.'s executor or administrator may sue for it. His right of action is exclusive also, and no words introduced into a contract or obligation can transfer to another his exclusive right of representation.³⁹ In order to vest a right of action in one named

and next of kin, and are protected from the claim of creditors. (*Matter of Cooley*, 6 Dem. 77.) See *Taft v. Marsily*, 47 Hun, 175.

³⁵ *Hodge v. Leaning*, 2 Dem. 553.

³⁶ *Beecher v. Barber*, 6 Dem. 129. And see *Tyler v. Ballard* (31 Misc. 54), where the widow had purchased land with pension moneys due her husband. See also *Matter of Liddle*, 35 Misc. 173; 71 N. Y. Supp. 474.

³⁷ Co. Civ. Proc., §§ 1902, 1903;

Snedeker v. Snedeker, 164 N. Y. 58. See *Shearman & Redfield on Negligence* (5th ed.), § 134. If the representative dies the action may be revived in the name of his successor. (*Mundt v. Glokner*, 24 App. Div. 110; 160 N. Y. 572.) See *McGahey v. Nassau El. R. Co.*, 51 App. Div. 281; affd., 166 N. Y. 617.

³⁸ Co. Civ. Proc., § 1903.

³⁹ *Dacey on Parties*, 207.

as executor in a will, it is essential, under our statutes, that he should qualify.⁴⁰

§ 541. **Survival of rights of action on contract.**— The general rule is that, with respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other duty, the right of action, on which the testator or intestate might have sued in his lifetime (with certain exceptions hereafter stated), survives his death, and is transmitted to his executor or administrator, whether the breach occurred in the lifetime, or after the death, of the decedent.⁴¹

In respect to rights arising out of real property, and proceedings relating thereto, they survive to the heir or the devisee; such as causes of action, in favor of the decedent, for waste of real property;⁴² or for injuries to it in the decedent's lifetime;⁴³ causes of action against the decedent, for specific performance of a contract to convey real property;⁴⁴ rights existing in favor of the decedent, to redeem real property from sale or by virtue of an execution.⁴⁵

⁴⁰ At common law, an executor might sue before probate; but, by 2 R. S. 71, § 16, he is prohibited from interfering with the estate, before letters granted, further than necessary for its preservation, and to pay funeral charges; and a plea in bar that he was not executor at the commencement of the action is good. (Thomas v. Cameron, 16 Wend. 579; Varick v. Bodine, 3 Hill. 444.) See Flinn v. Chase, 4 Den. 85; Matter of Flandrow, 28 Hun. 279; *ante*, §§ 130, 131. But where a wife dies intestate, and the husband afterward dies, leaving her assets which belonged to him as her survivor, unadministered, it is not necessary for his personal representatives to take out letters of administration on her estate, to enable them to institute suits for the recovery of such assets. But they may institute suits in their character of personal representatives of the husband, stating that he survived his wife. (Roosevelt v. Ellithorp, 10 Paige, 415; Lockwood v. Stockholm, 11 id. 87.)

⁴¹ Holbrook v. White, 13 Wend. 591. Thus, an administrator may have an action in his own name for an injury to personal property, intermediate the granting of letters and the death of the intestate. His title takes effect by relation. (Valentine v. Jackson, 9 Wend. 302; Babcock v. Booth, 2 Hill, 181.) The administrator has a right

to recover the purchase money due on a contract for the sale of land, made by the intestate in his lifetime, and may, *it seems*, extend the time of payment. (Schroeppel v. Hooper, 40 Barb. 425; Smith v. Gage, 41 id. 60.) But the interest of a purchaser in an executory contract of sale of land does not pass to his executor. (Griffith v. Beecher, 10 Barb. 432.) The personal representative may sue on a demand against a cotenant in common of the decedent, for his share of rents and profits. (Hannan v. Osborn, 4 Paige, 336.) Among the choses in action which thus go to the personal representatives, is a cause of action for a breach of a covenant of seizin (McKinstry v. Benson, 3 Johns. Cas. [2d ed.] 562), and of a covenant for title, if broken in the lifetime of the decedent (Beddoe v. Wadsworth, 21 Wend. 120); and though a covenant be purely personal, the death of the covenantor, after breach, does not extinguish the cause of action. (Mott v. Mott, 11 Barb. 127.) And so, as to a mortgage interest before foreclosure. (Demarest v. Wynkoop, 2 Johns. Ch. 461.)

⁴² Co. Civ. Proc., § 1652.

⁴³ See Co. Civ. Proc., § 2345; Reilly v. Erie R. Co., 63 App. Div. 415.

⁴⁴ 2 R. S. 114, § 4.

⁴⁵ Co. Civ. Proc., § 1447.

§ 542. **Contracts which do not survive.**— Contracts which, by their terms, are expressly limited to the lifetime of the deceased, or which, as matter of law, are determinable by the death of either party, do not survive, and no action can be maintained by or against the representative, for any alleged breach occurring after his death, though it may for breaches before death.⁴⁶ Contracts determinable by death, as a matter of law, are such as are obviously founded upon personal considerations — *i. e.*, made with reference to the personal qualities of the parties — such as an agreement to write a book, paint a picture, and contracts of apprenticeship and agency.⁴⁷

So, too, covenants which both run with the land and descend to the heir or devisee — *i. e.*, covenants which affect the freehold, — go to the heir, not only where he is not named, but also where the covenant is made with the covenantee and his executor. The heir is clearly the only person to sue for any breach of such covenant, after the death of the deceased. For breaches committed during the lifetime of the deceased, the rule seems to be that if there has been a formal breach of such covenants during the ancestor's lifetime, but the substantial damage has accrued after his death, the real, and not the personal representative is the proper plaintiff in an action on the covenant.⁴⁸

On the other hand, if the breach, though committed in the lifetime of the covenantee, has caused any damage to the personal estate, the personal representative may sue.⁴⁹ So, too, a covenant which does not run with the land — *e. g.*, a covenant in a lease not to cut down trees (the trees being excepted from the demise) — may be sued on by the personal representative.

§ 543. **Wrongs to the property of decedent.**— If a breach of contract affects the personal estate of the deceased, the representative can sue for the consequential damages. For example, an executor or administrator may maintain an action against the attorney of the deceased, for negligence in investigating a title to lands, in consequence of which the deceased took an insufficient title.⁵⁰

It is said that perhaps an action might be brought even for a

⁴⁶ See *Stubbs v. Holywell R. Co.*, L. R., 2 Exch. 311. ^{588.} Compare *Ricketts v. Weaver*, 12 Mees. & W. 718.

⁴⁷ As to a contract to build a house, see *Quick v. Ludborrow*, 3 Bulst. 30; 2 Wms. on Exrs. (6th Am. ed.) 1593, note.

⁴⁸ *Dacey on Parties*, 211.

⁴⁹ *Raymond v. Fitch*, 2 C., M. & R.

⁵⁰ *Knights v. Quarles*, 2 B. & B. 104. See *Fried v. N. Y. C. R. R. Co.*, 1 Sheldon, 1, for a review of rights of action under the statute which do and do not survive, and go to the executor and administrator.

breach of promise of marriage, if the representative could allege injury to the deceased's personal estate as a consequence of the breach of promise.⁵¹

The statute provides that for wrongs done to the property, rights, or interests of another (with the exceptions stated), for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contracts.⁵² Under this provision, it is held that an action is given against the executors for every injury by the testator, whether by force or negligence, to the property of another. The words "wrong done," extend to cases of nonfeasance.⁵³ The provision extends to a cause of action in favor of a husband against a railroad company, for the loss of services of his wife, who was injured in the act of leaving their cars, while a passenger, through their negligence.⁵⁴

§ 544. **Injuries to person of deceased.**—The general rule is, that, with some exceptions, an action for a personal wrong, *i. e.*, for injuries to the person, feelings, or reputation of the deceased, dies with the person. The statute declares that actions for slander, for libel, and actions of assault and battery, or false imprisonment, actions for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator, do not survive;⁵⁵ and the same rule is applied to actions for breach of promise of marriage.⁵⁶ Exceptions to the rule of the non-survival of actions for personal injuries are made by statute, in the case of injury or killing by the careless use of firearms;⁵⁷ also in the case of injuries, causing death, occasioned by wrongful act, neglect, or default, in which instance damages may be recovered for the benefit of the surviving husband, wife, or next of kin.⁵⁸

⁵¹ Dicey on Parties, 209. See Chamberlain v. Williamson, 2 Maule & S. 408; Beekham v. Drake, 8 Mees. & W. 846. And compare Alton v. Midland R. Co., 19 C. B. (N. S.) 213.

⁵² 2 R. S. 447, § 1.

⁵³ Elder v. Bogardus, Hill & D. Supp. 116. We have already referred to the remedy which an executor or administrator has by replevin to recover goods of the decedent wrongfully withheld. See 2 R. S. 449, § 17; and McKnight v. Morgan, 2 Barb. 171.

⁵⁴ Cregin v. Brooklyn Crosstown R. Co., 75 N. Y. 192; 56 How. Pr. 465.

⁵⁵ 2 R. S. 447, § 2.

⁵⁶ Wade v. Kalbfleisch, 58 N. Y. 282; 16 Abb. (N. S.) 104. See Price v. Price, 75 N. Y. 244.

⁵⁷ L. 1873, c. 19; under which the cause of action survives to the "heirs or representatives" of a person killed.

⁵⁸ Co. Civ. Proc., § 1902. See Shearman & Redfield on Neg. (5th ed.) § 124 *et seq.*

§ 545. **Suits to disaffirm wrongful acts of deceased.**— Authority is given by statute to any executor, administrator, receiver, assignee, or other trustee of an estate, or of the property and effects of an insolvent estate, corporation, association, partnership, or individual, to disaffirm, for the benefit of creditors or others interested in the estate, and treat as void, and resist, all acts done, transfers and agreements made, in fraud of the rights of any creditor, including themselves, and others interested in the estate;⁵⁹ and the executors of a fraudulent vendor may resist an attempt by the fraudulent vendee to recover either the possession or the value of the property fraudulently disposed of; and they may defeat a recovery, if they can establish satisfactorily the fraudulency of the transaction.⁶⁰ The executor or administrator, as the case may be, represents the decedent's creditors as well as his estate.⁶¹

He may sue to set aside decedent's transfer both on the ground of fraud on creditors, and of undue influence, and may prove both grounds.⁶² He is chargeable as for a breach of trust for a culpable neglect to institute any action or proceeding necessary to recover assets fraudulently disposed of by his decedent.⁶³

The right of an executor or administrator to assail an assignment, made by the decedent, in his lifetime, in fraud of his creditors, is not exclusive. If the executor collude with the assignee, and refuses to do so, the creditors, or a creditor, may, by action against the personal representative and assignee, have the assignment set aside, and the property applied as assets,⁶⁴ and it is not necessary in such an action that the plaintiff should be a judgment creditor; he stands simply as trustee in place of the administrator.⁶⁵

⁵⁹ L. 1858, c. 314, § 1, as amended L. 1889, c. 487; L. 1894, c. 740; L. 1896, c. 547, § 232; L. 1897, c. 417, § 7. See 22 Abb. N. C. 327, note.

⁶⁰ Bryant v. Bryant, 2 Robt. 612.

⁶¹ Hangen v. Hachemeister, 114 N. Y. 566. See § 516, *ante*.

⁶² Lore v. Dierkes, 51 N. Y. Super. (J. & S.) 144; 16 Abb. N. C. 47; Rousseau v. Bleau, 29 St. Rep. 334; 8 N. Y. Supp. 823; McCormick v. St. Joseph's Home, 26 Misc. 36.

⁶³ Matter of Cornell, 110 N. Y. 351. This was a proceeding to hold an assignee for the benefit of creditors, under the statute of 1858, *supra*, and is of course entirely applicable to the case of an executor or administrator. S. P. Matter of Dean, 86 id. 399; Matter of Cohn, 78 id. 248; Lichten-

berg v. Herdtfelder, 103 id. 302; Ball v. Slaften, 98 id. 622; Southard v. Benner, 72 id. 424; Matter of Hurt, 60 Hun, 516.

⁶⁴ Bate v. Graham, 11 N. Y. 237; Dewey v. Moyer, 72 id. 70; Guibert v. Saunders, 10 St. Rep. 43.

⁶⁵ Harvey v. McDonnell, 113 N. Y. 526. That was an action by a creditor to set aside a fraudulent mortgage, on the refusal of the administrator to do so. The sole heir and next of kin of a decedent who alleges that she has brought an action to determine the validity of the probate of an alleged will of the decedent, under which it seems she obtained no interest or property, has no standing, before the instrument is set aside, to maintain an action to set aside a transfer made

It is further provided that every person who shall, in fraud of the rights of creditors and others, have received, or in any manner interfered with, the estate or effects of the deceased, etc., shall be liable in the proper action to the executors, administrators, or other trustee of such estate, for the same or for the value of the property taken, and the damages caused thereby.⁶⁶

TITLE SECOND.

FUNERAL CHARGES AND EXPENSES OF ADMINISTRATION.

ARTICLE FIRST.

FUNERAL CHARGES.

§ 546. **Liability for funeral charges.**— The expenses of the suitable interment of decedent's remains have priority over every other claim against the estate; indeed, the statute provides that the representative shall not be allowed for the payment of any debt or claim, upon his accounting, until the funeral charges are paid.⁶⁷ The immediate duty of burying the body rests upon the husband or the wife,⁶⁸ or other relative of the decedent, or may rest upon a stranger under whose roof the death occurred.⁶⁹ He cannot keep the body unburied, or, by exposing it to violation, offend the feelings or endanger the health of the living.

by the decedent in her lifetime, for fraud. (*Hagan v. Ward*, 58 App. Div. 258; 68 N. Y. Supp. 1003.)

⁶⁶ L. 1858, c. 314, § 2; L. 1897, c. 417, § 7. And see 2 R. S. 449, § 17; *McKnight v. Morgan*, 2 Barb. 171; *Truesdell v. Bourke*, 80 Hun. 55; 29 N. Y. Supp. 849; *revd.*, on other points, 145 N. Y. 612.

⁶⁷ Co. Civ. Proc., § 2514, subd. 3.

⁶⁸ A husband, upon the settlement of his accounts as administrator of the estate of his deceased wife, should be allowed out of her estate for her necessary and proper funeral expenses paid by him. The fact that it is the duty of the husband to bury his deceased wife, does not exempt her separate estate from the ultimate charge. (*McCue v. Garvey*, 14 Hun. 562; *Freeman v. Coit*, 27 id. 450; *Kessler v. Hessen*, 19 Abb. N. C. 86.) See *Jackson v. Westerfield*, 61 How. Pr. 399; *Van Orden v. Krause*, 89 Hun. 1; 34 N. Y. Supp. 1004. In *Zapp v. Miller* (3 Dem. 266), the will gave to testator's widow the income of all his estate,

"after deducting taxes, assessments, interest on mortgages, if any, and other charges and expenses, for and during her natural life." Held, that disbursements for funeral expenses, transportation of decedent's remains, and services of his attending physician, were chargeable to the *corpus* of the estate, and not to income. Under a trust deed for the grantor for life, remainder over, the funeral expenses of the grantor should be paid out of accrued income and personally before using the principal of the trust. (*Matter of Yates*, 27 Misc. 395; 58 N. Y. Supp. 868.)

⁶⁹ *Regina v. Stewart*, 12 Ad. & E. 773. For a full collection of authorities upon the question of the rights of the heir, next of kin, and widow, respectively, to designate the place of burial, and the control of it, with the monuments, see *Matter of Beekman Street*, 4 Bradf. 503; and also the note of Mr. Moak to *Re Bettison*, L. R., 4 Ad. & Ecc. 294; 12 Moak, 656; and *Snyder v. Snyder*, 60 How. Pr. 368.

By whomsoever the duty is performed, the estate of the deceased is ultimately liable to defray the necessary reasonable expenses of the burial. It is analogous to the duty and obligation of a father, to furnish necessities to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits to do.⁷⁰

It is not usual, and, in most cases, it is not possible, for letters, either testamentary or of administration upon the estate, to be applied for and granted before the funeral of the decedent, so that the executor or administrator, as such, is very rarely called upon to superintend the funeral ceremony or direct the necessary expenditure of money. The authority of a person named as executor in the will, to pay the funeral charges of his testator, before the grant of letters to him, is expressly recognized by the statutes;⁷¹ and the rule at common law has long been settled, that the executor or administrator must bury the decedent in a manner suitable to the estate he left behind him.⁷² The reason of the rule is as applicable in the case of an administrator as an executor.⁷³

It seems to be settled that the reasonable and necessary expenses of interring the dead body of a decedent are a charge against his estate, though not strictly a debt due from him; so that his personal representative may be sued, as such, for their recovery.⁷⁴

An executor or administrator who gives orders for the funeral, or ratifies or adopts the acts of another who gives such orders, is also liable personally;⁷⁵ and, where he has assets, he is individually liable, though he has neither given nor adopted any directions

⁷⁰ Per Folger, J., in *Patterson v. Patterson*, 59 N. Y. 574. In this case it was held that funeral expenses were not to be treated as a *debt* of the estate but as a *charge* upon the same, of the same nature and character as necessary administrative expenses, and was entitled to a preference as such. See *Matter of Laird v. Arnold*, 42 Hun, 136; *Dalrymple v. Arnold*, 21 id. 110; *Laird v. Arnold*, 25 id. 4; *Huhna v. Theller*, 35 Misc. 296; 71 N. Y. Supp. 752. A life tenant, on accounting to the remainderman, may charge the trust fund with testator's funeral expenses, and the cost of a burial plot and of a monument paid for by him, where such expenditures are reasonable, and the remainderman assented to the expenditure. (*Young v. Young*, 2 Misc. 381; 21 N. Y. Supp. 1008.)

⁷¹ 1 R. S. 71, § 16.

⁷² 2 Blackst. Comm. 508.

⁷³ *Rappelyea v. Russell*, 1 Daly, 214.

⁷⁴ *Patterson v. Patterson*, 59 N. Y. 574; *Dalrymple v. Arnold*, 21 Hun, 110; *Laird v. Arnold*, 25 id. 4; *Riley v. Waller*, 22 Misc. 63; 48 N. Y. Supp. 535; *Patterson v. Buchanan*, 40 App. Div. 493; 58 N. Y. Supp. 179. But in the absence of fraud or insolvency the distribution of a trust fund should not be enjoined, pending an action upon a claim for funeral expenses. (*Van Orden v. Ledwith*, 44 App. Div. 580; 60 N. Y. Supp. 802.)

⁷⁵ *Ferrin v. Myrick*, 41 N. Y. 315; *Murphy v. Naughton*, 68 Hun, 424; 23 N. Y. Supp. 52; *Tracy v. Frost*, 32 St. Rep. 907; *Matter of Schulz*, 26 Misc. 688; 57 N. Y. Supp. 952. See *Congregation, etc. v. Sindrock*, 15 App. Div. 82.

for the funeral, upon an implied contract for the expenses of the suitable interment of the decedent.⁷⁶

But where a third person, *e. g.*, the mother of the deceased, officiously, in the presence of the husband of deceased, assumed entire control of the funeral arrangements and sent for the undertaker, telling him to spare no expense, it was held that she became personally liable to the undertaker for the funeral expenses, and that both the husband and the estate were relieved from the obligation otherwise imposed on them by law.⁷⁷

§ 547. Proceedings to compel payment of funeral expenses.—Formerly, one having a claim for funeral expenses was not considered a creditor of the estate, and could not enforce payment in the Surrogate's Court.⁷⁸ But the former distinction no longer obtains,⁷⁹ and he now is given a remedy for the collection of his claim against the representative directly. The statute provides⁸⁰ that every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the Surrogate's Court a duly verified petition praying that the executor or administrator may be cited to show cause why he should

⁷⁶ *Rappelyea v. Russell*, 1 Daly, 214; *Kittle v. Huntley*, 67 Hun, 617; 22 N. Y. Supp. 519; *Benedict v. Ferguson*, 15 App. Div. 96; 44 N. Y. Supp. 307. Upon the death of a legatee, a child of testator, the executor, without waiting for the appointment of an administrator of the estate of said legatee, who should be authorized to receive the same, paid out of testator's estate the necessary funeral expenses of the legatee. Held, that while the executor had no legal right to make such payment, yet as strict legal rules are not inflexible as to such expenditures, equitable considerations should be applied to the case, and such payment allowed. (*Matter of Butler*, 1 Connolly, 58.)

⁷⁷ *Quin v. Hill*, 4 Dem. 69; *s. c.* as *Matter of Hill*, 17 Abb. N. C. 273. In *Lucas v. Hessen* (17 Abb. N. C. 271), the husband of the deceased ordered the necessities of the funeral, and paid the undertaker a part of his bill, and suffered a judgment for the balance. Held, that as the under-

taker had given credit to the husband, he could not maintain an action against the executor for the amount of his bill. An action will not lie for services gratuitously rendered by a relative, in taking charge of the interment of the deceased, he having died suddenly in the street, the ordinary funeral expenses having been paid by the executor. (*Hewett v. Bronson*, 5 Daly, 1.) *S. P.*, *Hoffman v. Kanze*, 7 Misc. 237; 27 N. Y. Supp. 260.

⁷⁸ *Matter of Schulz*, 26 Misc. 688; 57 N. Y. Supp. 952. Thus he could not petition for the sale of decedent's land to pay the claim. (*Matter of Corwin*, 10 Misc. 196; 31 N. Y. Supp. 426.) See § 849, *n.* 71, *post*.

⁷⁹ Co. Civ. Proc., § 2514, subd. 3, as amended 1900.

⁸⁰ Co. Civ. Proc., § 2729, subd. 3 (added 1901). The practice regulated by this section applies to the collection of funeral expenses, though incurred prior to the enactment thereof. (*Matter of Kipp*, 70 App. Div. 567; 75 N. Y. Supp. 589.)

not be required to make such payment, and a citation shall be issued accordingly.

§ 548. **Hearing and decree thereon.**—If upon the return of such citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, the surrogate shall, unless the validity of the claim and the reasonableness of its amount are admitted by such executor or administrator, take proof as to such facts, and, if satisfied that such claim is valid, shall fix and determine the amount due thereon and shall make an order directing the payment, within ten days after the service of such order, with notice of entry thereof, upon such executor or administrator, of such claim or such proportion thereof as the money in the hands of the executor or administrator applicable thereto, may be sufficient to satisfy. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate.⁸¹

§ 549. **Only reasonable expenses allowed.**—The representative will be allowed, upon his accounting, the amount paid for funeral expenses, in the absence of proof that they were unreasonably large, even though they were first paid by another, to whom he subsequently repaid the amount.⁸² In respect to the reasonableness of the expenses incurred, a person, *e. g.*, an undertaker, who is called upon to furnish funeral requisites, is only chargeable with a knowledge of the *apparent* condition of the deceased's property, and his station in life; and if he furnishes only what would be suitable, if such appearances were not deceptive, he is entitled to be paid in full from the estate, even though it is insolvent.⁸³

§ 550. **What expenses allowable as against creditors.**—The amount of the expenses which will be deemed reasonable or necessary, for the suitable burial of a decedent, must be considered, generally, with reference to "his degree and quality," but, as against creditors, the amount of his estate is also to be considered. As respects those who are entitled to the estate, as legatees or next

⁸¹ (Ib.) Such further application shall not be made less than three months from the granting or denial of any previous application, and the issuance of a citation thereon shall be in the discretion of the surrogate. (Ib.)

⁸² Matter of Miller, 4 Redf. 302.

⁸³ Matter of Rooney, 3 Redf. 15. In that case, the court ordered the payment upon the petition of the undertaker. But the surrogate's power to do this was doubted in Matter of Hooney, 5 Dem. 235.

of kin, the executor or administrator, while he is not justified in an extravagant outlay,⁸⁴ is not restricted to the bare necessities of the case, as he is where the rights of creditors intervene.

The executor or administrator decides, at his peril, on the amount of the expenditure which will be allowed or disallowed, on the final settlement of his accounts, as it shall be deemed reasonable or otherwise.⁸⁵ He should not, before ascertaining the amount of the estate, purchase a larger burial lot than is necessary,⁸⁶ and although the expense of a tombstone has been considered a funeral charge,⁸⁷ yet, where the estate is insolvent, it can be allowed, if at all, to a very moderate amount only.⁸⁸

⁸⁴ In *Emans v. Hickman* (12 Hun, 425), the will contained the following clause: "To my executor all money in my possession, all money due from any source or sources whatever, and all property of every kind and description held by me, for my funeral expenses and the erection of a monument to my memory in the Purdy Yard, in Phillipstown, Putnam County." The estate amounted to \$1,200. The court decided that the testator did not intend to spend all his estate for funeral expenses and the erection of a monument to his memory, but only so much as would be suitable to his condition of life; fixed this amount at \$150, and directed that the balance be distributed among the heirs-at-law, as in cases of intestacy. See *Burnett v. Noble*, 5 Redf. 69; *Chalker v. Chalker*, id. 480; *Campbell v. Purdy*, id. 434; *Tickel v. Quinn*, 1 Dem. 432; *Matter of Beach*, 1 Misc. 27; 22 N. Y. Supp. 1079; *Matter of Shipman*, 82 Hun. 108; 31 N. Y. Supp. 571; *Matter of Barnes*, 7 App. Div. 13; 40 N. Y. Supp. 494; *affd.*, 154 N. Y. 737.

⁸⁵ *Ferrin v. Myrick*, 41 N. Y. 315. See *Springsteen v. Samson*, 32 id. 703, 714.

⁸⁶ *Matter of Erlacher*, 3 Redf. 8. In that case, the estate amounted to \$2,625.78. Held, that the administrators should be allowed only \$250 of \$670 expended by them for a monument and inclosing the burial plot. In *Matter of Wood* (3 Redf. 9, n.), it appeared that the estate amounted to less than \$2,800, and that \$700 was charged by the administratrix for burial lot and monument, and \$200 additional was placed to the account of funeral expenses. It was held, that the charge for burial lot and monu-

ment was excessive. In *Matter of Mount* (3 Redf. 9, n.), it was shown that, out of an estate of \$983.30, the administratrix paid \$425 for funeral expenses, besides \$60 for clergyman's fee and music, and \$78 for a gravestone. Held, that only \$200 should be allowed for funeral expenses and \$50 for a gravestone. In another case, it was held that, as against decedent's next of kin, an expenditure of \$351 for a burial lot is not unreasonable, where the estate amounts to \$13,000; but as against creditors, the expenditure would not have been allowed, it seems. (*Valentine v. Valentine*, 4 Redf. 265.) Funeral expenses incurred by an executor to the amount of \$60 will not be held excessive where the executor acted in good faith, though testator's estate was not sufficient to pay in full the statutory exemptions of the widow. (*Matter of Hildebrand*, 23 N. Y. Supp. 148.) An expense of \$300 incurred by an executor for testator's tombstone is reasonable where the estate is valued at more than \$6,000, and the rights of creditors are not impaired. (*Matter of Howard*, 3 Misc. 170; 23 N. Y. Supp. 836.)

⁸⁷ *Patterson v. Patterson*, 59 N. Y. 574; *Wood v. Vandenburg*, 6 Paige, 277; *Ferrin v. Myrick*, 41 N. Y. 315; *Owens v. Bloomer*, 14 Hun. 296. In the last case, the estate did not exceed \$8,000. An expenditure of \$500 for a headstone was held to be extravagant, and was not allowed as against the heirs. In *Harvey v. Van Cott* (71 Hun. 394; *affd.*, 149 N. Y. 579), the purchase of a monument by the husband, executor of his wife, with proceeds of a policy in her favor on his life, was sustained.

⁸⁸ *Wood v. Vandenburg*, *supra*. In *Cornwell v. Deek* (2 Redf. 87), it

§ 551. **Expenses incident to death.**— The expense of a special messenger to the family of the decedent, to inform them of his death, may be allowed, where he dies abroad, and such prompt communication is necessary for the security of the estate, for the burial, and to avoid expenses of delay. So, the expense of accompanying the body, and of a copy of the verdict of a coroner's jury, if such copy be necessary to the burial.⁸⁹ In some of the States, though not in this, the expenses of the decedent's last sickness are given a preference, with the funeral charges.⁹⁰ Mourning for the family of the testator is not a funeral charge, strictly speaking, although charges therefor have been allowed in some of the States,⁹¹ and in two cases were allowed here.⁹²

ARTICLE SECOND.

EXPENSES OF ADMINISTRATION.

§ 552. **Personal liability for administration expenses.**— After discharging the funeral expenses, the executor or administrator will then have occasion to incur certain expenses incident to the proof of the will, or the grant of administration, as the case may be, and such as are incident to the general administration of the estate. As in the case of funeral expenses, the executor or administrator is primarily liable for these expenses in his individual and not his representative character, although, of course, he is entitled to be reimbursed, out of the estate, his "actual and necessary expenses.

was held, that the expense of a tombstone, if not excessive, would be allowed, although the estate was insolvent. Since L. 1874, c. 267, funeral expenses, including a suitable monument, are not only a charge on the estate, but constitute a *debt*, so as to entitle one furnishing the monument to institute proceedings as a creditor for the sale of the real estate to pay debts. (Matter of Laird v. Arnold, 42 Hun. 136.)

⁸⁹ Hasler v. Hasler, 1 Bradf. 248.

⁹⁰ Freeman v. Coit, 27 Hun. 447. The commissioners proposed this rule for adoption here in their Draft of Revision (1878), § 549.

⁹¹ See Wood's Estate, 1 Ashm. 314; *Re* Holbert, 3 La. Ann. 436; Flint-ham's Estate, 11 Serg. & R. 16; Griswold v. Chandler, 5 N. H. 492; Mack-nett v. Macknett, 9 C. E. Green, 296.

⁹² Matter of Wachter, 16 Misc. 137; 38 N. Y. Supp. 941; Allen v. Allen, 3

Dem. 524. In the last case it was held that, it being the almost universal practice for the family of a deceased person to wear mourning; and a change of wearing apparel being thus rendered necessary as a part of the preparation for the funeral, and as a mark of proper respect for the dead; this expense, when reasonably incurred by those for whom he was bound, in his lifetime, to provide, should be borne by his estate. It was also held, in that case, that the widow should be allowed a reasonable expenditure (\$19) for the disinterment and reburial of decedent's remains.—the place where they were first deposited having been discovered to be undesirable; also \$175 for a mortuary monument; and \$40, the purchase price of a lot in a well-kept cemetery, the title to which she was allowed to take and hold in her individual name.

as appears just and reasonable,"⁹³ in addition to his statutory commissions, and consequently in addition to a legacy given by the will to the executor in lieu of "commissions."⁹⁴

The principle on which the rule of the representative's personal liability is founded is, that while he may disburse and use the moneys of the estate for purposes authorized by law, he may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator.⁹⁵

A claim, for example, by an attorney employed by an executor, for services rendered in conducting proceedings for the probate of decedent's will, and otherwise in the settlement of the estate, and for moneys advanced for disbursements therein, is against the executor personally, and not against the estate.⁹⁶

The liability of two or more co-representatives for the services of an attorney retained by them in proceedings against them on their accounting, is joint and personal, although their interests upon a distribution are different; and one of two representatives

⁹³ Co. Civ. Proc., § 2730, as amended 1893; adopting L. 1863, c. 362, § 8. See *Shepard v. Stebbins*, 48 Hun, 247; *Matter of Van Nostrand*, 3 Misc. 396; *Balz v. Underhill*, 19 id. 215; 44 N. Y. Supp. 419; *affd.*, 16 App. Div. 635.

⁹⁴ *Matter of Pollen*, 1 Law Bul. 40.

⁹⁵ *Austin v. Munro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 id. 315; *Reynolds v. Reynolds*, 3 Wend. 244; *Demott v. Field*, 7 Cow. 58; *Myer v. Cole*, 12 Johns. 349; *Davis v. Stover*, 58 N. Y. 473; *Bloodgood v. Sears*, 64 Barb. 71; *Stedman v. Feidler*, 20 N. Y. 437; *McMahon v. Allen*, 4 E. D. Smith, 519; *Stanton v. King*, 8 Hun, 4; *affd.*, 69 N. Y. 609. In *New v. Nicoll* (12 Hun, 431; *affd.*, 73 N. Y. 127), real estate was conveyed by deed to N. in trust, to receive the rents, etc., and after paying the taxes and other charges on the premises, to apply the residue to the use of R. during life. The trustee employed the plaintiff to make necessary repairs upon the building; but, having no money in hand, promised to pay therefor out of the rents to be subsequently received. The plaintiff did the work, relying upon this promise and the trust estate. The trustee subsequently received sufficient money to pay the bill, but neglected to do so. Held, that the estate was not liable upon the trustee's promise, though, *quere*, if the trustee having no funds

in his hands, had made a special agreement that such expenditure should be made on the credit of the estate and he be exempt from all personal liability therefor, such agreement could not be enforced against the estate, in equity. See *Gilman v. Gilman*, 6 Sup. Ct. (T. & C.) 211; *O'Gara v. Clarkin*, 2 id. 675; *Mesiek v. Mesiek*, 7 Barb. 120, 124; *Ross v. Harden*, 42 N. Y. Super. 427; 44 id. 26; *Foland v. Dayton*, 40 Hun, 563; 2 St. Rep. 121.

⁹⁶ *Budlong v. Clemens*, 3 Dem. 145; *Parker v. Day*, 155 N. Y. 383. If he overpays an attorney for services, he is personally liable for the excess. (*Matter of Bradley*, 1 Connolly, 106; *Mygatt v. Wilcox*, 45 N. Y. 306.) But the attorney is not liable for the amount so paid. (*Shaffer v. Bacon*, 35 App. Div. 248; 54 N. Y. Supp. 796; *affd.*, 161 N. Y. 635.) See *Bowman v. Tallman*, 2 Robt. 385. In *Hasler v. Hasler* (1 Bradf. 248) it appeared that A. and B., co-administrators of C., retained counsel in a suit touching the estate, and B. died, and A. was appointed his administrator, and paid for the counsel's services from B.'s estate. Held, that such payment was not authorized, unless the estate of C. was insolvent at the time; and the fact that B., before his death, had individually promised to pay it, made no difference.

is individually liable for the value of services performed, at his request, in preparing the joint account of both executors.⁹⁷

Qualifying executors, who honestly differ as to the conduct of the affairs of the estate, may each separately employ counsel to render to them professional services on substantially parallel lines, but quite independent of each other, and each executor is entitled to be reimbursed for a reasonable compensation paid by him to his counsel.⁹⁸ The representative has no power, therefore, to make an agreement with an attorney by which he creates a lien upon the estate for the amount of his services rendered in an action to recover assets, or to assign the same to him. He may bind himself personally, but not the estate which he represents.⁹⁹

Speaking generally, the Surrogate's Court has not authority to direct an appropriation of any part of the estate, in anticipation of the expenses of administration;¹ or to pass upon a bill for services rendered, with a view of instructing the representative whether or not, on a submission of the facts by the respective parties, the bill should be paid;² nor has the court power to prescribe the terms upon which a change of attorneys may be effected in a proceeding before it, or determine the amount of compensa-

⁹⁷ *Douglass v. Leonard*, 44 St. Rep. 293; 17 N. Y. Supp. 591; leave to appeal denied, 18 id. 144. In that case it was also held that the question whether plaintiff, employed as an accountant by an executor, was to be confined to the estate for compensation, in the absence of an express agreement, and where the inference from the circumstances was doubtful, was for the jury.

⁹⁸ *Matter of Delaplaine*, 1 Connolly, 1; 19 Abb. N. C. 413.

⁹⁹ *Platt v. Platt*, 105 N. Y. 488; *Martin v. Platt*, 51 Hun. 429. An attorney's claim for services in procuring the probate of a will, being against the executor personally, he has no lien for the amount upon the property of the estate which may be in his possession. (*Delamater v. McCaskie*, 4 Dem. 549.) Compare *Arkenburgh v. Little*, 64 N. Y. Supp. 742; *Lee v. Van Voorhis*, 78 Hun. 575; 29 N. Y. Supp. 571; 145 N. Y. 603; *Kennedy v. Steele*, 35 Misc. 105; 71 N. Y. Supp. 237. As to protecting the lien of an attorney on the interest of his client (a legatee) in the estate, under an agreement between them, see *Matter of Fernbacher*, 5 Dem. 219. See also § 48, *ante*.

¹ *Willcox v. Smith*, 26 Barb. 316. Under Co. Civ. Proc., § 2672, the surrogate may authorize a temporary administrator to pay expenses of administration.—*e. g.*, legal expenses (*Stokes v. Dale*, 1 Dem. 260); but he has no power to authorize him to mortgage the real property for that purpose (*Duryea v. Mackey*, 157 N. Y. 204); nor will he direct him to advance money to procure witnesses on the probate. (*Fricke's Estate*, 4 Civ. Proc. Rep. 177.) In *Swenarton v. Hancock* (22 Hun. 43), pending an appeal from a decree in a probate proceeding, the executors, upon petition to the Supreme Court, obtained an order directing the surrogate to pay, out of any funds of the estate in his hands, \$3,000 to the executors or their counsel for the expenses of the appeal. On appeal, held void for lack of power to grant it. Such property belongs to the beneficiaries under the will, and they cannot be deprived of any part of it, except by due process of law; the disposition of such property belongs to the executors under their official liability.

² *Matter of Cohn*, 5 Dem. 338; *Stokes v. Dale*, 1 id. 260; *St. John v. McKee*, 2 id. 236; *Journault v. Ferris*,

tion to which the retiring attorney is entitled.³ Nor will the court direct the compensation of an accountant, employed by the contestant to examine the accounts of an executor upon his accounting,—at least, not pending the accounting.⁴

§ 553. **Expenses incurred, but not paid.**—It has been repeatedly held that in no event can an allowance be made to a representative for an administrative expense, *e. g.*, counsel fees, until he has actually paid it; at least, not by a Surrogate's Court.⁵ The power of the Supreme Court to direct an executor, on an accounting in that court, to pay an expense, incurred by him but not paid, *e. g.*, counsel fees on a probate trial at circuit—has been adjudged;⁶ and in one case, a surrogate's allowance of an incurred expense (seemingly unpaid) was affirmed by the court of last resort.⁷

§ 554. **Expense of proving will.**—An executor is bound to pay the expenses of the proof of the will, and of defending the probate, when granted, against attack by appeal or otherwise, and must rely for reimbursement upon the settlement of his accounts, when the beneficiaries under the will are entitled to be heard on the question of the necessity and reasonableness of his expenditures.⁸

id. 320. See *Gilman v. Gilman*, 6 Sup. Ct. (T. & C.) 211. An attorney employed by the representative should present his account for payment before the final accounting, and the representative should fix upon the amount which is reasonable to be paid, and pay it on his own responsibility, and credit himself with such payment in his final accounting, so as to enable the parties in interest to interpose objections to it, if it appears to be exorbitant. (*Matter of Jarvis*, 1 L. Bul. 7.)

³ *Matter of Halsey*, 13 Abb. N. C. 353; *Chatfield v. Hewlett*, 2 Dem. 191.

⁴ *Matter of Smith*, 2 L. Bul. 50.

⁵ *Matter of Bailey*, 47 Hun. 477; *Shields v. Sullivan*, 3 Dem. 296; *Matter of Van Nostrand*, 3 Misc. 396; *Matter of Patterson*, N. Y. L. J., Nov. 22, 1892; *Matter of Booth*, id., Mar. 9, 1893; *Matter of Koch*, 33 Misc. 153; 68 N. Y. Supp. 375; *Matter of O'Brien*, 5 Misc. 136. The giving of a note does not supply the want of actual payment. (*Matter of Blair*, 49 App. Div. 417; 63 N. Y. Supp. 678.) But the representative may file a supplemental account after payment and then be credited with the amount. (*Matter of Blair*, 67 App. Div. 116.)

⁶ *Douglass v. Yost*, 64 Hun. 155; 28 Abb. N. C. 370.

⁷ *Gilman v. Gilman*, 6 Sup. Ct. (T. & C.) 211; affd., 63 N. Y. 41.

⁸ In *Matter of Jones* (24 Week. Dig. 333), an allowance was made to an administrator for expenses in resisting successfully proceedings for the revocation of his letters; and in *Matter of Wolfe* (N. Y. Daily Reg., Dec. 31, 1883), where the will directed the payment of debts and then created a trust for the distribution of the income of the residue, it was held that the expenses incurred in proceedings for the revocation of the will were chargeable to the principal and not to the income. (Citing *Whitson v. Whitson*, 53 N. Y. 481.) But an administrator of a nonresident decedent was not allowed credit for expenses incurred in contesting the probate of a will subsequently found in the decedent's domicile. (*Matter of Black*, 6 Dem. 331.) See *Matter of Blair*, 28 Misc. 611; 59 N. Y. Supp. 1090), where an executor of a will, who was unsuccessful in procuring its admission to probate, became liable for fees of counsel engaged to prosecute an appeal, and afterward, on being appointed administrator, actually paid such counsel

"If the executors cannot administer the trust devolved upon them, either because they have not means sufficient to defray the expenses thereof, or from any other cause, they should renounce the office."⁹

If the executor resides at a distance,—*e. g.*, in another State,—he will be allowed the expenses of his journey hither and return, and of his board while here, in the business of proving the will; for the testator must have known that such a journey would be necessary.¹⁰ Where, in addition to proving the will here, it is necessary to prove it in another State, his expenses thither, and while there, will be allowed.¹¹

Where experts are employed as witnesses in a cause affecting the estate, on the order of the court, they may be considered *quasi* officers of the court, and the court will order them to be compensated out of the estate.¹²

As to the executor's expenses for counsel in probate proceedings, there is no reason, either on principle, or under the statute, for confining the amount thereof to the taxable costs; for if that were the case, "there would be many cases where the wills of testators, as well as their estates, could not be fairly protected without great personal loss to the executors. A testator, in naming an executor, gives him an implied authority and direction to do all he reason-

fees, he was not entitled to include the fees in his account as administrator, and receive reimbursement from the estate, without first having the item of the fees allowed in his account as executor. (*Matter of Blair*, 67 App. Div. 116; 73 N. Y. Supp. 675.)

⁹ Per Gilbert, J., in *Swenarton v. Hancock*, 22 Hun, 43.

¹⁰ *Everts v. Everts*, 62 Barb. 577, where the executor, resident of Iowa, traveled from that State to Oswego, in this State, to attend the probate of the will, and to qualify.

¹¹ *Young v. Brush*, 28 N. Y. 667.

¹² *Rollwagen v. Powell* (8 Hun, 210), which was an action in the Supreme Court to set aside a will. An order was made, with the consent of all parties, appointing two physicians to inquire into the pregnancy of the testator's widow, their compensation to be a charge against the estate. The court afterward awarded them \$1,000, but the suit was discontinued without payment of the amount so ordered to be paid. On petition, the surrogate made an order directing the administrator of the estate to pay the amount

of such order. Held, on appeal, that the physicians were *quasi* officers of the court, and it not being intended that they should be dependent upon the contingency of an action for their compensation, it was made a charge, in anticipation, upon the estate; that such order having been made with the consent of all parties, the physicians became *quasi* parties to the action in whose favor a decree had been entered, and the discontinuance as to them, without notice of the proceedings therefor, was a nullity. And further, that although their claim was not a debt or demand against the testator or the personal representative of the deceased, and it was, therefore, questionable if the surrogate could decree the payment thereof; yet, as the surrogate's order was predicated on that of the Supreme Court, for the payment of services ordered by it, and could by that court have been directly ordered to be paid out of the funds in the hands of the administrator, it was proper, as matter of form, to reach the funds of the estate in the hands of the special administrator appointed by the surrogate, and would not be disturbed.

ably can to prove and carry out the will, and this carries with it the right to charge the estate with the reasonable expense."¹³

It is certain that an executor has no right to buy off contestants of his decedent's will, and charge the expenditure against the estate.¹⁴

§ 555. Expenses of litigation generally.—The expenses incident to the prosecution and defense of actions affecting the administration of the estate, including the employment of attorneys and counsel, the obtaining of testimony, and the representative's personal expenses, are always allowed, provided they are shown, on the accounting, to have been necessarily or properly incurred, and the amount is just and reasonable.¹⁵

The rule is not confined to the cases where the suit or proceeding was in the name of the executor or administrator, as such; but if, acting in good faith, for the benefit of the estate, and under advice of counsel, they sue in a manner apparently beneficial to the estate — *e. g.*, in the name of a third person, instead of their own names as executors — and thereby are subjected to costs, they may be allowed them as against the estate.¹⁶

Whether the representative is entitled to be reimbursed for costs and expenses paid or incurred by him, in the prosecution or defense of suits by or against him, as such, depends upon the nature

¹³ Per Merwin, J., *Douglas v. Yost*, 64 Hun. 155, *supra*.

¹⁴ *Bolles v. Bacon*, 3 Dem. 43.

¹⁵ The expenses of himself and witnesses, incurred in a journey necessarily undertaken in order to testify in a case involving the property of the estate, will be allowed. (*Elliott v. Lewis*, 3 Edw. 40.) And the charge of counsel will not be limited to the taxable costs of the action. (*Ib.*) See *Betts v. Betts*, 4 Abb. N. C. 323. The attorney's costs recovered from the defendant in an action by the representative, on a collection of the claim, including costs, do not belong to the latter, and he should not be surcharged with them. (*Clute v. Gould*, 28 Hun. 348.) An expenditure for a stenographic report of an examination of a witness *de bene esse*, which was not read in evidence at the trial, and was never even returned to the court, will not be allowed. (*Matter of Henry*, 5 Dem. 272.) The expense of searching for a person or his heirs, after it has been judicially de-

cided that he died without issue, will not be allowed. (*Matter of Nottingham*, 88 Hun. 443; 34 N. Y. Supp. 404.) Nor will the representative be credited with amount paid to detectives for obtaining and collecting testimony. (*Matter of Van Buren*, 19 Misc. 373; 44 N. Y. Supp. 357.) As to allowance of counsel fees generally, see *Matter of Hutchinson*, 84 Hun. 563; 32 N. Y. Supp. 869; *Matter of Spooner*, 86 Hun. 9; 33 N. Y. Supp. 136; *Matter of Thrall*, 30 App. Div. 271; 51 N. Y. Supp. 595 (modified in other respects, 157 N. Y. 46); *Matter of Hosford*, 27 App. Div. 427; 50 N. Y. Supp. 550; *Matter of Archer*, 23 id. 1041; *Matter of Quinn*, 16 Misc. 651; 40 N. Y. Supp. 732; *Matter of Arkenburgh*, 13 Misc. 744; 35 N. Y. Supp. 251; 69 St. Rep. 567. For a case where the representative was concerned as attorney, see *Matter of Van Wert*, 3 Misc. 563; 24 N. Y. Supp. 719.

¹⁶ *Collins v. Hoxie*, 9 Paige, 81.

of the suit, and his good faith in the matter; advice of counsel is immaterial.¹⁷ If the prosecution or defense was in good faith, he has not only a claim against the fund, but a right of action against the beneficiaries, for "his reasonable costs and other expenses;"¹⁸ but not, where the costs were expressly personally charged to him in the action in which they were incurred,¹⁹ though the fact that they were not expressly charged to him, is not conclusive that they were incurred in good faith, so as to enable him to their allowance in the Surrogate's Court.²⁰

The fact that the result of a proceeding instituted by the representative was favorable to him, in the first instance, proves that the proceeding was not altogether groundless, notwithstanding a reversal on appeal.²¹ The awarding of costs, on appeal, against the estate is no evidence that the court considered the proceedings unjustifiable. Nor does such a conclusion follow from the fact that costs are awarded against the estate, in a case where the representative is plaintiff. It is different where he is defendant. If costs are awarded against him in such an action, it is some evidence that the claim was unreasonably litigated.²² The fact that costs were not awarded against him personally is not conclusive of his good faith.²³

The good faith of the representative in resisting the claim and defending the action will determine his right to be reimbursed. Thus, where an executor unsuccessfully defended an action brought against him, individually, for the price of a tombstone, ordered by him in pursuance of a direction in the will, he is entitled to be reimbursed, out of the estate, the amount of the judgment paid by him, which included plaintiff's costs and disbursements, and, in

¹⁷ Matter of Huntley, 13 Misc. 375; 35 N. Y. Supp. 113.

¹⁸ Co. Civ. Proc., § 1916. See Boynton v. Laddy, 32 St. Rep. 578; 10 N. Y. Supp. 622. A surrogate by a decree refusing probate to a codicil may award costs to the successful contestant, and if the executor pays the same before an appeal is perfected, he is protected in such payment, as he is also if no appeal is taken from that part of the decree which awards such costs. (Matter of Eastman, 25 Week. Dig. 397.)

¹⁹ Hosack v. Rogers, 9 Paige, 461; Matter of Miller, 4 Redf. 302. See Co. Civ. Proc., § 1836.

²⁰ Tucker v. McDermott, 2 Redf. 319. The subject of costs, etc., in

actions by and against personal representatives, is fully treated in subsequent sections of this chapter.

²¹ Matter of Miller, 4 Redf. 302.

²² *Ib.* Upon an application for leave to issue execution upon a judgment recovered in an action, which the administrator had unsuccessfully defended, and in which the court had awarded costs against the estate to the plaintiff, the administrator cannot be allowed to reduce the amount in his hands by a charge for counsel fees for professional services, in the very action in which the judgment was recovered. (Matter of Nichols, 4 Redf. 288.)

²³ Matter of Smith, 1 Misc. 269; 22 N. Y. Supp. 1067.

addition, a reasonable counsel fee paid to his own attorney, it appearing that he acted in good faith in defending the action.²⁴

A representative is not justified, however, in incurring expenses in contesting a claim presented against the estate, where there is no fund out of which such claim could be paid, if judgment were recovered; nor in defending claims presented against the estate, out of the proceeds of lands sold to pay debts in proceedings under the statute,²⁵ especially where the litigation is unnecessarily protracted by repeated appeals after the law has been settled by the courts.²⁶

It stands to reason that he is not entitled to charge the estate with the expenses of his unsuccessful resistance of an application for an order requiring him to account, nor of his defense in proceedings for contempt for neglecting to account.²⁷

§ 556. What are necessary and reasonable expenditures.—The responsibility rests upon the representative, of deciding what is a necessary or reasonable expense of administration, in a particular case. In general, the necessity and reasonableness of an expense incurred and paid by him, will, upon his accounting, be presumed, and the burden is upon the objector to show that the sum paid

²⁴ *Matter of Grout*, 15 Hun. 361. See *Matter of Ritch*, 76 id. 36; 27 N. Y. Supp. 613.

²⁵ *Matter of Wilcox*, 11 Civ. Proc. Rep. 115 (s. c. as *Matter of Woodward*, 13 St. Rep. 161). So the estate should not be charged with costs incurred by him in defending an action brought against him by testator's widow to recover dower in lands devised to her for life by the will, but of which the executor had received the income subsequent to testator's death. (Ib.)

²⁶ *Gross v. Moore*, 14 App. Div. 353; 43 N. Y. Supp. 945.

²⁷ *Gilman v. Gilman*, 2 Lans. 1. Compare *Tucker v. McDermott*, 2 Redf. 320; *Shakespeare v. Markham*, 10 Hun. 312; aff'd., 72 N. Y. 400. In *Matter of Collyer* (1 Connolly, 546), on an administrator's accounting, the following expenses were not allowed, viz.: Counsel fee paid to an attorney for consultations of the administrator, next of kin, before his appointment, as to the selection of an administrator, such appointment being without a contest. Payment to counsel for attendance and advice as to the making of an inventory. Payment of a retaining fee to an attorney. Pay-

ment of a counsel fee in a proceeding for the revocation of the will, in which the administrator appeared in his representative capacity as well as next of kin, where he was a necessary party only as next of kin; especially where his attorney has received costs which he has not credited against the charges for services to the administrator. A large amount of money — \$3,000 — paid to a young attorney who was not retained by the administrator, but who, by his persistent attendance in the proceeding, was finally recognized by the administrator as one of his counsel, such expenses not appearing to be necessary or reasonable. Searching for evidence by the administrator's attorney for the purpose of bringing actions. A sum paid as counsel fees for services upon furnishing a new bond on the release of one of the administrator's original bondsmen. Fees to an attorney for services rendered necessary by the attorney's remissness. A charge of \$20 a day by the attorney of the administrator, for attending sessions of a reference where nothing was done but to adjourn (this charge was reduced to \$10 for each of such sittings). See *Matter of Oakes*, 19 App. Div. 192; 45 N. Y. Supp. 984.

was unreasonably large,²⁸ provided the voucher shows, *prima facie*, an allowable claim.²⁹ The character and amount of the estate, and of the business of its administration, will, to a great extent, determine this question.

But in no case ought an expenditure to be allowed, which was not connected with the business of administration. It must have been, in every case, for a purpose either authorized by the will or comprehended in his duty as representative. Thus an executor will not be allowed for the expenses of maintaining the testator's favorite horse, though requested verbally by the testator to keep the horse as long as he should live;³⁰ nor will he be compensated for carrying on testator's business in conjunction with the surviving partner.³¹

The surviving partner of the decedent is bound, as such, to collect the assets and close the business, without compensation from the estate of his deceased partner.³² An executor cannot be allowed, therefore, the expenses of stocking and managing the decedent's farm, or in operating a mill, of which he and the decedent were tenants in common.³³

§ 557. Representative's personal services.—The representative is supposed to be fully compensated for his personal services rendered to the estate, by the commissions allowed him under the

²⁸ Fowler v. Lockwood, 3 Redf. 465.

²⁹ "Where an item of an account is attacked, the question upon whom the burden of proof is imposed must be decided by the test whether the court can, from the voucher therefor, standing uncontradicted, justify his allowance thereof as establishing a *prima facie* case." (Per Ransom, S., Matter of Graham, N. Y. L. J., Dec. 22, 1892.) In Matter of Swart (25 St. Rep. 88), a surrogate's decree was sustained, disallowing liabilities created for professional services and otherwise, in the absence of proof, either that the services were reasonable in amount, or necessary for the estate's protection.

³⁰ Matter of Teyn, 2 Redf. 306. So the representative will not be allowed the expenses of lunacy proceedings instituted against the widow and sole legatee of the intestate. (Underhill v. Newburger, 4 Redf. 499.) Payment by an executor on a judgment against a legatee, and a brother of the executor, which does not appear to have any connection with the admin-

istration of the estate, will be disallowed. (Matter of Smith, 1 Misc. 269; 22 N. Y. Supp. 1067.) So, too, the expense of collecting rents and for taxes, etc., where the widow, who is the life tenant, is required by the will to bear such charges. (Matter of Turfier, 24 N. Y. Supp. 91.) See Matter of Spears, 89 Hun, 49; 35 N. Y. Supp. 35. But the expense of erecting a factory building for use in closing up the estate, and which increases the value of the land, of which the heirs have received the benefit, should be credited to the executor and charged against principal. (Matter of Braunsdorf, 2 App. Div. 73; 37 N. Y. Supp. 229.)

³¹ Matter of Taft, 28 St. Rep. 315; 8 N. Y. Supp. 282; Matter of Hayden, 54 Hun, 197; 26 St. Rep. 911; *affd.*, 125 N. Y. 776.

³² Ames v. Downing, 1 Bradf. 321. See 17 Abb. N. C. 172, note.

³³ Larrou v. Larrou, 2 Redf. 69. But charges for threshing grain raised by decedent, if done to prepare for sale or market, are proper. (Ib.)

statute.³⁴ Hence a representative, who, being a lawyer, appears and acts in his own behalf, in an action, in which the estate is interested, is not entitled to charge the estate for such services,³⁵ although he may employ his partner, provided he does not share in the compensation for such services.³⁶

He will not, for example, be allowed for the use of his own horse in going about attending to the business of the estate, nor for its feed, provided by himself.³⁷ Except in a case where the will authorizes it, the executors are not justified in employing one of their number to perform extra services as clerk in keeping the accounts of the estate, and allowing him a salary in addition to his statutory commissions;³⁸ nor can they charge the estate for the services of a co-executor, an attorney, in professionally defending, at their request, an action brought against the estate, though the legatees and next of kin united in such request.³⁹

This rule does not apply, however, to the case of the employment by the executors of one who, though named in the will as an executor, never took out letters or exercised any executorial control over the estate.⁴⁰

The general principle must be deemed settled that allowances for the representative's personal work and labor, *e. g.*, in the repair of buildings belonging to the estate, cannot be allowed, unless specifically authorized by the judicial act of the surrogate, or a court of competent jurisdiction, before they are rendered. And in case of a guardian rendering voluntary services, the broad rule has been established that it makes no difference whether he applies to the surrogate for a formal order directing the performance of such service, and fixing the compensation for it, before the service is done (which the surrogate has no power to grant), or whether, after such a service has been rendered, the surrogate ratifies and

³⁴ "Where the will provides a *specific compensation*, to an executor or administrator, he is not entitled to any allowance for his services, unless by a written instrument, filed with the surrogate, he renounces the *specific compensation*." (Co. Civ. Proc., § 2730, as amended 1893, consolidating former § 2737.)

³⁵ *Matter of Howard*, 23 N. Y. Supp. 836. See *Matter of Van Wert*, 3 Misc. 563; 24 N. Y. Supp. 719. A mortgage given to an executor as security for a claim for his services as attorney in defending the estate.—*Held*, not binding. (*Bigelow v. Davol*, 69 Hun, 74; 23 N. Y. Supp. 494.)

³⁶ *Matter of Simpson*, 36 App. Div. 562; 55 N. Y. Supp. 697; *affd.*, 158 N. Y. 720.

³⁷ *Pullman v. Willets*, 4 Dem. 536.

³⁸ *Clinch v. Eckford*, 8 Paige, 412; *Vanderheyden v. Vanderheyden*, 2 id. 287. But see *Matter of Meilke*, 2 Connoly, 97.

³⁹ *Collier v. Munn*, 41 N. Y. 143 (three judges out of eight dissenting; but approved in *Smith v. Albany*, 61 id. 444).

⁴⁰ *Campbell v. Mackie*, 1 Dem. 185. Compare *Campbell v. Purdy*, 5 Redf. 434.

allows it, and fixes and awards the charge against the estate, as an extra compensation; for, in each case, the surrogate is asked to act upon the representation and proof of the guardian as to the necessity, the extent, and the value of the services to be rendered, or which have been rendered, and hence there may arise the incentive, on the part of the guardian, to create or magnify the need and to overrate the value of the performance.⁴¹

The rule, however, is not inflexible, and does not apply in a case, for example, where one of the executors, at the request of his co-executors, and with the consent of all parties in interest, took charge of three farms and for a period of fifteen years spent his time and labor in managing their cultivation and collecting their rents and profits; this was no part of his executorial duty.⁴²

§ 558. **Employment of agents and clerks.**—As a representative is not entitled to extra compensation for his own services, in the performance of his administrative duties, he cannot employ, and charge the estate for, the services of another, *e. g.*, a lawyer, in doing what he himself might justly be expected to do.⁴³ If he sees fit to employ another to perform the usual and ordinary services attendant upon the execution of the trust, *e. g.*, the preparation of his inventory,⁴⁴ the expense of the employment is his own and not that of the estate.

In ordinary cases, a representative ought to keep his own accounts, as such, and will not be allowed clerk-hire;⁴⁵ but cases are easily conceivable where the magnitude of the estate, or the com-

⁴¹ *Matter of Hayden*, 1 Connoly, 563. See *Matter of Knapp*, 8 Abb. N. 454; *modif.*, 54 Hun, 197; *affd.*, 125 C. 308; *Matter of Arkenburgh*, 13 N. Y. 776; *Morgan v. Hannas*, 13 Abb.

Pr. (N. S.) 361, and cases *infra*. Compare the *Parsee Merchant's Case*, 3 Daly, 529; 11 Abb. Pr. (N. S.) 209; *Hooper v. Adey*, 3 Duer, 235. But an executor or other trustee of a fund invested in land, who pays the highway taxes thereon by his personal labor, is entitled to be allowed the amount thereof in his account, as if it had been paid in money. (*Lansing v. Lansing*, 45 Barb. 182; 31 How. Pr. 55.) But in this case the liability is created and liquidated by law.

⁴² *Lent v. Howard*, 89 N. Y. 169; *Matter of Meilke*, 2 Connoly, 97.

⁴³ *Raymond v. Dayton*, 4 Dem. 333; *St. John v. McKee*, 2 id. 236; *Willson v. Willson*, id. 462; *Journault v. Ferris*, id. 320; *Matter of Van Nostrand*, 3 Misc. 396; *Matter of Van Wert*, id.

⁴⁴ *Matter of Quin*, 1 Connoly, 382. See *Pullman v. Willets*, 4 Dem. 536.

⁴⁵ *Matter of Beach*, 1 Misc. 27; 22 N. Y. Supp. 1079; *Matter of Richardson*, 2 Misc. 288; 23 N. Y. Supp. 978; *Matter of Harbeck*, 81 Hun, 26; 30 N. Y. Supp. 521; *affd.*, 145 N. Y. 648. An allowance as for clerk hire cannot be made to an executor for his personal services, although the affairs of the estate are such as to have justified the employment of a clerk and the executor's firm had been obliged to employ a clerk to attend to the duties which the executor would have performed, if not engaged in the affairs of the estate. (*Matter of Butler*, 1 Connoly, 58; 9 N. Y. Supp. 641.)

plication of its affairs, would amply justify the employment of clerical services.⁴⁶

Where the employment of an agent or clerk, in the management of the estate, is rendered fit and beneficial, by the circumstances of the estate, or is authorized by the will, the expense is a proper charge upon the estate.⁴⁷ Thus, where the decedent, a merchant, left a stock of goods in the retail store carried on by him, it was a fair exercise of discretion, by the representative, to employ a clerk to continue the sale at retail, instead of making a forced sale; and there being no proof of loss to the estate, the wages of the clerk were allowed.⁴⁸

Where business of the estate is required to be transacted at a distance, the representative ought to employ an agent on the spot, instead of incurring the expense of repeated personal journeys thither.⁴⁹

§ 559. Expenses of preparing account for settlement.—How far a representative is justified in employing a lawyer or an accountant in preparing his account for judicial settlement necessarily depends upon the circumstances of each case. The Code allows him on a judicial settlement of his account, such sum as the surrogate deems reasonable for his counsel fees, *and other expenses* not exceeding ten dollars for each day occupied in the trial, and necessarily occupied *in preparing his account*.⁵⁰ It is held, therefore, that the representative may put into his account a charge for payment to an attorney for making up his account.⁵¹

⁴⁶ In a proper case, the representative may employ an attorney at a specified sum per annum. (Matter of Beckman, 1 L. Bul. 55.)

⁴⁷ McWhorter v. Benson, Hopk. 28; Cairns v. Chaubert, 9 Paige, 160; Fisher v. Fisher, 1 Bradf. 335; Bronson v. Bronson, 48 How. Pr. 481; Meeker v. Crawford, 5 Redf. 450; Matter of White, 6 Dem. 375; Wells v. Dishrow, 48 St. Rep. 746; 20 N. Y. Supp. 518. In Matter of Steward (90 Hun, 94; 35 N. Y. Supp. 366), a payment to the son of decedent for taking care of the property after the latter's death, was allowed.

⁴⁸ Cornwall v. Deck, 2 Redf. 87.

⁴⁹ Everts v. Everts, 62 Barb. 577.

⁵⁰ Co. Civ. Proc., § 2562. The allowance which may be made to an executor on his accounting for services of his counsel in the probate proceedings is not limited to the costs allowable under this section; and the previous allowance of such costs by

the surrogate in the probate proceedings will not constitute a bar to the allowance of a further sum on the accounting. (Douglas v. Yost, 64 Hun, 155; 28 Abb. N. C. 320.) An allowance to an administrator under this section, for counsel fees and expenses of his accounting, is an "actual expense" within section 2557, and may be made although the estate is less than \$1,000. (Matter of Van Kleeck, 2 Connolly, 14.)

⁵¹ Matter of Selleck, 1 St. Rep. 575. Compare Fowler v. Lockwood, 3 Redf. 465; Underhill v. Newburger, 4 id. 499; Betts v. Betts, 4 Abb. N. C. 323; Hall v. Campbell, 1 Dem. 416; Hall v. Hall, 78 N. Y. 535; Matter of Carman, 3 Redf. 46; Ward v. Ford, 4 id. 34; Matter of Brown, 16 Abb. Pr. (N. S.) 457. Where the services of a lawyer in preparing an account are merely clerical, the statute limits the amount he is to be paid, as above. Where the services were professional, counsel is entitled to a professional

But failing to keep his accounts distinct from his dealings with others, he is not entitled to be allowed, for his own time and expenses, more than would be reasonable for time spent in keeping an account in such manner as the law requires.⁵² Merely because the representative had not the necessary leisure to do so himself, it not appearing that the employment of an accountant was necessary for any other reason, does not justify an allowance for an accountant in preparing the account.⁵³

TITLE THIRD.

WIDOW'S QUARANTINE AND SUSTENANCE.

§ 560. **The statutory provision.**— In this State, as in most, if not all, of the States, provision is made by statute, taken from *magna charta*, for the tarrying of the widow in the chief house of her husband for the period of forty days after his death, without being liable to rent, and for her reasonable sustenance in the meantime, out of her husband's estate; and this, whether her dower be sooner assigned to her or not.⁵⁴

This right to remain in the husband's house relates only, it is held, to lands of which the widow was dowable, that is to say, in which the husband had an estate of inheritance.⁵⁵ Upon the expiration of the forty days, the right ceases, whether her dower has meanwhile been assigned or not, and thereupon the heir may expel her.⁵⁶

fee to be charged as an expense of administration. (Matter of Graham, N. Y. L. J., Dec. 22, 1892.) See Harrison v. McAdam, 38 Misc. 18.

⁵² Matter of Wilcox, 11 Civ. Proc. Rep. 115.

⁵³ Matter of Quin, 1 Connoly. 382. For other cases, see chapter XXII, on Costs, *post*.

⁵⁴ 1 R. S. 742, § 17; L. 1896, c. 547, § 184.

⁵⁵ Voelckner v. Hudson, 1 Sandf. 215. A widow is entitled to be endowed of the third part of all the real property of which her husband was seized of an estate of inheritance at any time during the marriage (1 R. S. 740, § 1; Durando v. Durando, 23 N. Y. 331), unless, of course, she has, by joining him in a conveyance, released her right thereto (Hawley v. James, 5 Paige, 318, 543); or unless the lands have been taken from her husband by the right of eminent do-

main (Moore v. Mayor, etc., of N. Y., 8 N. Y. 110); or by virtue of a paramount lien prior to the marriage (Van Duyne v. Thayre, 14 Wend. 233; 19 id. 162); or barred by a decree of divorce (Pitts v. Pitts, 14 Abb. Pr. [N. S.] 97; 52 N. Y. 593); or by her acceptance of a provision in the husband's will, given in lieu of dower (Lewis v. Smith, 9 N. Y. 517; Crain v. Cavana, 36 Barb. 410; 62 id. 109). See Matter of Mersereau, 38 Misc. 208. As to the effect of alienage on a claim for dower, see Burton v. Burton, 1 Abb. Ct. App. Dec. 271; Goodrich v. Russell, 42 N. Y. 177. As to lands held by the husband, as tenant in common with a third person, and as to partnership lands, see Smith v. Jackson, 2 Eaw., 28; Smith v. Smith, 6 Lans. 313.

⁵⁶ Jackson v. O'Donaghy, 7 Johns. 247; Siglar v. Van Riper, 10 Wend. 414.

§ 561. **What is a reasonable sustenance.**— In regard to the widow's right to a reasonable sustenance during the forty days, the fact that the estate is insolvent is not material,⁵⁷ except as it may control the discretion of the surrogate, either in ordering the amount to be allowed, or in determining the reasonableness of the amount expended for that purpose by the executor or administrator. The reasonableness of the sum to be allowed for sustenance, which is, of course, in addition to the articles set apart for her, and the one hundred and fifty dollars for furniture,⁵⁸ is to be determined in the light of all the circumstances of the particular case, the allowance being more or less as the case may seem to require, or none at all, perhaps, if it appears that, all things considered, none ought to be made.⁵⁹ But the discretion is a legal discretion, and is subject to appeal.

In a case where all the real and personal estate, except a small legacy, was given by the will to the widow for life, the surrogate's decision that she was not entitled to an allowance for forty days' sustenance, nor to one hundred and fifty dollars for household furniture, was sustained on appeal.⁶⁰ But the sustenance to be allowed for is, in any case, that of the widow herself; she cannot be allowed, by virtue of this statute, to provide out of the estate for the maintenance of the children;⁶¹ nor, as "sustenance," will she be allowed her mourning outfit, or her personal expenses in attending her husband's funeral. She is entitled to the use of the supplies left on hand in the house during her quarantine, and the reasonable cost of her board during that period.⁶²

TITLE FOURTH.

REDUCTION OF ESTATE TO POSSESSION.

ARTICLE FIRST.

PROCEEDINGS BEFORE ISSUE OF LETTERS.

§ 562. **Extent of representative's authority.**— In regard to the collection of the estate, before the grant of letters, there was formerly a great difference between the powers of an executor and an administrator. At common law, an executor was said to derive his title from the will itself, and not from the probate; the letters

⁵⁷ Johnson v. Corbett, 11 Paige, 265.

⁵⁸ See *ante*, § 508; Matter of Wachter, 16 Misc. 137; 38 N. Y. Supp. 941.

⁵⁹ See Kersey v. Bailey, 52 Me. 199; Hallenbeck v. Pixley, 3 Gray, 524.

⁶⁰ Peck v. Sherwood, 56 N. Y. 616.

⁶¹ Johnson v. Corbett, 11 Paige, 265.

⁶² Matter of Miller, 1 L. Bul. 48.

issued to him being evidence only of his title, and not the foundation of it. On the other hand, the authority of an administrator springs from, and is founded on, the grant of letters to him.⁶³

Even a person entitled to administer in preference to every one else, and competent in every respect, has no right to interfere with the estate before the issuing of letters to him. An executor, however, was held to have the right — as a deduction from the principle that he derived his authority immediately from the will — to do nearly all acts in regard to the estate before obtaining letters, and letters, therefore, were only necessary to him when he commenced legal proceedings in which he was obliged to prove his title to act as executor; which he could only do by showing a grant of letters to him. By the Revised Statutes, however, the powers of executors have been considerably limited, and they cannot now interfere with the estate further than is necessary for its preservation, nor can they dispose of any part of it, except to pay funeral charges.⁶⁴

Any person, therefore, who takes into his possession any of the assets of the decedent, without being authorized to do so as executor, administrator, or collector, is liable to account for the full value of such assets, and cannot retain or deduct for any debt due to him.⁶⁵

§ 563. Effect of letters upon prior acts.— If, however, letters are subsequently granted to such person, the letters are retroactive, and legalize the acts which were before tortious.⁶⁶ But this rule extends only to those acts which he might have done, had he been executor at the time, and will not protect an executor who, before the grant of letters, issued execution against a debtor of the testator and sold property thereunder.⁶⁷

⁶³ *Valentine v. Jackson*, 9 Wend. 302. See *ante*, §§ 130, 131.

⁶⁴ 2 R. S. 71, § 16. Accordingly, one to whom a due-bill, belonging to the testator's estate, purported to have been transferred by a person, as executrix, to whom the letters had not issued, acquired no title thereto, and is not entitled to maintain an action thereon. (*Humbert v. Wurster*, 22 Hun. 405.) Until letters are issued to one named executor in the will, he does not represent the decedent so as to make service of process on him good as binding the estate. (*Matter of Flandrow*, 28 Hun. 279.) Admissions of an executor or administrator made before the issuance of

letters to him are inadmissible against him in his representative capacity. (*Fitzmahony v. Caulfield*, 87 Hun. 66; 33 N. Y. Supp. 876.)

⁶⁵ 2 R. S. 81, § 60. See § 130, *ante*.

⁶⁶ Executors cannot be charged with a *devastavit* in taking moneys of the estate before they had received their letters and, acting in good faith and with what then appeared to be reasonable prudence, using it to discharge an apparently valid obligation of their testator. (*Matter of Denton*, 103 N. Y. 607.) See *ante*, § 130.

⁶⁷ *Bellinger v. Ford*, 21 Barb. 311. Where an executrix, before probate, sold a part of the estate, and, after

So, formerly, an executor could begin a suit before letters were issued to him, and if he obtained them before trial, so that he could then produce them in evidence, it was enough; but the clause of the Revised Statutes above mentioned has now changed this rule, and he must have letters to entitle him to commence suit.⁶⁸ Where, however, an executor or administrator has, by virtue of his power under the statute, taken possession of the goods of the deceased, which are afterward wrongfully taken from him, he may sue to recover them or their value on the strength of his own possession.⁶⁹

Collecting debts due the deceased is not, however, regarded as necessary to the preservation of the estate, and unless the person named in the will as executor should afterward have letters issued to him, payment to him of a debt due the deceased would not be valid as against the proper representative of the estate.

ARTICLE SECOND.

PURSUIT OF LEGAL REMEDIES IN GENERAL.

§ 564. Continuing action brought by representative.—The primary design of this section is to present the *general rules of procedure* applicable to actions and special proceedings instituted or continued by the representative of a decedent; but, for the sake of convenience, it includes also the like rules applying to legal proceedings taken against them. The substantive general provisions concerning the liability incurred by the personal representatives of a decedent are treated in the next succeeding title, under the topic of the care and custody of the estate, and liabilities incurred therein.

Whether an action, or a special proceeding, by or against a decedent may be continued as to his representatives, depends upon whether the cause of action, or right to the relief sought, sur-

probate, brought suit to recover it.—Held, on a nominal judgment, that the sum she had received should be applied to reduce the amount of her recovery. (Thomas v. N. Y. L. Ins. Co., 50 N. Y. Super. [J. & S.] 225.) See Dutcher v. Dutcher, 88 Hun. 221; 34 N. Y. Supp. 653. If persons pretending to be executors take possession, the next of kin should procure an administrator to be appointed, and he may recover the property. (Muir v. Trustees of the Leake & Watts Orphan House, 3 Barb. Ch. 477.) And see

Brown v. Brown, 1 id. 189; Wever v. Marvin, 14 Barb. 376; Humbert v. Wurster, 22 Hun. 405. While a person, as next of kin simply, may not sue to recover personal property of a deceased person, a recovery may be had, under special circumstances, without the intervention of an administrator. (Segelken v. Meyer, 94 N. Y. 473.)

⁶⁸ Thomas v. Cameron, 16 Wend. 580.

⁶⁹ Valentine v. Jackson, 9 Wend. 302.

vives.⁷⁰ An action or special proceeding *brought by* an executor or administrator does not abate by his death or removal, but may be continued by his successor, who must, upon his application, be substituted for that purpose.⁷¹ One who succeeds another in the administration has, however, an election to continue, or not, an action commenced by the former representative.⁷²

"If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force, as against the estate of the decedent, or a person succeeding to the administration thereof." ⁷³

§ 565. Extension of limitation of actions.— Where the decedent died, owning a cause of action which survives, the executor or administrator may sue thereon after the limitation expires, and within one year after the death.⁷⁴

Where the representative brings an action to establish the de-

⁷⁰ Co. Civ. Proc., § 755, as amended by L. 1891, c. 284. The provision as to special proceedings applies only to cases where a party dies after the amendment took effect. For former rule, see *Leavy v. Gardner*, 63 N. Y. 625.

⁷¹ Co. Civ. Proc., §§ 766, 1828, 2605. See *Bonnel v. Griswold*, 15 Abb. N. C. 470. But it may be denied for laches. (*Pringle v. Long Island R. Co.*, 157 N. Y. 100; *Crowley v. Murphy*, 33 App. Div. 456.) See *Matter of Waite*, 43 id. 296; *Van Brocklin v. Van Brocklin*, 17 id. 226; *Shipman v. Long Island R. Co.*, 11 id. 46. An action by an administrator, who is also sole next of kin of decedent, to recover damages for negligently causing the latter's death, survives the plaintiff's death and may be continued by the administrator *de bonis non*. (*Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145.) But compare *contra*, *Mundt v. Glokner*, 20 Misc. 63.

⁷² *Bain v. Pine*, 1 Hill. 615.

⁷³ Co. Civ. Proc., § 1830.

⁷⁴ Co. Civ. Proc., § 402. See *Mills v. Mills*, 115 N. Y. 80; *Green v. N. Y. Cent., etc., R. R. Co.*, 49 N. Y. Super. (J. & S.) 333; *Scovill v. Scovill*, 45 Barb. 517. See also Co. Civ. Proc., § 405, for an extension of limitation, in favor of the representative, as to

bringing a new action after reversal, etc. Payments on a debt which is barred by the Statute of Limitations, made to the widow of an intestate, though made before she had taken out letters of administration, will take the debt out of the statute, so as to enable her to maintain a suit on it as administratrix, upon taking out letters. (*Townsend v. Ingersoll*, 12 Abb. Pr. [N. S.] 354.) As to payments, where there are both a domestic and a foreign administration, compare *Stone v. Scripture*, 4 Lans. 186. The insertion, in an inventory, of a note theretofore made by the executor to his testator, such inventory being signed and verified by the executor, to the effect that it was a true inventory of all just claims of the deceased against him (the executor) is a sufficient acknowledgment of the indebtedness by the executor, to take the case out of the Statute of Limitations. (*Morrow v. Morrow*, 12 Hun, 386.) For the application of the Statute of Limitations to an action by an administrator with the will annexed, as trustee under the will, to recover a surplus retained, on foreclosure, by a mortgagee of decedent's lands, see *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497.

cedent's will, he must commence it within six years after the cause of action accrues.⁷⁵

Where the representative brings an action to recover personal property taken after the decedent's death, and before letters issued, or to recover damages for taking, etc., such property during that period, the letters are deemed to have issued within six years after the death of the decedent.⁷⁶ If the decedent, being liable for a cause of action, died without the State, the claimant has until eighteen months *after letters* are issued here, within which to sue the executor or administrator, in extension of the ordinary limitation.⁷⁷

But if, being so liable, he died within the State, the claimant has an extension of eighteen months *after the death*, within which to sue, in all cases, and, if letters are not issued here at least six months before that period expires, an additional year after they are so issued.⁷⁸ Where a claim against the estate has been liquidated by the recovery of a judgment thereon in an action in a court of record, or upon a reference under the statute,⁷⁹ or where a legatee brings an action, or institutes a special proceeding against an executor or administrator with the will annexed to enforce payment of a legacy, the time during which an action is pending in a court of record to recover from the executor or administrator any money or other property, claimed by said executor or administrator to belong to the estate of the decedent, or is embraced in inventory of the assets of said decedent's estate, and until the final determination thereof, is not a part of the time limited for the commencement of an action against an executor or administrator, for a claim against the estate of the decedent.⁸⁰

⁷⁵ Co. Civ. Proc., § 382, subd. 6. It was held, under the former Code (§ 102), that where, after the accruing of a cause of action as to which the cause accrues upon the discovery of the facts upon which its validity depends, (Ib., amended L. 1894, c. 307.) before the expiration of the time limited, the debtor dies, and an action is brought more than seven years and a half after the cause of action accrued, and after the lapse of a year from the issuing of letters of administration, allowed for the bringing of action in such cases, the action is barred. (Sanford v. Sanford, 62 N. Y. 553.) See Matter of Kendrick, 107 id. 104.

⁷⁶ Co. Civ. Proc., § 392. See Bucklin v. Ford, 5 Barb. 393.

⁷⁷ Co. Civ. Proc., § 391.

⁷⁸ Co. Civ. Proc., § 403. The statutory limitations of the time to commence an action against executors or administrators are not applicable to an action based upon a claim against the decedent, on which a judgment has been recovered against his administrator, to reach real property alleged to have been conveyed by the decedent in fraud of his creditors; the only limitation applicable is that relating to actions for equitable relief against fraud. (Kent v. Kent, 62 N. Y. 560.)

⁷⁹ Co. Civ. Proc., § 2718.

⁸⁰ Co. Civ. Proc., § 403, as amended 1896. As to the limitation of an action upon a surrogate's decree, see Co. Civ. Proc., § 382, subd. 7.

An action against an executor or administrator, to recover a chattel, or damages for taking, detaining, or injuring personal property, by him or the decedent, must be brought within three years.⁸¹ The rules of the Code pertaining to the limitation of actions apply also to special proceedings.⁸²

§ 566. Extension of time for representative to appeal.—Where a party, entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the personal representative at any time within four months after such death.⁸³

§ 567. Actions to be brought by and against representative as such.—The Code abrogates the practice of bringing proceedings, by or against an executor or administrator personally, where the cause pertains to him only in his representative character, and provides that an action or special proceeding commenced by him, upon a cause of action belonging to him in his representative capacity, or commenced against him, unless the intent is to charge him personally, must be brought by or against him in his representative capacity.⁸⁴

The capacity in which the proceeding is taken should properly appear in the title of the action, upon the process, complaint, etc. The designation of the plaintiff, in the title of the action, as "A. B., executor, etc.," without using the word "as," or its equivalent, is mere *descriptio personæ*.⁸⁵ But, though there be naught in the title of the process or the complaint to give a representative character to the plaintiff, the frame and averments and scope of the

⁸¹ Co. Civ. Proc., § 383, subd. 4.

⁸² Co. Civ. Proc., § 414. The short limitation of actions on disputed claims (2 R. S. 89, § 38) is discussed in tit. 6, art. 1, subd. 3 of this chapter; and the limitation of proceedings to enforce a debt owing to the executor or administrator by the decedent's estate, in tit. 6, art. 2 of the same.

⁸³ Co. Civ. Proc., § 785.

⁸⁴ Co. Civ. Proc., § 1814; Gulke v. Uhlig, 55 How. Pr. 434. The section includes only such causes of action as accrued during the lifetime of the decedent, or are founded on contracts made by him. (Buckland v. Gallup, 105 N. Y. 453.) The same was held in Bingham v. Marine Nat. Bank (41

Hun. 377; 17 Abb. N. C. 431; 112 N. Y. 661); also that the fact that an executor or administrator sues as such, in a case where he should have sued individually, does not prevent his recovering in the action in his individual capacity. An action involving a contract made by a representative with respect to the estate, should be brought by, or against, him individually. (Morris v. Hunken, 40 App. Div. 129; 57 N. Y. Supp. 712; Loew v. Christ, 13 App. Div. 624; 42 N. Y. Supp. 963; Gross v. Gross, 26 Misc. 385; 56 N. Y. Supp. 572.)

⁸⁵ Sheldon v. Hox, 11 How. Pr. 11; Stilwell v. Carpenter, 62 N. Y. 639; 2 Abb. N. C. 238.

complaint may be such as to affix to him such character and standing in the litigation.⁸⁶

Since foreign letters confer no authority to sue here, and letters can issue, in this State, only from a Surrogate's Court, an appointment by such a court should be alleged by a plaintiff suing as a representative.⁸⁷

§ 568. Joinder of parties and causes of action.—In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the complaint. Separate answers, by different executors or administrators, cannot be required or allowed, except by direction of the court.⁸⁸

An executor or administrator may sue without joining with him the person for whose benefit the action is prosecuted.⁸⁹ "One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding in favor of or against the executors, in their representative capacity."⁹⁰

⁸⁶ *Beers v. Shannon*, 73 N. Y. 292; *Cordier v. Thompson*, 18 Alb. L. J. 498; 8 Daly, 172. An error in the description of the representative character of the plaintiff, as where executorship is alleged, though the letters granted were of administration with the will annexed, is amendable before or after judgment, and even by the General Term, on appeal. (*Risley v. Wightman*, 13 Hun, 163.)

⁸⁷ See *Vroom v. Van Horne*, 10 Paige, 549; *Forrest v. Mayor*, 13 Abb. Pr. 350; *Beach v. King*, 17 Wend. 197. A foreign administrator cannot sue in our courts without taking out letters here, and where the action is brought "as administrator" it cannot be claimed, in order to avoid the effect of a demurrer, that the action is in his individual capacity. (*Farrington v. American Loan & Trust Co.*, 18 Civ. Proc. Rep. 135; 9 N. Y. Supp. 433.)

⁸⁸ *Co. Civ. Proc.*, § 1817. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued, against all the defendants, as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators who are parties. (*Ib.*) See *Salters v. Pruyn*, 15 Abb. Pr. 224.

⁸⁹ *Co. Civ. Proc.*, § 449. Though he may do so. (*Peck v. Richardson*, 17 App. Div. 618; 44 N. Y. Supp. 919.)

⁹⁰ *Co. Civ. Proc.*, § 1818. Where one of two administrators of an estate, directed a debtor thereof to retain the money due from him, and not to pay it to the other administrator, with which direction the debtor complied, and the other administrator thereupon brought action to recover the debt, in which the coadministrator, refusing to join as plaintiff, was made defendant: Held, that the debtor could not set up the direction not to pay as a bar to the action, the administrator who gave it having done so in violation of his duty, and that the administrator suing was entitled to bring the action and join the other as defendant. (*Strever v. Feltman*, 1 Sup. Ct. [T. & C.] 277.) In an action against executors, for a specific performance of a contract, entered into by the testator, persons claiming through such testator are not necessary parties. The decree against the executors, to make the conveyance, would bind all parties claiming through the latter. (*Patterson v. Copeland*, 52 How. Pr. 460.) See *Fox v. Carr*, 16 Hun, 434.

The plaintiff may unite, in the same complaint, two or more causes of action, whether legal or equitable, arising upon claims against a trustee, by virtue of a contract, or by operation of law.⁹¹

"An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

"1. Where the complaint sets forth a cause of action against him in both capacities, or states facts which render it uncertain in which capacity the cause of action exists against him.

"2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other."⁹²

§ 569. Pleadings; set-off.—"In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency, or want of assets, shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law."⁹³ An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.⁹⁴

Where an executor, administrator, or other person is sued in a representative capacity, he may set forth, as a counterclaim, a demand belonging to the decedent, etc., in any case where the latter could have done so, if the action had been against him.⁹⁵

"In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death, to the defendant, may be set forth by

⁹¹ Co. Civ. Proc., § 484, subd. 8.

⁹² Co. Civ. Proc., § 1815. In such a case, a judgment for the plaintiff for a sum of money, must distinctly show, whether it is awarded against the defendant personally, or in his representative capacity; and so much of the judgment as awards a sum of money against him, personally, may be separately docketed, and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity. The same rule applies where costs, to be collected out of the individual property of an executor or

administrator, are awarded in an action by or against him in his representative capacity. (§ 1816.)

⁹³ Co. Civ. Proc., § 1824. A judgment in such an action is not evidence of assets in the defendant's hands. (Ib.)

⁹⁴ Co. Civ. Proc., § 1831.

⁹⁵ Co. Civ. Proc., § 505. But a creditor of an insolvent estate cannot purchase property at an executor's sale on credit, and, when sued by the executor, counterclaim a debt due him from the decedent. (Thompson v. Whitmarsh, 100 N. Y. 35.)

the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment, in an action against the executor or administrator."⁹⁶ It is necessary that the demand sought to be set off should have been due and payable at the time of the decedent's death.⁹⁷

§ 570. Form of judgment against representatives.—A judgment in an action,⁹⁸ recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the decedent's property, except by the special direction of the court contained therein.⁹⁹

"Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof."¹ On a judgment in favor of the plaintiff, in an action against two or more representatives, some of whom did not answer, execution may issue, in a proper case, against all the defendants, as if all had appeared."

⁹⁶ Co. Civ. Proc., § 506.

⁹⁷ *Jordan v. National S. & L. Bank*, 74 N. Y. 467; affg. 12 Hun, 512. In that case, in an action commenced before the present Code, the defendant sought, but was not allowed, to set off the amount of a note given by the decedent, then held by defendant, but which did not become due until after his death. See *Jaeger v. Bowery Bank*, 8 Misc. 150; 29 N. Y. Supp. 303. Where one indebted to an estate in the hands of a receiver, executor, or trustee, is employed to render necessary services for the benefit and protection of the estate, the value of his services is a proper counterclaim in an action to recover the debt. (*Davis v. Stover*, 58 N. Y. 473.) And see *Patterson v. Patterson*, 1 Hun, 323; modified, 59 N. Y. 574; *Matter of Livingston*, 27 Hun, 607. In an action by executors upon a note given by their testator, and for advances made by him to defendant, a claim in favor of the defendant against the executors for the conversion of certain securi-

ties alleged to have been in the possession of the testator at the time of his death, is against plaintiffs personally and not available as a counterclaim. (*Wakeman v. Everett*, 41 Hun, 278.) To the same effect, *Starke v. Myers*, 24 Misc. 577; 53 N. Y. Supp. 650; *U. S. Trust Co. v. Stanton*, 139 N. Y. 531; 54 St. Rep. 816. As to what is a just set-off against a claim against the estate, see *Shimer v. Kinder*, 12 St. Rep. 728; *Peyman v. Bowery Bank*, 14 App. Div. 432; *Thornton v. Moore*, 26 Misc. 120. A defendant, who is sued by executors on a contract made with them, cannot counterclaim on a cause of action which accrued in the testator's lifetime. (*Gross v. Gross*, 26 Misc. 385; 56 N. Y. Supp. 219; *Jay v. Kirkpatrick*, 26 Misc. 550; 57 N. Y. Supp. 476.)

⁹⁸ Commenced after Sept. 1, 1880.

⁹⁹ Co. Civ. Proc., § 1814.

¹ Co. Civ. Proc., § 1823. See *Matter of Hesdra*, 23 N. Y. Supp. 842.

² Co. Civ. Proc., § 1817.

An executor or administrator may satisfy of record a judgment in favor of his decedent, docketed in the office of a county clerk;³ and may move to set aside, for error in fact, a final judgment of a court of record, rendered against his decedent for a sum of money, or a chattel, or an interest in real property which is declared by law to be assets;⁴ and may bring an action upon a judgment recovered in favor of, and during the lifetime of the decedent, without leave of court; such an action not being between the same parties.⁵

The executor or administrator of a judgment creditor may have execution upon the judgment at any time within five years after its entry, and must indorse his name and residence upon the same when issued.⁶

§ 571. Costs in actions by representatives.— The subject of the award of costs in favor of or against the personal representatives of a decedent, by a Surrogate's Court, or on appeal from a determination thereof, is discussed elsewhere.⁷ So far as actions are concerned, executors and administrators, etc., when plaintiffs, are entitled to, or liable to be mulcted in, costs like other parties; while, as defendants, they are specially protected. The Code declares that, "in an action, brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right;"⁸ "but they are exclusively chargeable upon, and collectible from, the estate, fund, or person represented, unless the court directs them to be paid by the party personally, for mismanagement or bad faith in the prosecution or defense of the action."⁹

³ Co. Civ. Proc., § 1260.

⁴ Co. Civ. Proc., §§ 1283, 1284.

⁵ *Smith v. Britton*, 45 How. Pr. 428. For the proceedings to substitute an executor or administrator in place of the decedent, where the latter dies after the rendering of a judgment or making of an order which is to be appealed from, see Co. Civ. Proc., §§ 1297-1299. Notwithstanding the right to have execution on the judgment, the executor may maintain an action upon a judgment in favor of his testator against the judgment debtor without leave of court. (*Freeman v. Dutcher*, 15 Abb. N. C. 431.)

⁶ Co. Civ. Proc., § 1376.

⁷ See c. XXII, *post*.

⁸ Co. Civ. Proc., § 3246. "Except as otherwise prescribed in" sections 1835, 1836, which relate to the cases where they are protected, as above mentioned,—a matter treated in another place (see tit. 6 of this chapter).

⁹ Co. Civ. Proc., § 3246. See § 555, *ante*. The provisions of this section do not apply to actions by the representative upon causes arising after the death of the decedent. (*Mullen v. Guinn*, 88 Hun. 128; 34 N. Y. Supp. 625; *O'Brien v. Jackson*, 42 App. Div. 171; 58 N. Y. Supp. 1044; *revd.*, on other points, 167 N. Y. 31.)

Where the cause of action (if any) arose after the decedent's death, the representative is personally liable for the costs of an action unnecessarily brought by him, and defendant may enter judgment against him personally, without an order of court.¹⁰

It is said that where costs are awarded generally to the plaintiff, in an action against a representative, they are, *prima facie*, payable out of the estate.¹¹

§ 572. Security for costs.— In an action originally¹² brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by a statute to sue, or to be sued, the court may, in its discretion, require the plaintiff to give security for costs.¹³

While an administrator appointed in this State, and resident within the jurisdiction of the court in which he sues, will not ordinarily be required to give security for costs, in the absence of mismanagement or bad faith,¹⁴ security may be exacted from a nonresident representative¹⁵ though acting under domestic letters.

¹⁰ Feig v. Wray, 64 How. Pr. 391; 3 Civ. Proc. Rep. 159. Where the cause of action sued on by the representative might have been sued on by him in his private right, he cannot, if he fails to obtain judgment, escape the penalty of costs by suing in his representative capacity. (Holdrige v. Scott, 1 Lans. 303; overruling Woodruff v. Cook, 14 How. Pr. 481.) And see Brockett v. Bush, 18 Abb. Pr. 337; Dubois v. Sands, 43 Barb. 412; Butler v. Boston & Albany R. Co., 24 Hun, 99; Bedell v. Barnes, 29 id. 589. The court, upon adjudging that a fund in the hands of an administrator defendant, which he claims belongs to his decedent, in fact belongs to the plaintiff, and that neither the administrator nor his decedent has any interest therein, cannot direct the payment of the defendant's costs out of such fund. (Sheehan v. Huerstel, 46 N. Y. Super. 64.)

¹¹ Berwick v. Halsey, 4 Redf. 18; Matter of Smith, 1 Misc. 269; 22 N. Y. Supp. 1067.

¹² Sullivan v. Remington Sewing Machine Co., 27 Hun, 270. But not where the action was brought by decedent and revived. (Denehy v. McCloud, 21 Misc. 541.)

¹³ Co. Civ. Proc., § 3271.

¹⁴ Drago v. Kavanagh, 56 App. Div. 179; 67 N. Y. Supp. 622; Davidson

v. Bose, 57 App. Div. 212; 68 N. Y. Supp. 316; Podmore v. South Brooklyn Savings Inst., 27 Misc. 120; 57 N. Y. Supp. 406; McNeil v. Merriam, 57 App. Div. 164; 68 N. Y. Supp. 165. And it was so held under the former Code (§ 317), in Norris v. Breed, 1 Sheldon, 271. A domestic administrator, though nonresident, was not required to furnish security in Dunn v. American Surety Co., 58 N. Y. Supp. 140. It has been held that the discretion as to requiring security, under the present Code, is not, in terms, limited at all. Accordingly, an administrator with the will annexed suing under letters ancillary to those granted to an executrix in Georgia, was required, on defendant's application, to file security. (Carney v. Bernheimer, 3 Law Bul. 24; citing Kimberley v. Stewart, 22 How. Pr. 281; Darby v. Condit, 1 Duer, 599.) An administrator of an insolvent estate, who had concealed the fact that another administrator had previously been appointed, was ordered to file security for costs in Pfeifer v. Supreme Lodge, 54 App. Div. 200; 66 N. Y. Supp. 604.

¹⁵ Pursley v. Rodgers, 44 App. Div. 139; 61 N. Y. Supp. 1015. Compare Podmore v. Seaman's Bank for Savings, 30 Misc. 416; revg. on reargument, 27 id. 317.

The provisions of section 3268 of the Code do not apply to such an application, the requiring of security being governed by section 3271, which makes it purely a matter of discretion with the court.¹⁶

That discretion is absolute, and notwithstanding there is no evidence of mismanagement or bad faith, the court may require security.¹⁷ On the other hand, the court may limit the amount of security required to be given by a representative, trustee, etc., to stay execution on appeal.¹⁸

ARTICLE THIRD.

SPECIAL PROCEEDING TO DISCOVER PROPERTY CONCEALED OR WITHHELD.

§ 573. **By whom maintained.**— A special proceeding, summary in its operation, is provided by the statute, whereby an executor or administrator may obtain discovery, and security for the delivery or an award of possession, of money or other personal property, belonging to the estate of his decedent, and concealed or withheld from him. The Code permits “an executor or administrator” to institute the special proceeding.¹⁹ The latter term, it is believed, includes, in this instance, an administrator with the will annexed, as well as a temporary administrator, and a public administrator after he has become fully vested with the power to administer, though a doubt may exist as to the latter officer, unless he has actually received letters from the Surrogate’s Court to which he applies.²⁰

§ 574. **The object of the proceeding.**— The design of the statute is twofold,— a discovery of personal property to the end that the representative may obtain immediate possession; or to the end that it may be included in the inventory, but cannot be so included because the party proceeded against refuses to impart knowledge or information concerning the same.²¹ It is certainly not the

¹⁶ *Pelkey v. Town of Saranac*, 67 App. Div. 337; 73 N. Y. Supp. 493. See *Podmore v. Seaman’s Bank*, *supra*.

¹⁷ *Tolman v. Syracuse, B. & N. Y. R. Co.*, 92 N. Y. 353, and cases *supra*.

¹⁸ Co. Civ. Proc., § 1312.

¹⁹ Co. Civ. Proc., § 2707, as amended 1893, consolidating former § 2706. These provisions of the Code are not unconstitutional because they do not provide for a trial by jury. The Legislature has power to confer upon the

surrogate summary authority in respect to estates within his jurisdiction, which courts of equity could have used before the adoption of the Constitution. (*Matter of Curry*, 25 Hun, 321; 1 Civ. Proc. Rep. 319; distinguishing *Matter of Beebe*, 20 Hun, 462.)

²⁰ See § 376, *ante*.

²¹ *Matter of O’Brien*, 65 App. Div. 282.

object of the proceeding to enable the representative to collect debts due the decedent,²² and was not intended as a substitute for ordinary civil remedies in cases where the latter are appropriate.²³

§ 575. **Petition for citation.**—The proceeding is to be instituted by a “written petition, duly verified, setting forth, on knowledge, or information and belief, any facts tending to show that money or other personal property, which ought to be delivered to the petitioner, or included in an inventory or appraisal, is in the possession or under the control or within the knowledge or information of a person who withholds the same from him, or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry, and be examined accordingly. The petition may be accompanied with an affidavit or other evidence, written or oral, tending to support the allegations thereof.”²⁴

Where there are two or more representatives, all of them should be made parties.²⁵ But the proceeding cannot be maintained by one of two representatives against the other, for the reason that each of them has full control of the assets, and may dispose of them without the co-operation of the other.²⁶

§ 576. **To whom petition presented.**—The petition must be presented to the Surrogate’s Court from which letters were issued to the applicant; or if that surrogate is absent, it may be presented to the county judge, the special county judge, or the special surrogate, or to a justice of the Supreme Court, or, except in New York or Kings county, to the mayor or recorder of a city within the surrogate’s county.²⁷

An officer, other than the surrogate, to whom it is so presented,

²² Matter of Knittel, 5 Dem. 371; 7 St. Rep. 752; Matter of Nay, 6 id. 346; 19 St. Rep. 259; Matter of Carey, 11 App. Div. 289; 42 N. Y. Supp. 346; Matter of Stewart, 77 Hun. 564; 28 N. Y. Supp. 1048; *sub nom.* Matter of Russell, 60 St. Rep. 505.

²³ Matter of Cunard, 27 St. Rep. 128; 7 N. Y. Supp. 553.

²⁴ Co. Civ. Proc., § 2707, as amended 1893, consolidating former §§ 2706, 2707.

²⁵ Matter of Slingerland, 36 Hun. 575; *revq.* Tracey v. Slingerland, 3 Dem. 1.

²⁶ Matter of Prime, N. Y. L. J., Nov. 24, 1891. The proper proceeding for petitioner to have taken was that provided by Co. Civ. Proc., § 2602. See § 520, *ante*.

²⁷ Co. Civ. Proc., §§ 2707, 2708, as amended 1895. See § 4, *ante*, as to the officer designated “special surrogate.”

has the same power as the surrogate, with respect to all the proceedings, and must issue a citation and an order, returnable before him, or as hereafter mentioned; and he may, at any stage of the proceedings, make an order transferring them to the surrogate, who must thereupon complete them, in like manner, as if he had issued the citation.²⁸

§ 577. When citation will be denied.— Although the statute permits the applicant to adduce oral evidence in support of his written allegations, it requires that the surrogate shall be satisfied “upon the papers so presented.” The moving papers, therefore, should be sufficient to justify the granting of a citation and order. The statute requires the petition to set forth *facts*. These should be detailed as fully as practicable. It is not necessary, however, that anything amounting to legal evidence of a concealing or withholding of property should be alleged; but facts, from which there arises a reasonable suspicion thereof, should be stated.²⁹

It is said that the allegations on the part of the petitioner may be exclusively on information and belief, without disclosing the sources or grounds thereof; the only prerequisite to the issuing of a citation being the satisfaction of the surrogate that there are reasonable grounds for the inquiry.³⁰

But a petition only stating petitioner's belief as to the respondent's possession of certain property, without disclosing any facts, is fatally defective.³¹

Delay in making the application, *e. g.*, eleven years after decedent's death, will defeat it; especially where the application is apparently for inquisitorial purposes only.³²

§ 578. Citation and order, and service thereof.— Assuming that the surrogate is present, if he is satisfied, upon the papers presented, “that there are reasonable grounds for the inquiry, he must issue a citation accordingly; which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Where the person, or any of the persons, to be cited, does not reside, or is not within the county of the surrogate, the citation may, in the surrogate's discretion, require him to appear at a specified time, at a place within the

²⁸ Co. Civ. Proc., § 2708.

²⁹ See *Public Adm'r v. Ward*, 3 Bradf. 244.

³⁰ *Walsh v. Downs*, 3 Dem. 202; *Mead v. Sommers*, 2 id. 296. See *Matter of Paramore*, 15 St. Rep. 449.

³¹ *Matter of Robbins*, N. Y. L. J., Jan. 27, 1891.

³² *Matter of Cunard*, 24 St. Rep. 319, *supra*; *Matter of Fogal*, N. Y. L. J., June 23, 1892.

county where he resides or is served, before a judge, a justice of the peace, or a referee, designated in the citation, or before the surrogate of that county.”³³ “The surrogate must annex to or indorse upon the citation, an order, requiring the party cited to attend, personally, at the time and place therein specified. The citation and order must be personally served;³⁴ and service thereof is ineffectual, unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness, who is subpoenaed to attend a trial in the Supreme Court. A failure to attend, as required by a citation and order personally served, may be punished as a contempt of the court.”³⁵

§ 579. Dismissal of proceeding, on answer.—On the return day, or subsequently, pending the examination,³⁶ the person cited may interpose a written verified answer to the petition, alleging that he is the owner of the property in question, or is entitled to its possession by virtue of a lien thereon or special property therein. In case of the interposition of such answer, the surrogate is required to dismiss the proceeding as to the property so claimed by the respondent,³⁷ the reason being, that Surrogates’ Courts cannot try questions of title. Thus, where, at the testator’s death, his widow was possessed of certain coupon bonds, which she subsequently sold, claiming that they were her own property, investments of the proceeds of her own labor, and in her own possession prior to her husband’s death, it was held that it was not proper to issue a warrant, because, first, the bonds were held under fair color of title adverse to the decedent, and not through him; and second, because

³³ Co. Civ. Proc., § 2707, as amended 1893.

³⁴ “It is only necessary to personally serve the citation, and order indorsed thereon, requiring the parties cited to attend personally at the time and place therein specified. Rule 3 of this court does not apply.” (Per Ransom, S., *Matter of Hotchkiss*, N. Y. L. J., July 20, 1892.) See next note.

³⁵ Co. Civ. Proc., § 2708. The citation can only be issued by the surrogate (not by the clerk of the court), and a copy of the petition and order must be personally served, and the original exhibited, or the service will not bring the party into contempt. (*Mauran v. Hawley*, 2 Dem. 396.)

³⁶ In *Matter of McKenna* (N. Y. L. J., Apr. 8, 1892), Ransom, S., said: “I am of the opinion that an answer in a discovery proceeding may be received by the surrogate pending the

examination of the party cited. In this matter, the answer proposed will be received and the proceeding then dismissed, upon the respondent paying the petitioner \$10 costs of this motion, and the taxable disbursements of the petitioner.”

³⁷ Co. Civ. Proc., § 2709, as amended 1893 (former § 2710). See *Matter of Hastings*, 6 Dem. 423; 16 St. Rep. 980; *Matter of McCarthy*, 47 N. Y. Supp. 1127; *Matter of Basch*, 24 Civ. Proc. Rep. 264; 33 N. Y. Supp. 424; *Matter of Lynch*, 83 Hun. 39; 31 N. Y. Supp. 767. As to the surrogate’s power to investigate the truth of the answer, and when an answer may entitle respondent to a dismissal, see *Doyle v. Doyle*, 15 St. Rep. 318, and *Matter of Masterton*, 6 Dem. 460. As to whether an affidavit is an answer, see *Matter of Elias*, 4 Dem. 139.

they, having been sold, could not be deemed to be concealed or withheld, within the meaning of the statute.³⁸ The answer need not set forth the particulars of the respondent's ownership; to allege that he is the owner of the property is sufficient;³⁹ but where he claims to be "entitled to the possession thereof, by virtue of a lien thereon or special property therein," he must allege the facts necessary to sustain the claim.⁴⁰ An answer alleging that the property is held by virtue of letters of temporary administration granted in another State, does not require a dismissal, as, in such case, the respondent is merely a custodian of the property and not the holder of "a lien thereon or special property therein."⁴¹ The proceeding is for the determination of the question of *possession*, and not of title,⁴² and delivery to the representative of the decedent can be decreed, only after it clearly appears that possession is wrongfully withheld.⁴³ Therefore the president of a savings bank will not be examined as to a deposit in his bank, claimed to have been made for the benefit of the decedent.⁴⁴ So the surviving partners of a decedent, having a right to settle up the business of the firm, cannot be required to turn over the decedent's interest therein to his personal representative, until after the payment of partnership debts, and an accounting whereby the amount of such interest is determined.⁴⁵ So an answer that the respondent had held the property in question under an agreement with decedent that he should hold the same as security for certain advances which had been made, and that the respondent, as by agreement it was

³⁸ Public Adm'r v. Ward, 3 Bradf. 244.

³⁹ But it is not enough to allege that he is the owner of all the property, or entitled to the possession thereof. (Matter of Peyser, 35 App. Div. 447; 54 N. Y. Supp. 832.)

⁴⁰ Metropolitan Trust Co. v. Rogers, 1 Dem. 365; Matter of Motz, 5 St. Rep. 343. Of course, the executor or administrator has a remedy by action against any person withholding any part of the estate. In one case, where several persons had colluded to keep from the administrator money found among the intestate's effects, under a false claim of one of them that it had been given to her by the intestate, and subsequently deposited with the intestate for safe-keeping, they were all held liable for the amount, with interest from the grant of letters. (Scoville v. Post, 3 Edw. 203.) In another case, where A. assisted B. to

take possession of an intestate's estate, and received certain moneys claimed by B. as belonging to her, and afterward delivered the same to B., and there was sufficient evidence to show that A. must have known that B. was not entitled thereto, it was held that A. must be considered a principal wrongdoer, and personally liable to the public administrator for the moneys that came into his hands. (Post v. Ketchum, 1 N. Y. Leg. Obs. 261.)

⁴¹ Matter of O'Brien, 65 App. Div. 282.

⁴² Matter of Scott, 34 Misc. 446; 70 N. Y. Supp. 425; Thomas v. Troy City, etc., Bank, 19 Misc. 470; 44 N. Y. Supp. 1039; Matter of Richardson, 31 Misc. 666; 66 N. Y. Supp. 94.

⁴³ Matter of Curry, 25 Hun. 321; 1 Civ. Proc. Rep. 319.

⁴⁴ Matter of Knittel, 5 Dem. 371.

⁴⁵ Camp v. Fraser, 4 Dem. 212.

provided he might, had disposed of the property in the lifetime of the deceased, and applied the proceeds to his reimbursement, was held good, and the proceeding was dismissed.⁴⁶ But an answer setting up title to a part only of the property referred to in the moving affidavit, and denying possession of the balance, does not interpose a plea of title which will oust the surrogate of jurisdiction as to such balance; nor will a statement that the respondent returned such property to the decedent in his lifetime have that effect.⁴⁷

§ 580. The examination of respondent.— If the surrogate entertains the proceedings,—that is, there being no answer raising an issue of ownership,—and the respondent attends in obedience to the citation, he may be examined fully and at large, respecting property of the decedent, or of which the decedent had possession at the time of, or within two years before, his death. A refusal to be sworn, or to answer any questions which the officer conducting the examination determines to be proper, is punishable by the officer or referee conducting the examination, in the same manner as a like refusal by a witness, subpoenaed to attend a hearing before the surrogate.⁴⁸ The surrogate acts judicially, in conducting the examination, and the testimony receivable therein is subject to the restrictions of the Code relating to the admission of evidence given by persons interested, etc., as to personal transactions or communications with the deceased.⁴⁹ After the examination of all the parties cited is completed, if no answer is interposed, unless one or more of them give security, as hereinafter mentioned, either party may produce further evidence, in like manner and with like effect as upon a trial.⁵⁰ The inquiry is limited to personal property capable of delivery; testimony tending to show that a trust was imposed upon real property which had been transferred by the decedent to the respondent, is inadmissible.⁵¹

§ 581. Decree of possession.—“Where it appears to the surrogate or other officer who issued the citation, from the examination and other testimony, if any, that there is reason to suspect that property of the decedent is withheld or concealed by the person cited, he must, unless that person gives the security,” mentioned below,

⁴⁶ *Matter of Wing*, 41 Hun. 452.
Compare *Matter of Richardson*, 31 Misc. 666; 66 N. Y. Supp. 94.

⁴⁷ *Public Adm'r v. Elias*, 4 Dem. 139. See *Matter of Peyser*, 25 Misc. 70; affd., 35 App. Div. 447.

⁴⁸ *Co. Civ. Proc.*, § 2709, as amended 1893 (former § 2710).

⁴⁹ *Tilton v. Ormsby*, 10 Hun. 7; affd., 70 N. Y. 609. See *Co. Civ. Proc.*, § 829.

⁵⁰ *Co. Civ. Proc.*, § 2709, as amended 1893 (former § 2711).

⁵¹ *Matter of Tone*, N. Y. L. J., Mar. 28, 1892.

"make a decree, reciting the ground of making it, and requiring the person cited to deliver possession of the property to the petitioner. The decree must specify the sum of money or describe the other property. Where it is made by an officer, other than the surrogate or temporary surrogate, it must be entered, and may be enforced, as a decree of the Surrogate's Court."⁵² The surrogate must find, as a fact, that the property belonged to the estate; it is not enough to determine that there was probable cause to believe that it belonged thereto. The decree should distinctly specify the property, delivery of which is required; if, after specifying certain articles, it continues, "and all other property, goods, etc., of the said deceased, in her possession or under her control, at her place of residence," it is too broad.⁵³

§ 582. **Security to prevent decree.**— The security, to be given to prevent a decree for delivery, "must be a bond to the petitioner, executed by the person cited, with such sureties and in such a penalty as the surrogate approves; describing the property or specifying the sum of money; and conditioned that the principal in the bond will pay to the obligee, or his successor, the money; or that he will deliver to him the property, or, in default thereof, pay to the obligee the full value of the property; and, in either case, that he will pay all damages awarded against him for withholding the property, whenever it is determined, in an action or special proceeding to be brought by the obligee or his successor, that it belongs to the estate of the decedent. On the presentation of such a bond, and the payment of the costs, if any, which the surrogate or other officer awards to the petitioner, within such a time⁵⁴ as the surrogate or other officer fixes for that purpose, an order must be made, dismissing the proceeding."⁵⁵ The giving of security cannot be compelled; if it is not given, the person against whom the decree issues has an option to deliver the property or submit to a warrant.⁵⁶

⁵² Co. Civ. Proc., § 2709, as amended 1893 (former § 2712).

⁵³ *Tilton v. Ormsby*, 10 Hun. 7; *affd.*, 70 N. Y. 609; *Matter of Mapes*, 6 St. Rep. 668; *Camp v. Fraser*, 4 Dem. 212. An order of the surrogate, deciding that the administrator was entitled to the custody of a bank-book, is not an adjudication of his title to the funds represented thereby. (*Westervelt v. Westervelt*, 46 N. Y. Supp. 298.) As to proceeding being *res adjudicata*, see *Spreen's Estate*, 1 Civ. Proc. Rep. 375.

⁵⁴ "Within such time as the surrogate or other officer fixes for that purpose," relates solely to the payment of costs, the time for which cannot be fixed except upon presentation of such a bond. (*De Lamater v. McCaskie*, 5 Dem. 8.)

⁵⁵ Co. Civ. Proc., § 2710, as amended 1893, consolidating former §§ 2713, 2714.

⁵⁶ See *Matter of McCabe*, 2 L. Bul. 72.

§ 583. **Enforcement of decree; warrant.**—"Where the decree requires the person cited to deliver money, disobedience thereof may be punished as a contempt of the court. Where it requires him to deliver possession of other property, a warrant must be issued, upon the application of the petitioner, directed to the sheriff, or, generally, to any constable of the county, or any marshal of the city where the property may be found; commanding him to search for it, to seize it, if it is found in the possession of the person cited, or his agent, or a person deriving title from him since the presentation of the petition, and for that purpose, if necessary, to break open any house in the daytime; to deliver the property so seized to the petitioner; and to return the warrant within sixty days thereafter. If the decree was made by the surrogate or temporary surrogate, the warrant must be under the seal of the Surrogate's Court; if by any other officer, it must be under his hand, and returnable before him. The issuing of such a warrant does not affect the power of the court to enforce the decree, or any part thereof, by punishing a disobedience thereof."⁵⁷

ARTICLE FOURTH.

GIFTS CAUSA MORTIS.

§ 584. **Characteristics of such gifts.**—There is a species of interest in a decedent's property, termed *donatio mortis causa*, which the personal representatives have no right to reduce to possession, inasmuch as it vests neither in them, nor in the husband or wife or next of kin. The doctrine and denomination are each taken from the civil law. It may, however, become the right and duty of the executor or administrator to oppose the claim that such a gift has been made, with a view to securing its subject as part of the assets, to be administered; and questions of this character are liable to be presented to the surrogate, for his determination.⁵⁸

Such gifts resemble testamentary dispositions in certain particulars; the only essential difference between such a gift and a nuncupative will being, that, in the former, a delivery of the property by the donor to the donee, or to some agent or trustee for him, is indispensable to the validity of the gift; while in the latter, delivery is not essential. Such a gift differs from a gift *inter vivos*, in that it is ambulatory, incomplete, and revocable during the testator's life, and is also liable for the debts of the testator on de-

⁵⁷ Co. Civ. Proc., § 2710, as amended 1893.

⁵⁸ See *Young v. Young*, 80 N. Y. 422; *Fowler v. Lockwood*, 3 Redf. 465.

ficiency of assets.⁵⁹ It differs from a legacy, in that it need not be proved in the Surrogate's Court; and no act or assent on the part of the executor or administrator is necessary to perfect the donee's title. These gifts having many of the qualities of testamentary donations, the same considerations of prudence and caution which induced the Legislature to require wills of personal property to be executed publicly and attested with great formality, would seem to forbid these informal dispositions of property, in expectation of death. The temptation to fraud and imposition in regard to these gifts is as powerful and as dangerous as in the cases of wills, and yet they have been left unchecked and unregulated by statute. It is said, therefore, that the courts ought not to tolerate them, unless they are attended by all the requisites which the common law prescribes, to give them validity.⁶⁰

§ 585. **The subject of the gift.**—Only personal property capable of delivery is the subject of a gift *mortis causa*; and it may embrace all the testator's personal estate, however large the amount and value.⁶¹ A bond and mortgage, stocks, or any other chose in action, whether negotiable or not, may constitute the subject-matter of a good gift *mortis causa*, and pass by delivery to the donee, without any formal assignment by the donor.⁶² And a delivery of a formal written assignment of the contract, as the symbol of the delivery of the gift, may be sufficient to perfect the gift, even without the delivery of the contract or instrument itself.⁶³ The delivery of a mortgage as a gift *mortis causa* is

⁵⁹ Curtiss v. Barrus, 38 Hun. 165. See House v. Grant, 4 Lans. 296; Hoar v. Hoar, 5 Redf. 637; Johnson v. Spies, 5 Hun. 468.

⁶⁰ Harris v. Clark, 3 N. Y. 121. See also Kenney v. Public Adm'r, 2 Bradf. 319; Champney v. Blanchard, 39 N. Y. 111; Grey v. Grey, 47 id. 552.

⁶¹ Meach v. Meach, 24 Vt. 591; White v. Wager, 32 Barb. 250.

⁶² See Hackney v. Vrooman, 62 Barb. 650; Reed v. Reed, 52 N. Y. 651; Montgomery v. Miller, 3 Redf. 154.

⁶³ Grymes v. Hone, 49 N. Y. 17. In that case, the defendant's testator being the owner of 120 shares of bank stock, included in one certificate, made an absolute assignment, in writing, of twenty shares to the plaintiff. This he handed to his wife, to be kept by her and delivered to the plaintiff upon his death. At the time of executing the assignment, the donor was about eighty years of age, in failing health,

and so continued until his death, which occurred about five months thereafter. Held, that this was a valid gift *mortis causa*; that the equitable title to the stock passed by the assignment; that the defendant was trustee for the plaintiff by operation of law, to make the gift effectual, and that a judgment requiring him to produce the certificate and cause a transfer of the twenty shares to be made to the plaintiff was proper. In another case (Westerlo v. De Witt, 36 N. Y. 340) the deceased, being conscious that her death was near, requested B. to give her a parcel, out of which she took money to pay some debts, and returned the rest of the parcel, including some money and a certificate of deposit, to B., saying that she gave it to the latter for her own use. The certificate was undorsed. Held, that this was sufficient evidence of a gift of the certificate,

treated, not as a complete act passing the property, but as creating a trust by operation of law, in favor of the donee, which a court of equity will enforce in the same manner as it would the right of the donee to a bond.⁶⁴ A delivery of the donor's promissory note, without other contract, by which he undertakes to pay money, either during his life or out of his estate after his decease, will not constitute a valid gift *mortis causa*; and a draft unaccepted is equally incapable of becoming the subject of such a gift.⁶⁵ The delivery of a bank pass-book, accompanied with a check, on the savings bank, made payable four days after the depositor's death, is not a good gift *causa mortis*.⁶⁶ But delivery of a bank-book, indorsed "in case of my death my daughter," naming her, is sufficient.⁶⁷

§ 586. **Requisites of gift enumerated.**—To constitute a valid gift in view of death, it must appear: 1. That the gift was made with a view to the donor's death from present illness or from external and apprehended peril. 2. The donor must die of that ailment or peril. 3. There must be a delivery of the subject of the gift. 4. The gift must be absolute.

§ 587. **Gift must be in view of death.**—It is not necessary that the donor should be *in extremis*, or that he should die from the very disease in apprehension of which the gift was made; it is only necessary that he shall not recover from the disease from which

under all the circumstances. Where decedent purchased government bonds and kept them in a box which, with the key thereof, he intrusted to his wife, and from time to time collected the interest and paid over the same to his daughters, these facts were held sufficient to sustain a gift of the bonds, *causa mortis*, to the daughters. (Fowler v. Lockwood, 3 Redf. 465.) And see Corneil v. Cornell (12 Hun, 312), which was a case of donation, by a decedent, in his old age and last illness, to his wife, without assignment, of railroad stocks and bonds, municipal bonds, and bonds and mortgages of individuals. The gift was upheld, as one *causa mortis*. See Shuttleworth v. Winter, 55 N. Y. 629; Stevens v. Stevens, 3 Redf. 507; Conklin v. Conklin, 20 Hun, 278; Kurtz v. Smither, 1 Dem. 399; Kirk v. McCusker, 3 Misc. 277; 22 N. Y. Supp. 780; Tusch v. German Sav. Bank, 23 App. Div. 279; 48 N. Y. Supp. 221; Plasterstein v. Hoes, 37 App. Div. 421; 56 N. Y. Supp. 103.

⁶⁴ 1 Story's Eq. Jur., § 607. A gift of a bond and mortgage *inter vivos* may be effected by a simple delivery of the security. (Taber v. Willets, 44 Hun, 346.)

⁶⁵ Harris v. Clark, 3 N. Y. 93; 2 Barb. 94; Coutant v. Schuyler, 1 Paige, 316. See Craig v. Craig, 3 Barb. Ch. 76; Wilson v. Baptist Education Society, 10 Barb. 315; Huntington v. Gilmore, 14 id. 243; Fulton v. Fulton, 48 id. 581. It is well settled that one may remit a debt due him, by way of a gift *mortis causa*, by a formal surrender of the securities, with a verbal declaration of intention to that effect. (Moore v. Darton, 7 Eng. Law & Eq. 134.) And see Gray v. Barton, 55 N. Y. 68.

⁶⁶ Curry v. Powers, 70 N. Y. 212. The delivery of the check did not transfer the funds, nor did the delivery of the pass-book; the depositor did not absolutely part with his control of the funds. (Ib.)

⁶⁷ Ackerman v. Herrick, 71 Hun, 190; 24 N. Y. Supp. 606.

he then apprehended death.⁶⁸ Whether the testator was so seriously ill as to be apprehensive of death, so that he was legally acting "in view of death," must depend upon the circumstances of each case. A vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sustain a gift *mortis causa*.⁶⁹ Therefore, the delivery, by one about entering the army, of a promissory note to his brother, with directions to give it to his mother, if he should not return alive, is not a valid gift to the mother.⁷⁰ But a donor may make a valid gift *causa mortis* in the apprehension of death from a surgical operation to be performed in the future to which he intends voluntarily to expose himself. Death from a surgical operation, made necessary by a present disease, is, in a proper sense, death from the disease, and the gift may, in such case, be upheld as made in the apprehension of death from the disease.⁷¹ The time of the death is not material, except as the fact bears upon the question of the testator's apprehension of that event. There is no rule which limits the time within which the donor must die, to make the gift valid.⁷² Where it appears that the gift was made during the testator's illness, and only a few days or weeks before his death, the law presumes that the gift was made in contemplation of death.⁷³

§ 588. **Death of donor.**—The death of the donor is essential to the validity of the gift. If the gift be made during the donor's last illness, the law infers the condition that the donee is to hold the gift, only in case the donor die of that indisposition. It is not essential that the donor should expressly declare that the gift is

⁶⁸ Ridden v. Thrall, 125 N. Y. 572; 35 St. Rep. 913; Langworthy v. Crissey, 10 Misc. 450; 31 N. Y. Supp. 85.

⁶⁹ Irish v. Nutting, 47 Barb. 370. A gift made during the donor's last illness, but which she did not expect would result fatally, is not sufficient. (Partridge v. Kearns, 32 App. Div. 483; 53 N. Y. Supp. 154.) See Alsop v. Southold, etc., Bank, 50 St. Rep. 672.

⁷⁰ Sheldon v. Button, 5 Hun, 110. A voluntary conveyance, by a parent to a child, of land inherited from the grantor's ancestor, pursuant to a request made by the latter a few days before the commencement of the sickness which terminated with his death,

cannot be sustained as a gift *causa mortis* from the ancestor to the grantee, for want of delivery, and also because such a gift must clearly appear to have been made in contemplation of death. (Champlin v. Seeber, 56 How. Pr. 46.)

⁷¹ Ridden v. Thrall, 125 N. Y. 572; 35 St. Rep. 913.

⁷² Grymes v. Hone, 49 N. Y. 17.

⁷³ Merchant v. Merchant, 2 Bradf. 432. And see Vandermark v. Vandermark, 55 How. Pr. 408; Bliss v. Fossdick, 86 Hun, 162; 33 N. Y. Supp. 317; affd., 151 N. Y. 625; Matter of Swade, 65 App. Div. 592; 72 N. Y. Supp. 1030.

to take effect only on his death. Until death, the donor may reclaim the gift, and his recovery makes the gift void.⁷⁴

§ 589. **Delivery.**— It is also requisite, in order to give effect to the gift (if by parol), that the donor should, at the time of the delivery, part with the possession of the subject of the gift.⁷⁵ The delivery of possession need not be to the donee personally, but may be given to a third party for the donee's use.⁷⁶ Delivery must be made according to the nature of the subject of the gift, not according to the capability of the donor.⁷⁷ So far as possible, there must also be an acceptance of the thing by the donee. The mere fact that it has passed into the possession of the donee, even by the act of the donor himself, is said not to be enough. Thus, where the deceased, in his last illness, expressed a desire to his daughter that she should have his carriage and horses, but did not request her to take possession of them, nor direct the stable-keeper to deliver them to her, and it did not appear that there had been any actual transfer or change of possession, though they were afterward used by her, it was held not such a delivery as was necessary to complete the gift.⁷⁸ Where the nature of the subject-matter of the gift will not admit of a corporal delivery, the delivery of the means of obtaining possession, or making use of the thing given, amounts to a delivery of the thing itself. Thus, the delivery of the key of a trunk or bureau, by the donor, accompanied by the declaration of the donor that he gave all his property to the donee, is a good delivery of the contents, though they

⁷⁴ Hayes v. Kerr, 19 App. Div. 91; 45 N. Y. Supp. 1050.

⁷⁵ Grymes v. Hone, 49 N. Y. 17; Brink v. Gould, 43 How. Pr. 289. See Gray v. Barton, 55 N. Y. 68; Johnson v. Spies, 5 Hun, 468; Matter of Ward, 2 Redf. 251; Hoar v. Hoar, 5 id. 637. See Montgomery v. Miller, 3 id. 155.

⁷⁶ Grymes v. Hone, 49 N. Y. 17; Callanan v. Clement, 18 Misc. 621; 42 N. Y. Supp. 514.

⁷⁷ Accordingly, where the owner of articles of furniture, situated in rooms occupied by herself and husband, while lying in bed and *in extremis*, called the claimant to her, and, after giving directions as to the disposition of certain articles, said, "all the rest of my things I give to you. * * * I want you to take all the things and use them," etc., and died the same day, the articles remaining in use in the rooms. Held, to be no gift, for

want of sufficient delivery. (Turner v. Brown, 6 Hun, 331.) To same effect, Matter of Somerville, 2 Connolly, 86; 20 N. Y. Supp. 76.

⁷⁸ Delmotte v. Taylor, 1 Redf. 417. See Martin v. Funk, 75 N. Y. 134; Fowler v. Lockwood, 3 Redf. 465; Matter of Goss, 71 Hun, 267. In Gescheidt v. Drier (20 N. Y. Supp. 11), the evidence tended to show that deceased promised to give a bank pass-book to defendant when she died, but did not show any completed gift before the day of deceased's death. On the morning of that day, defendant got the book from a place pointed out by deceased in her wardrobe, and afterward put it back again, locked the wardrobe, and put the keys under deceased's pillow. The book remained in the wardrobe until after the aunt's death. Held, no sufficient delivery to support a gift.

were not removed.⁷⁹ In regard to the delivery of things in action, it is well settled that all that is necessary is a delivery of the contract or note upon which the cause of action is founded.⁸⁰ A gift of a savings-bank deposit is sufficiently consummated by the delivery of the pass-book, and this, although a rule of the savings bank required an order or power of attorney from one seeking to draw money for a depositor.⁸¹ The donor's retention of the pass-book is not necessarily inconsistent with the completeness of the gift,⁸² nor is mere possession by the donee conclusive of the transfer.⁸³

§ 590. **Gift should be absolute.**—In order to make a valid gift *causa mortis* there must be a renunciation by the donor, and an acquisition by the donee, of all interest in and title to the subject of the gift.⁸⁴ The rule is the same as in the case of a gift *inter vivos*. One cannot, without a written transfer or declaration of trust, make a valid gift, *in præsentis*, of an instrument securing the payment of money, reserving to himself the accruing interest during life, unless there is an absolute delivery of the security to the donee, vesting the entire legal title and possession in him.⁸⁵

⁷⁹ *Cooper v. Burr*, 45 Barb. 9; *Matter of Swade*, 65 App. Div. 592; 72 N. Y. Supp. 1030; *Allerton v. Lang*, 10 Bosw. 362. In the latter case the deceased, shortly before her death, took from her drawer a cloth pocket containing a pocket-book, and took out the pocket-book, and, after giving away money which she took from it, and expressing her intentions as to a devise of real property, replaced the pocket-book in the cloth pocket, and gave it to her daughter-in-law, saying, "Here, I give you this. I make you a present of it. I have another, and want you to wear them, they are so very handy." Held, that this was a valid gift to the latter of stock belonging to the giver, a certificate for which, in the giver's name, was then contained in the pocket-book. In *Vandermark v. Vandermark* (55 How. Pr. 408), the decedent during his lifetime made a deposit in a savings bank, to the credit, and in the name of the one claiming as donee; and, being in advanced age, about two weeks before his death, left with a third person a box containing the bank-book, saying that he intended it for the claimant, and that no other person must have it. The court upheld the transaction as a valid gift *causa mortis*, though the

key to the box was retained by decedent, and found in his pocket-book after his death.

⁸⁰ See *Bedell v. Clark*, 33 N. Y. 581; *Matter of Crosby*, 46 St. Rep. 442.

⁸¹ *Ridden v. Thrall*, *supra*; *Walsh v. Bowers Sav. Bank*, 28 St. Rep. 402; 7 N. Y. Supp. 669. See *Board of Domestic Missions v. Mechanics, etc., Bank*, 40 App. Div. 120; 57 N. Y. Supp. 582.

⁸² *Martin v. Funk*, 75 N. Y. 134. See *Sherwood v. Mer. Mut. Ins. Co.*, 5 Hun. 115.

⁸³ See *Podmore v. Dime Sav. Bank*, 29 Misc. 393; 60 N. Y. Supp. 533.

⁸⁴ *Wetmore v. Brooks*, 44 St. Rep. 327; 18 N. Y. Supp. 852, and cases cited.

⁸⁵ *Young v. Young*, 80 N. Y. 422. Accordingly, where the owner of coupon bonds inclosed them in two envelopes, indorsed with memoranda that he owned and reserved the interest during life, but that, after his death, the securities belonged absolutely and entirely to his two sons, respectively, with one of whom he lived, and placed and kept the envelopes in a safe used by him in common with one of the sons and a grandson, and also exhibited the envelopes to the sons' wives, and spoke of the contents as belong-

§ 591. **Gift void as against creditors.**—The statutory provision to the effect that persons who, in fraud of creditors and others, have received the estate of a deceased person, are liable to the representative of the estate therefor, applies to a gift *causa mortis*.⁸⁶ Hence, where the alleged gift was of all the decedent's estate which, if allowed, would leave the estate insolvent, and decedent's creditors unpaid, the gift is void.⁸⁷

§ 592. **Revocation of gifts.**—A gift *mortis causa* is revocable in case the donor recover, and this, notwithstanding the gift was in express terms absolute, and the delivery was absolute.⁸⁸ It may be revoked in the donor's lifetime, by his resumption of posses-

ing to the boys, but cut off the coupons as they matured, and retained dominion over the bonds, giving one of them to a third person, before his death, which occurred about a year and a half after the deposit, it was held that, as the memoranda showed the disposition intended not to be of a testamentary character, the transaction could be upheld only as an executed gift, or a declaration of trust; but that the former theory was untenable for want of delivery, and the latter, because an attempt was not made to create a trust but only to vest a remainder directly in the donees. (Ib.) See a somewhat similar case. (Trow v. Shannon, 78 N. Y. 446.) And see, further, as to a gift of a bank deposit, Matter of Ward, 2 Redf. 251; Hoar v. Hoar, 5 id. 637; Matter of Hermes, 1 L. Bul. 72; Ackerman v. Herrick, 71 Hun. 190; Cosgriff v. Hudson City Sav. Inst., 24 Misc. 4; 52 N. Y. Supp. 189; Louck v. Johnson, 70 Hun. 565; 24 N. Y. Supp. 267; Podmore v. South Brooklyn Sav. Inst., 48 App. Div. 218; 62 N. Y. Supp. 961. For the case of a gift by a husband of a joint deposit in the names of himself and wife, see Wetherow v. Lord, 41 App. Div. 413. In pursuance of an antenuptial promise, but without other consideration, decedent transferred a mortgage to his wife, by a written assignment, which provided that "the interest on said mortgage and the money thereby secured" were to belong to the assignor during his lifetime; and delivered to her the mortgage and assignment, retaining the bond in his own possession. Upon her accounting, as executrix, the widow claimed title to the

mortgage as donee. Held, that the transfer could only be sustained, if at all, as a gift *inter vivos*; and that it was invalid as such, by reason of the interest retained in the subject by decedent. (Matter of Wirt, 5 Dem. 179.) The owner of bonds caused them to be registered in the name of the donee with intent to vest the title in the latter. Held, that he had absolutely divested himself of his dominion and control over the property and that title vested in the donee as a gift, notwithstanding the fact that the donor retained the actual custody of the bonds and collected the interest accruing on them during his lifetime. (Matter of Townsend, 5 Dem. 147.) So held, also, as to moneys deposited in a trust company in the name and to the credit of the donee, whose signature was delivered by the depositor to the bank for its guidance in paying out the moneys. (Ib.)

⁸⁶ Jones v. Jones, 41 Hun. 163; 4 St. Rep. 141.

⁸⁷ Wetmore v. Brooks, 44 St. Rep. 327; 18 N. Y. Supp. 852.

⁸⁸ A gift deed was executed by the grantor when very sick and under apprehension of death, and was delivered to a third person. Held, that this was a gift *causa mortis*, and a subsequent delivery of the deed to the grantee by grantor's direction did not of itself convert the gift into one *inter vivos*; and, therefore, upon the grantor's recovery the deed became revoked. (Curtiss v. Barrus, 38 Hun. 165.) See Bliss v. Fosdick, 86 id. 162; 33 N. Y. Supp. 317; affd., 151 N. Y. 625; Collins v. Collins, 11 Misc. 28; 31 N. Y. Supp. 1017.

sion. It is not necessary that the donor should actually regain the possession of the subject of the gift; it is sufficient if he reclaims it from the donee, or from the person to whom it had been intrusted, with intent to recall the gift. It is not even necessary that the reclamation should be made with the knowledge of the donee at the time, and if the donee subsequently resume the possession of the subject-matter of the gift, without the consent of the donor, or after his decease, and retain such possession, claiming it as his property by virtue of the gift, he may be compelled to surrender it to the personal representative of the donor, or, if he be himself such representative, to account for it as belonging to the estate.⁸⁹ It has been held that any act, such as the subsequent birth of a child, which operates to revoke a will, should have the same effect in regard to a gift *mortis causa*.⁹⁰ But the bequest of all the testator's property to another will not operate to revoke such a gift, since the will only becomes operative at the death of the testator, when the gift also becomes irrevocable.⁹¹

§ 593. Evidence of gift.—Where the personal representative sues to recover effects claimed by one as a gift *mortis causa* from the decedent, and the only substantial question is the fact of the gift, the burden of establishing it is upon the defendant.⁹² The most clear, circumstantial, and satisfactory proof will be required to support such a disposition.⁹³ It is not necessary that the donee, in order to sustain the claim, should show affirmatively, and with minuteness, the circumstances under which the alleged gift was made, nor is he required to prove affirmatively that the donor

⁸⁹ Merchant v. Merchant, 2 Bradf. 432; Kirk v. McCusker, 3 Misc. 277; 22 N. Y. Supp. 780.

⁹⁰ Bloomer v. Bloomer, 2 Bradf. 340.

⁹¹ 2 Redf. on Wills, 331. The presumption is that a gift made during a last sickness is intended to take effect at the donor's death, even though not so declared in express terms, and if such is the intent the donor has a right to revoke it. (Jennings v. Jennings, 23 Week. Dig. 457.)

⁹² Conklin v. Conklin, 20 Hun. 278; Chalker v. Chalker, 5 Redf. 480; Flood v. Cain, 78 Hun. 378; 29 N. Y. Supp. 156; aff'd., 150 N. Y. 573.

⁹³ Delmotte v. Taylor, 1 Redf. 417; Bedell v. Carll, 33 N. Y. 581; Matter of Essex, 20 N. Y. Supp. 62; Alsop v. Southold Sav. Bank, 21 id. 300; Wetmore v. Brooks, 44 St. Rep. 327; 18 N. Y. Supp. 852. See Tilford v. Bank for Savings, 31 App. Div. 565; 52

N. Y. Supp. 142; Reynolds v. Reynolds, 20 Misc. 254; 45 N. Y. Supp. 338; McMath v. O'Connor, 11 App. Div. 627. It is competent for the party seeking to establish it to prove, in corroboration, a letter written at about the same time by the alleged donor indicating an intention to give the property to the donee. (Ridden v. Thrall, 125 N. Y. 572; 35 St. Rep. 913.) In Farmer v. Devlin (32 St. Rep. 168), the only witness to establish the gift was the alleged donee's husband, and he testified that he never talked the matter over with her, until after the death of the donor's administrator, and she testified, that she had never spoken about the matter with her husband. Held, in view of the suspicious character of the testimony, a finding that there was no gift *causa mortis* would not be disturbed.

was of sound, disposing mind and memory, when he made the gift, and that the delivery of the subject was his free and voluntary act.⁹⁴ He establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the common law prescribes, to give it validity.⁹⁵

TITLE FIFTH.

DEALING WITH ESTATE

ARTICLE FIRST.

SOURCES OF AUTHORITY AND MODE OF EXERCISE.

§ 594. **Exercise of power to sell, under will.**—As the powers of a personal representative are personal and cannot be delegated, he cannot empower an agent to contract for the sale of the trust property; and a contract by an agent is void, though the principal may render it valid by ratifying it, with full knowledge of all the facts. In ratifying it, he exercises the personal qualities essential to the due execution of the trust.⁹⁶ An executor's power to sell must be exercised in the mode prescribed by the will; and any sale made in contravention of the trust is void.⁹⁷ If the will directs a sale of real estate by public auction, to pay off legacies as they become due, and the executor sells at private sale, and

⁹⁴ See *Matter of Hall*, 16 Misc. 174; 38 N. Y. Supp. 1135.

⁹⁵ *Bedell v. Carll*, 33 N. Y. 581. In *Turner v. Brown* (6 Hun. 331), where the property claimed as a gift *causa mortis* from a married woman, consisted of articles of furniture in the possession of herself and husband, being in rooms occupied by them, it was held that the possession was presumptively that of the husband; but that such presumption might be rebutted by proof of conversations between them, in which the husband admitted that the property belonged to his wife, and that he stood silently by when she asserted title thereto. As to the competency of evidence of declarations of the decedent, to support the claim of such gifts, in view of the restrictions of the Code of Civil Procedure (§ 829), see *Trow v. Shannon*, 8 Daly. 239; *Montgomery v. Miller*, 3 Redf. 154. Language claimed to establish a gift *causa mortis* was held insufficient for that purpose, by reason

of failure to clearly describe the property or the donees or the intention to make a gift, in *Halstead v. Sherrill* (6 St. Rep. 15).

⁹⁶ *Newton v. Bronson*, 13 N. Y. 587. A power in two executors "to sell all said real estate from time to time, as the same can be sold to advantage," involves the exercise of the discretion of both, and the power cannot be exercised by one alone, nor can it be delegated to an agent; and its execution by an agent cannot be ratified by parol. (*Whitlock v. Washburn*, 62 Hun. 369; 43 St. Rep. 4.) The will, giving explicit directions to the executors concerning the entire estate, with a power to sell, requires no specific use of the word "trustees," nor a specific devise of the property to them, the purposes of the trust being sufficiently declared to validate it. (*Wright v. Merecin*, 34 Misc. 414; 69 N. Y. Supp. 936.)

⁹⁷ L. 1896, c. 547. § 85.

before the legacies become due, the sale is void.⁹⁸ And so, in a conveyance under a power in a will, the forms prescribed by the power must be followed.⁹⁹ So long as the executor keeps within the limits of his power, he may bind the estate by an executory contract of sale, but the moment he steps outside of the same, his promises are void and cannot be enforced against the estate.¹ Thus a naked power to sell does not authorize an executor to contract to convey with covenants of warranty.² Under an ordinary power of sale, the executors are not authorized to sell the real estate for the purpose of forming a mining corporation, receiving stock of the corporation in payment.³ An executor's authority to sell real estate is derived from the will either when it gives him a power in trust to sell and apply the proceeds for certain specific objects, or when it contains a general power and direction to sell,

⁹⁸ *Pendleton v. Fay*, 2 Paige, 202. See *McDermut v. Lorillard*, 1 Edw. Ch. 273. The statute prescribes that sales of real estate, made by executors in pursuance of an authority given by will, unless otherwise directed in the will, may be public or private, and on such terms as, in the opinion of the executor, will be most advantageous to those interested therein. (L. 1883, c. 65, § 1.) The act confirms and declares valid in every respect, sales made since September 1, 1880; but the act does not affect any pending suit to set aside any private sale by executors made since that date. (Id., § 2.)

⁹⁹ See *Waldron v. McComb*, 1 Hill, 111, 115. But where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power. (L. 1896, c. 547, § 150; 1 R. S. 736, § 119.) So, too, where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power. (L. 1896, c. 547, § 151; 1 R. S. 736, § 120.)

¹ In *Bostwick v. Beach* (31 Hun, 343), the power was "to rent, sell, or convey my real estate," etc. Held, that though the executor might contract for the sale of the testator's interest in land as of the time of his death, he could not bind the estate by

covenants in a contract of sale to buy off the widow's dower right, and pay off mortgage incumbrances which the testator was not personally liable to pay. The failure of an executor who has contracted to sell land of the estate, to disclose the fact that his authority to sell is in litigation, is his personal act and justifies rendering a judgment against him personally for the return of the purchase money paid. (*Warren v. Banning*, 50 St. Rep. 810; 21 N. Y. Supp. 883.)

² *Ramsey v. Wandell*, 32 Hun, 482. Trustees under an active trust may grant an easement over lands belonging to the estate. (*Valentine v. Schreiber*, 3 App. Div. 235.)

³ *Adair v. Brimmer*, 74 N. Y. 539. The fact that the testator, in his lifetime, was willing to make such a disposition of the lands does not enlarge the powers of the executors; it is only material as bearing upon the question of their good faith in the transaction. (Ib.) In *Boskowitz v. Held* (15 App. Div. 306; 44 N. Y. Supp. 136; affd., 153 N. Y. 666), real estate was devised to executors in trust for testator's daughter for life, with a general power to lease, sell, and mortgage and convert into personalty, and to make advances to the life tenant,—Held, that the executors had no power to give a mortgage to secure notes made by a corporation, though the estate and the life tenant were interested in the corporation, the proceeds of the note not going to the estate nor to the life tenant.

for the purposes of the administration of the estate generally.⁴ Probate and letters testamentary are necessary to give him authority to sell under a general direction in the will.⁵ If the will gives the executors no authority to sell, they cannot sell any portion of the real estate for the purposes of division or otherwise.⁶ If they are merely directed to sell real estate, "as they shall deem expedient, and for the best interests" of certain legatees named, they have a power in trust, without an interest. Such a power is not well executed by the delivery of a deed upon the consideration of a purchase-money mortgage for the full amount,⁷ nor by a conveyance to one of the legatees of a portion of the real estate of the testator, in payment of a debt due from the testator to the legatee, except upon an order of the surrogate, on application to sell, to pay debts, after the personal estate is exhausted.⁸ The

⁴ An authority to let land, "and after the decease of my wife to sell said land on such terms as may seem right," justifies the executors in retaining *all* the real estate until after the widow's death, even though it restricts a previous clause in the will authorizing a division of the residue of the estate. (*Hancox v. Meeker*, 95 N. Y. 528.) See *Hancox v. Wall*, 28 Hun, 214. A power of sale may be implied in executors where it appears that it was the testator's intention to make a complete distribution of his property. (*Messenger v. Casey*, 18 Week. Dig. 71.) See *Murdock v. Kelly*, 62 App. Div. 562; 71 N. Y. Supp. 152; *Cahill v. Russe'l*, 140 N. Y. 402; *Corse v. Chapman*, 153 id. 466; *Meehan v. Brennan*, 16 App. Div. 395. Where executors are empowered to lease and mortgage, in addition to their powers to sell, and reinvest as they may see fit, they are to be regarded as trustees and hold the legal title until the final division of the estate. (*Wetmore v. Peck*, 66 How. Pr. 54.) See *Macy v. Sawyer*, id. 381; *Danziger v. Deline*, 25 Misc. 635. But where no power to mortgage is given, the executor cannot create one by a transaction which is a mere evasion of the provisions of the will. (*Arnoux v. Phyfe*, 6 App. Div. 605; *Griswold v. Caldwell*, 65 id. 371.)

⁵ 2 R. S. 71, § 16. See *Conover v. Hoffman*, 1 Bosw. 214; *Shiffer v. Dietz*, 53 How. Pr. 372. As to whether an executor, who is also a donee of a power of sale, may execute the power before probate, see *Bolton v. Jacks*, 6

Robt. 166, and § 531, note 1, *ante*. An executor appointed here may, where the power to do so is contained in the will, convey land situated in another State. In so conveying, he acts as the devisee of a power, not under an authority conferred by the surrogate (*Newton v. Bronson*, 13 N. Y. 587); but sales of lands in another State must be governed by the law of such State. (*Hawley v. James*, 5 Paige, 318, 476.) Power of sale, given by a foreign will, is independent of the issue of letters here. (*Pollock v. Hooley*, 67 Hun, 370; 22 N. Y. Supp. 215.) An unlimited power of sale not connected with any trusts attempted to be created may be executed, though such trusts are void, and even for the purpose of distribution, to avoid the expense of partition. (*Lindo v. Murray*, 91 Hun, 335; 70 St. Rep. 805.) See *Taber v. Willetts*, 1 App. Div. 285; 37 N. Y. Supp. 233; *McCready v. Metropolitan Life Ins. Co.*, 83 Hun, 526; 32 N. Y. Supp. 489; *affd.*, 148 N. Y. 761.

⁶ *Craig v. Craig*, 3 Barb. Ch. 76. See *O'Donoghue v. Boies*, 92 Hun, 3; 37 N. Y. Supp. 961; *affd.*, 159 N. Y. 87.

⁷ *Winslow v. Miller*, 10 App. Div. 406; 41 N. Y. Supp. 1073.

⁸ *Russell v. Russell*, 36 N. Y. 581. Compare *Hurrell v. Hurrell*, 65 App. Div. 527; *Kinnier v. Rogers*, 42 N. Y. 531; *Benedict v. Arnoux*, 7 App. Div. 1; 39 N. Y. Supp. 793; *revd.*, on other points, 154 N. Y. 715. See *Stokes v. Hyde*, 14 App. Div. 530. As to the joint authority of several executors,

statute provides that where the consent of two or more persons to the execution of a power is requisite, all must consent; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power.⁹

§ 595. **Administrator's want of power over realty.**—Until there is a deficiency of personal assets to pay the debts of the intestate, an administrator has no control of his intestate's real estate, or its proceeds.¹⁰ Hence, a contract of an administrator to convey the lands of his intestate, on obtaining the authorization of the Surrogate's Court, is void and vests no interest, though an order of the surrogate authorizing a sale be afterward obtained;¹¹ and so, a bond given, by an administrator to convey his intestate's real estate, in contemplation of an order of sale by the surrogate, is void.¹² The statute requires the heir to satisfy the mortgage of his ancestor without resorting to the administrator.¹³

§ 596. **Discretion as to time of sale.**—As to the time of sale, where the executors are directed, by the will, to convert the residuary estate into money, they are clothed with a reasonable discretion as to the proper time for the sale, which they are bound, however, to exercise in good faith; but the reasonableness of any delay must be determined by the circumstances of each case.¹⁴

see *ante*, § 524. As to powers of surviving executor, etc., see *ante*, § 526. An executor who makes a collusive sale under a power may be surcharged with the difference between what he received and the actual value of the land. (Matter of Vandevort, 8 App. Div. 341; 40 N. Y. Supp. 791.) Or the beneficiary may treat the sale as lawful and recover of the executor his share of the purchase money. (Ferris v. Nelson, 60 App. Div. 430; 69 N. Y. Supp. 999.)

⁹ L. 1896, c. 547, § 154 (taking effect Oct. 1, 1896). This statute is not retroactive. Prior to its going into effect the rule established was otherwise. See Gulick v. Griswold, 160 N. Y. 399; Correll v. Lauterbach, 12 App. Div. 531; *affd.*, 159 N. Y. 553; Suarez v. De Montigny, 1 App. Div. 494; *affd.*, 153 N. Y. 678.

¹⁰ See § 530, *ante*.

¹¹ Bridgewater v. Brookfield, 3 Cow. 299.

¹² Herrick v. Grow, 5 Wend. 580; S. P., Breevort v. McJimsey, 1 Edw. 551; Halsey v. Reed, 9 Paige, 446;

Johnson v. Corbett, 11 id. 265; Hillman v. Stephens, 16 N. Y. 278.

¹³ L. 1896, c. 547, § 215; 1 R. S. 749, § 4. In Estate of Dooley (3 L. Bul. 18), an application to the surrogate to compel a special administrator to pay or purchase a mortgage which was in process of foreclosure, as a lien upon the decedent's real estate was denied; Surrogate Calvin saying, "The functions of a special administrator are only to preserve and protect the personal estate, and he has no control over decedent's realty, nor can the surrogate enlarge his powers. Besides, an administrator has no right to use personal assets to pay a mortgage upon decedent's real estate, for such real estate constitutes the primary means or source of payment, and the heir or devisee must satisfy it." Compare Matter of Rolph, 29 St. Rep. 64; 9 N. Y. Supp. 293.

¹⁴ Matter of Fargo, 20 Misc. 137; 45 N. Y. Supp. 732; Matter of Horsford, 27 App. Div. 427; 50 N. Y. Supp. 550; Champlin v. Champlin, 3 Edw. Ch. 571; Selden v. Vermilyea, 1

Where they forbear to sell, in the exercise of an honest judgment, and loss results to the estate, they are not liable for this error of judgment.¹⁵ There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with that direction; what is a reasonable time must depend upon the circumstances of each particular case. It seems, that when no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, may serve as a just standard.¹⁶

§ 597. Application of proceeds of sale under a power.—Where the will directs a particular application of the proceeds of lands sold under a power, the executor is bound so to apply them. Thus the proceeds of a sale of lands under a power "to sell all or any of my real estate to pay my debts and settle up my estate" (the lands being devised beneficially), can be applied only to the payment of debts, as to which, but for the will, the personal estate

Barb. 58; *Campbell v. Purdy*, 5 Redf. 434; *Wilcox v. Quimby*, 47 St. Rep. 423; *Matter of Prentice*, 25 App. Div. 209; 49 N. Y. Supp. 353; *affd.*, 160 N. Y. 568. As to what words in a will confer a discretion as to time of sale, see *Hancox v. Meeker*, 62 How. Pr. 336; *Carpenter v. Bonner*, 26 App. Div. 462; 50 N. Y. Supp. 298; *Matter of Ryder*, 41 App. Div. 247; 58 N. Y. Supp. 635. Where an absolute power of sale is conferred, the addition of words suggesting a time for its exercise does not limit the action of the executor. (*Chanler v. N. Y. Elevated R. R. Co.*, 34 App. Div. 305; 54 N. Y. Supp. 341.) The court will not ordinarily compel a sale, the time of which is discretionary with the executors. (*Trask v. Sturges*, 31 Misc. 195; 56 App. Div. 625; 167 N. Y. 575.)

¹⁵ *Matter of Hosford*, 27 App. Div. 427; 50 N. Y. Supp. 550.

¹⁶ *Estate of Weston*, 91 N. Y. 502; *affg. Weston v. Ward*, 4 Redf. 415. Compare *Matter of Gray*, 27 Hun. 455; *Hancox v. Wall*, 28 id. 214; *Gillespie v. Brooks*, 2 Redf. 355; *Lockhart v. Public Adm'r*, 4 Bradf. 21. In *Matter of Quin* (1 Connoly, 382), the testator devised three parcels of

real estate, two of which were incumbered, in trust, to his three children respectively, and it appeared from the will that he wished to equalize these devises by giving the executors authority to sell certain other specific real estate, and he directed them to pay off the incumbrances on the two parcels already mentioned. Held, that the executors were bound to sell the specified parcels of real estate to raise the necessary funds as soon as they possibly could without sacrificing them, and where they have refused a reasonable offer at auction therefor, the payments of interest accruing on the mortgages on the two incumbered parcels, since the date of the auction, should be disallowed them. Interest on the mortgages accruing prior to the time of the auction should be charged to the general estate. Where the residuary estate is to be converted into money, and annuities paid out of the income; and after the death of the widow, the executors are to make distribution, a power of sale being given by a subsequent clause, such power may be exercised after the death of the widow. (*Matter of Prentice*, 25 App. Div. 209; 49 N. Y. Supp. 353; *affd.*, 160 N. Y. 568.)

would have been the primary fund.¹⁷ So, although, under a general power of sale, an executor may compound with any person having an interest in the real estate, he cannot apply the proceeds of sale to the payment of the widow's dower right, before or without admeasurement.¹⁸ But where a will empowers the executors to sell the real estate when in their judgment they deem it for the best interests of the estate, they are entitled to reimburse themselves from the proceeds of such sale for debts paid by them in excess of the personal estate, irrespective of whether the power was given for the purpose of paying debts.¹⁹ The executor may, though it was formerly held that he was not required so to do,²⁰ bring the proceeds of real estate, under a power in the will, into the Surrogate's Court where the will was proved, which court has authority to make distribution.²¹ Otherwise, the executor is accountable for the proceeds as a part of the personal estate.²²

§ 598. **Sales of personal property.**—The statute provides, that if any executor or administrator shall discover that the debts against any deceased person, and the legacies bequeathed by him, cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts and legacies, shall be sold.²³ But the right of an executor or administrator to sell personal assets is not limited by this statute to a case of *necessity* for the payment of debts; and to sustain such a sale made by an executor or administrator, it is not essential to show the necessity of the sale, in order to pay debts.²⁴ The sale of personal property for debts or legacies may

¹⁷ *Van Vechten v. Keator*, 63 N. Y. 52; *Erwin v. Loper*, 43 id. 521. In *Hopkins v. Gourand* (23 N. Y. Supp. 189), the will directed that the proceeds of a certain mortgage owned by testatrix should be used to pay an existing mortgage against the estate. Before her death, the mortgage was paid to her, and she invested the proceeds in certain railroad bonds. Held, that, as the bonds were traceable to the immediate proceeds of the mortgage, they were proceeds thereof, within the meaning of the will.

¹⁸ *Kyle v. Kyle*, 3 Hun. 458. Compare *Eagle v. Emmet*, 4 Bradf. 117; 3 Abb. Pr. 218; *Matter of Smith*, 1 Misc. 269; 22 N. Y. Supp. 1067.

¹⁹ *Matter of Bolton*, 146 N. Y. 257; 66 St. Rep. 630.

²⁰ *Holmes v. Cock*, 2 Barb. Ch. 426.

²¹ See §§ 530, 531, *ante*.

²² See *Stagg v. Jackson*, 1 N. Y. 206.

²³ Co. Civ. Proc., § 2717, as amended 1893, adopting 2 R. S. 87, § 25. See *Matter of Fidelity Loan, etc., Co.*, 23 Misc. 211; 51 N. Y. Supp. 1124.

²⁴ *Sherman v. Willett*, 42 N. Y. 146; *Leitch v. Wells*, 48 id. 585. A legatee who is entitled under the will to the use and enjoyment of personal property is not liable to the executor for retaining possession thereof, for her personal benefit, where it was not shown that it was needed for the payment of debts, for which purpose the will limited the executor's power of sale in respect to it. (*Champion v. Williams*, 36 St. Rep. 706; 12 N. Y. Supp. 697.) If an expense is involved in keeping the property, it becomes the duty of the executor to dispose of it. (*Matter of Spears*, 10 Misc. 635; *affd.*, 89 Hun. 49.)

be public or private, and, except in the city of New York, may be on credit, not exceeding one year, with approved security.²⁵ The executor or administrator is not responsible for any loss happening by such sale, when made in good faith, and with ordinary prudence.²⁶ In making such sales, such articles as are not necessary for the support and subsistence of the family of the deceased, or as are not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts.²⁷ If a purchaser, at the sale, have knowledge of the representative's misappropriation of the assets, he cannot acquire title, but, in the absence of fraud and collusion, the bare act of the sale is a sufficient indemnity to the purchaser.²⁸ The sale should be for cash or its equivalent.²⁹

§ 599. Sale of stale or doubtful claims.—The statute authorizes the surrogate, on good and sufficient cause shown, to authorize the executor or administrator to sell at public auction, on such notice of sale as he may prescribe, any uncollectible, stale, or doubtful debt or claim belonging to the estate.³⁰

²⁵ Co. Civ. Proc., § 2717, as amended 1893. In other cases the executor has no right to sell on credit. (Matter of Woodbury, 13 Misc. 474; 35 N. Y. Supp. 485.) The "approved security" which an executor is required to take on a sale on credit consists solely of national and State bonds or real estate mortgages, and must be approved by the surrogate before its acceptance. (Ib.)

²⁶ Co. Civ. Proc., § 2717, as amended 1893. In Matter of Beach (1 Misc. 27; 22 N. Y. Supp. 1079), the executor sold, on credit, personal property of the estate to an irresponsible party, who was indebted to him personally, and who failed to furnish security as required by the terms of the sale; the executor took a mortgage back on such property to secure his own debt, and allowed the purchaser to retain it for some time; his mortgage was afterward released, and the property taken back and resold by the executor at a loss. Held, that the executor must account for the amount of the first sale. Where machinery in property of the estate which was taken by the

city was sold at public auction upon due notice, and it appears that there was an adequate attendance and that the sale was fairly conducted, and that much of the machinery was old and was located in a place from which transportation was difficult.—Held, that the executors should not be charged with more than the amount which it brought at such sale, although it had been inventoried at a much greater sum. (Matter of Bolton, 141 N. Y. 554.) See Matter of Johnston, 74 Hun. 618; 26 N. Y. Supp. 966; *affd.*, 144 N. Y. 563.

²⁷ Co. Civ. Proc., § 2717, as amended 1893.

²⁸ See Sutherland v. Brush, 7 Johns. Ch. 17; Colt v. Lasnier, 9 Cow. 320; Bogert v. Hertell, 4 Hill. 492; Leitch v. Wells, 48 N. Y. 585. See Benedict v. Arnoux, 154 id. 715; Mahaney v. Walsh, 16 App. Div. 601; 44 N. Y. Supp. 969. See §§ 522, 523, *ante*.

²⁹ Powers v. Powers, 48 How. Pr. 389.

³⁰ Co. Civ. Proc., § 2719, as amended 1893.

ARTICLE SECOND.

CARE AND CUSTODY OF ESTATE PENDING ADMINISTRATION, AND LIABILITIES INCURRED THEREIN.

§ 600. **Who entitled to physical custody of assets.**—On the supposition that the representative has got in the estate, we now come to consider his duty and liabilities in respect to its safe-keeping, investment, and the general management of its affairs, pending the administration, until the debts are paid, and the surplus is distributed among the legatees or next of kin, as the case may be.

We have pointed out that the estate of two or more executors or administrators is a joint tenancy; they are to be considered as one person, and as having but one joint and entire estate in the property. Consequently, as a general rule, the acts of any one of two or more executors or administrators relating to the management and disposition of the assets are to be deemed the acts of all.³¹ Neither one, as against the other, has any right to claim the right to the sole and exclusive custody of the assets.

§ 601. **Where trustee is a beneficiary.**—There is an exception to this rule, in a case where one of several trustees is a beneficiary of a trust created by the will, with remainder over. Such a beneficiary cannot act both as trustee and *cestui que trust*, and the other trustees must take the exclusive control and management.³² The statute provides, however, that a person beneficially interested in the whole or a part of the income of a trust estate for a life or lives, or a shorter term, and, at the same time, is entitled, on the termination of the trust, to the remainder, in the whole or any part, of the principal fund, may terminate the trust, as to his interest, by a release of such interest in the income; and thereupon the estate of the trustee or trustees, as to the whole or such portion of the principal fund, will cease and determine,—the trust estate, so far as it affects the whole or such portion of the income and principal fund, becoming merged in the remainder or reversion.³³

§ 602. **Liability for misconduct of cotrustee.**—The English rule, which holds a trustee to a stricter accountability than an executor, for the misconduct of his cotrustee, is not recognized in this

³¹ See *ante*, § 524.

³³ 1 R. S. 730, § 63, as amended L.

³² *Bundy v. Bundy*, 38 N. Y. 410; 1893, c. 452. See also L. 1896, c. 547; *Postley v. Cheyne*, 4 Dem. 492; s. c. *id.* c. 553; L. 1897, c. 417, § 83. as Estate of Sterling, 9 Civ. Proc. Rep. 448.

State.³⁴ It is difficult to find any sound reason for the distinction. The general rule undoubtedly is, that trustees, like executors, are liable only for their own acts and receipts, subject to the exception that they cannot be excused for negligently suffering a cotrustee to receive and waste the fund, when there are means of preventing it, by the exercise of reasonable care and diligence. It is the positive duty of each trustee to protect the trust estate from any misfeasance on the part of his cotrustee, and to institute such proceedings as shall prevent it; and it is only in case of his neglect or refusal so to do, or his connivance in the fraud, that the beneficiaries of the trust can maintain the necessary action in their own name, for the protection of their violated interests.³⁵ The duty of a trustee, or of an executor or administrator, to exercise vigilance in protecting the property and funds of the estate is not fulfilled by merely seeing to it that they have come into the hands of his co-representative in due course of administration. Although his being merely passive, and not obstructing the collection or receipt of assets by his associate will not render him liable for the latter's waste, yet where he knows and assents to a misappropriation, or negligently suffers his co-executor to receive and waste the estate, when he has the means to prevent it, he becomes liable for a resulting loss which might have been prevented by reasonable diligence on his part.³⁶

The fact that he omitted to make a separation of a particular trust fund, as contemplated by the will, where such omission does not induce or cause the despoliation of the estate by the co-executor, and which would not have been prevented if the separation had been made, does not render him liable.³⁷ It must

³⁴ *Matter of Brown*, 16 Abb. Pr. (N. S.) 457; *Matter of Adams*, 51 App. Div. 619; 64 N. Y. Supp. 591; *affd.*, 166 N. Y. 623.

³⁵ *Knight v. Plymouth*, 1 Dickens, 120; *Ex p. Belchier*, Amb. 218; *approved*, *Thompson v. Brown*, 4 Johns. Ch. 619, 628.

³⁶ *Wilmerding v. McKesson*, 103 N. Y. 329; *Matter of Niles*, 113 id. 547. To same effect, *Croft v. Williams*, 88 N. Y. 384; *McCabe v. Fowler*, 84 id. 314; *Sherman v. Parish*, 53 id. 483; *Adair v. Brimmer*, 74 id. 539; *Ormiston v. Olcott*, 84 id. 339; *Earle v. Earle*, 93 id. 104; *Matter of West-erfield*, 32 App. Div. 324; also *s. c.*, 48 id. 542; 63 N. Y. Supp. 10 (163 N. Y. 209); *Matter of Peck*, 31 App. Div. 407; 52 N. Y. Supp. 1028; 161 N. Y. 655, and cases cited *infra*.

In *Matter of Barrett* (58 App. Div. 45; 68 N. Y. Supp. 589), the executor, sought to be charged, had been excluded from the management of the estate. Held, not responsible, especially after a lapse of five years. The fact that the surviving executrix participated in acts of negligence resulting in loss to an estate, cannot be set up in a proceeding by such surviving executrix, representing the estate, to have charged against the estate of deceased executor, moneys lost to the estate through his negligence. Her individual liability must be ascertained and fixed in some other suit or proceeding against her for contribution. (*Matter of Scudder*, 21 Misc. 179; 47 N. Y. Supp. 101.)

³⁷ *Wilmerding v. McKesson*, *supra*.

appear that he had some reason to apprehend that a loss might be the consequence of his acts.³⁸

§ 603. **Intrusting property to co-executor.**—As mere passivity is not, of itself, enough to hold one executor for the *devastavit* of his associate, so it is not, *per se*, actionable negligence for one executor to intrust his co-executor with the trust property, for sale, on the latter's promise to pay the proceeds into the general fund, which he failed to do.³⁹ So where both executors signed a con-

³⁸ *Cocks v. Haviland*, 124 N. Y. 426; 36 St. Rep. 408. The same estate was in the Surrogate's Court, on an accounting, when the court held the co-executor who had permitted funds of the estate to remain in the control of his co-executors, men of supposed large means and integrity, was not liable for a loss occasioned through the investment of such funds by them in their business, without her knowledge. (*Matter of Cocks*, 1 Connolly, 347; 9 N. Y. Supp. 402.) Hence, where two executors and trustees divided the trust funds and securities between them, and, though the accounts were kept together, each managed his own part of the business, and one of them died insolvent and owing the estate, his co-trustee was held not liable for the amount of the loss. (*Matter of Smith*, 39 St. Rep. 386; 15 N. Y. Supp. 771.) Where one of the executors becomes the acting executor by the consent of the others, the circumstance of the individual custody of assets by the former is not a breach of trust in the others, and they are not rendered liable for his act in collecting and converting to his own use, a fund without their knowledge. (*Banks v. Wilkes*, 3 Sandf. Ch. 108.) Merely permitting the other to receive the assets does not render him answerable therefor. (*Sutherland v. Brush*, 7 Johns. Ch. 17; *Monell v. Monell*, 5 id. 283; *Mumford v. Murray*, 6 id. 1.) See *Manahan v. Gibbons*, 19 Johns. 427. In *Wright v. Dugan* (15 Abb. N. C. 107), at the time of making the inventory, one of the executors produced from a room in his own house the securities of the estate before the appraisers, and permitted the other executor, without protest, to take them away. Held, that the executor who parted with the possession of the securities under these circumstances was not liable for a subsequent misappropriation and waste by the co-executor. An inventory and account,

filed by co-executors, though evidence of a joint possession of securities and receipt of moneys by them, is not conclusive so as to preclude proof that the same were in fact held and received exclusively by one of their number. (*Taylor v. Shuit*, 4 Dem. 528; distinguishing *Glacius v. Fogel*, 88 N. Y. 434.) In *Matter of Hall* (5 Dem. 42; 14 St. Rep. 540), an administratrix, having confidence in the co-administrator and his financial position, permitted him to retain the custody of the funds of the estate, and also her own personal funds, for management and investment, without any knowledge of the fact that he was improperly using the funds of the estate for his own purposes; held, not liable for the *devastavit* of the latter.

³⁹ *Adair v. Brimmer*, 74 N. Y. 539. If excessive payments have been made by one of several executors, without the authority or consent of the others, out of moneys which have come to his hands severally, and which have never come under the control of the other executors, that one will be held solely responsible for so much of the fund as has thus come to his hands, and be credited only with such amounts as have been legally paid, or which, if himself a legatee, he was legally entitled to retain. But if excessive payments are made, or moneys drawn, by one executor, with the consent or acquiescence of the others, out of a fund which has been collected, and has come into the possession of such other executors, or the joint possession and control of all, they all become liable, not only to make good to the other distributees, on the final distribution, any excess of advances so made, but at all intermediate stages to make good all payments which become due or payable, under the provisions of the will, to such distributees. (*Ib.*) See another phase of this case, 95 N. Y. 35.

tract of sale, and the purchaser made a payment on account in the presence of both, which one of them took without objection from the other, and subsequently misappropriated, the latter was held not liable, there being no evidence of negligence on his part. The mere fact of the insolvency of the defaulting executor was not, of itself, sufficient to so charge him.⁴⁰ And an executor, not trustee under the will, who pays the proceeds of a sale of property belonging to the estate to his co-executor, who is a trustee, for investment according to the terms of the trust, is not liable to the estate for a subsequent misappropriation of the funds.⁴¹ But a payment to a co-executor is not of itself a discharge of all liability for such co-executor's faithful application of the moneys so paid. In other words, an executor or trustee who parts with the possession of the funds of the estate, whether to a stranger or to a co-trustee, does so at his peril.⁴² Thus, where the funds were drawn from bank by one trustee, on the joint check of the two, and by him deposited with a private banker, both trustees are liable for the consequent loss of the fund.⁴³ So an express assent by one trustee that the other shall use money of the fund, taking back, as security, a bond which he is afterward obliged to surrender to the lawful owner, will make the former liable for the loss to the estate.⁴⁴

⁴⁰ *Croft v. Williams*, 88 N. Y. 384. To the same effect is *Paulding v. Sharkey*, id. 432.

⁴¹ *Paulding v. Marvin*, 3 Redf. 365, note: more fully on appeal, as *Paulding v. Sharkey*, 88 N. Y. 432; *Taylor v. Shuit*, 4 Dem. 528; *Matter of Smith*, 46 App. Div. 318; 61 N. Y. Supp. 716; *affd.*, 166 N. Y. 620.

⁴² *Matter of Storm*, 28 Hun. 499; *Thompson v. Hicks*, 1 App. Div. 275; 37 N. Y. Supp. 340; *Matter of Litzberger*, 85 Hun. 512; 33 N. Y. Supp. 155. An executor who pays to his co-executor a debt due from himself individually to the estate, is not liable for the diversion or waste thereof by the co-executor, unless he has knowledge or information of the misapplication intended or in progress. (*Matter of Demarest*, 1 Connolly, 200; 9 N. Y. Supp. 292.) See *Altman v. Wile*, 46 St. Rep. 517; 19 N. Y. Supp. 500. The liability of an executor for the proceeds of a mortgage due the estate is not affected by the fact that the widow of the decedent, who was entitled to the money, had, as co-executrix, collected the same, she not having applied them to her personal use. (*Mat-*

ter of Clark, 34 St. Rep. 523; 11 N. Y. Supp. 911.) In *Matter of Grant* (40 St. Rep. 944; 16 N. Y. Supp. 716), the will gave the widow the right to possess and enjoy the rents and profits of the entire estate during life, with the remainder over, and provided that, if the use and profits were not sufficient for her support, a sale might be made therefor, and appointed the widow one of the executors, but appointed no trustee.—Held, the executor was not chargeable with the moneys expended for her support, including the purchase of a house, nor for the amount she paid to a creditor of the estate in satisfaction of his claim.

⁴³ *Bruen v. Gillet*, 115 N. Y. 10. In *Wyckoff v. Van Sieten* (3 Dem. 75), it was held that an executor who handed a sum of money to his co-executor, who was in good standing, with which to pay the debts of decedent at his place of business, pursuant to advertisement, was liable for the latter's misappropriation of the money.

⁴⁴ *Matter of Smith*, 39 St. Rep. 386; 15 N. Y. Supp. 771.

§ 604. **Evidence of connivance or assent.**—If one of two or more representatives, who join in rendering an account, which includes an unauthorized investment, claims to be exempt from liability on any of the investments, the burden is on him to prove the facts on which he founds a claim of immunity.⁴⁵ The mere fact that the other executors had charge of the books of the estate, drew checks in their joint names, and made the illegal investment out of money received by them, does not prove that such investment was made without his consent.⁴⁶ The fact that executors, who were ordered by the court to have certain securities of the estate registered in their joint name, repeatedly requested their co-executor to have them so registered, but on his failure to do so, neglected to enforce, by legal proceedings, observance of the order, or to bring the matter to the notice of the court, is enough neglect to render them liable for such co-executor's misappropriation of the securities.⁴⁷

§ 605. **Liability for waste of agent.**—An executor or administrator who permits a third person to manage and control the estate, adopts him as his agent; he is responsible for the agent's conduct, and is liable for losses occasioned by his improper or negligent management of the affairs of the estate.⁴⁸ He cannot avoid liability for a loss of the fund, through the misconduct of the agent, on the ground that his co-executors were mainly active in the administration of the estate, and mainly instrumental in passing the fund into the hands of such agent, if he tacitly assented thereto when he had opportunity and reasonable cause to object. The fact that the parties interested in the estate knew of the employment of such agent to make investments, does not

⁴⁵ But the joining in the account does not necessarily make him liable for a *devastavit* by his co-trustee subsequent to the filing of the account, although known to him at the time the decree was entered. (Matter of Westerfield, 32 App. Div. 324.)

⁴⁶ Lacey v. Davis, 4 Redf. 402. By including the illegal investment in her account, the executrix declares her knowledge of its existence, and if there is no evidence that she made an effort to collect it, or that it could not be collected, she is liable for the *devastavit* of her co-executor. (Ib.) In the same case again (5 Redf. 301), it appeared that the executors subscribed for bonds to the amount of \$10,000, to protect certain stock formerly

owned by the testator, being assets of the estate, which they ought previously to have disposed of; and it appeared that the executrix knew, all along, that the estate held the stock, and made no effort to sell it, nor even asked the executors so to do. The executrix, having acquiesced in keeping the stock on hand, was held liable, with her co-executor, for the consequences of so doing.

⁴⁷ Matter of Macdonald, 4 Redf. 321.

⁴⁸ Earle v. Earle, 93 N. Y. 104. See Clark v. Clark, 8 Paige, 152; Mesick v. Mesick, 7 Barb. 120; Douglass v. Satterlee, 11 Johns. 16; Whitney v. Phoenix, 4 Redf. 180; Johnson v. Corbett, 11 Paige, 265.

preclude them from holding the executor responsible, especially where there is no ground for holding them estopped.⁴⁹ But in a matter where the employment of an agent or broker is necessary, or is according with the usage of business, the English rule is, that the trustee is not liable for the fraud or misconduct of the agent in his employment.⁵⁰ It was therefore held, that a trustee investing trust funds, who employed a broker to procure securities authorized by the trust, and paid the purchase money to the broker,—such being the usual and regular course of business of persons acting with reasonable care and prudence,—on their account, was not liable for the loss of the money through the fraud of the broker.⁵¹

§ 606. Liability of estate on contracts of representative.—We have already adverted to the principle that an executor or administrator may disburse and use the funds of the estate for purposes authorized by law,⁵² but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator.⁵³ He may, of course, by a special promise, make himself personally liable to pay a debt of the deceased, but such promise is not enforceable, unless it is evidenced in the manner prescribed by the Statute of Frauds. As such promise, however, constitutes a right of action against the executor or administrator personally, and not in his character as such, it is not enforceable in the Surrogates' Courts. But the rule is well settled that personal representatives have no power to bind the estate through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the decedent. They take the personal property as owners, and have no principal behind them for whom they can contract.⁵⁴ The title vests in them for the purposes of

⁴⁹ *Matter of Brown*, 16 Abb. Pr. (N. S.) 457.

⁵⁰ *Knight v. Plymouth*, 1 Dickens, 120; *Ex p. Belchier*, Amb. 218; approved, *Thompson v. Brown*, 4 Johns. Ch. 619, 628.

⁵¹ *Speight v. Gaunt*, 2 Ch. Div. 727. And see *Lamar v. Micou*, 112 U. S. 468.

⁵² One of two executors acting within the scope and authority of his office, may bind the estate by contract. (*Barry v. Lambert*, 98 N. Y. 300.) See *Alexander v. Greacen*, 36 Misc. 526. An executor may settle or state an account or liability incurred by the decedent. (*Schutz v. Morrette*, 81 Hun, 578; 31 N. Y. Supp. 39.)

⁵³ See *ante*, § 552 *et seq.* See also *Cary v. Gregory*, 38 N. Y. Supp. 127; *Norling v. Allee*, 31 St. Rep. 412; *Glenn v. Burrows*, 37 Hun, 602; further decision, 26 St. Rep. 588; *affd.*, 119 N. Y. 660; *Cary v. Dooley*, 19 Misc. 553; 43 N. Y. Supp. 399; *Darling v. Powell*, 20 Misc. 240; 45 N. Y. Supp. 794; *Mulrein v. Smillie*, 25 App. Div. 135; 48 N. Y. Supp. 994. *Olcott v. De Jorin*, 36 Misc. 735; 74 N. Y. Supp. 393; *O'Brien v. Jackson*, 167 N. Y. 31; *Olin v. Arendt*, 27 Misc. 270; 58 N. Y. Supp. 429.

⁵⁴ See *Metropolitan Trust Co. v. McDonald*, 52 App. Div. 424.

administration, and they must account as owners to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and, in actions thereon, the judgment must be *de bonis propriis*. Therefore, if an executor accept negotiable paper, he will be held personally liable, even if he adds to his own name the name of his office. Signing as executor will be deemed only a part of his description, or will be rejected as surplusage.⁵⁵ An executor has not only no power to bind the estate by a new contract, but he cannot revive a demand which has once expired; neither his contracts nor admissions can have the effect of creating the one or reviving the other.⁵⁶ The rule that a representative has no power to confess judgment, applies only to cases in which he attempts to give a preference against an estate.⁵⁷

§ 607. **Representative may borrow money for estate.**—To justify the representative in borrowing money, at the expense of the estate, it must clearly appear either that he had authority to do so under the will, or that the necessities of the estate required it. He should be able to show, on his accounting, that the expenditure, like any other administrative expense, was for the advantage of the estate, and to the benefit of the parties.⁵⁸ But

⁵⁵ Schmittler v. Simon, 101 N. Y. 554. This case overrules the case of the same title, 25 Hun, 76. See Scott v. McMillan, 16 St. Rep. 795; Westphal v. Carter, 1 Misc. 403; 20 N. Y. Supp. 945; Jenkins v. Phillips, 41 App. Div. 389; 58 N. Y. Supp. 788. The fact that the note was given in payment of a claim against the estate is immaterial, where no proof is given to rebut the presumption that the representative had assets to meet the claim. Compare Hamlin v. Smith, 72 App. Div. 601.

⁵⁶ Barry v. Lambert, 98 N. Y. 300; McLaren v. McMartin, 36 id. 88; Ferrin v. Myrick, 41 id. 315; Austin v. Munro, 47 id. 366; Martin v. Platt, 51 Hun, 429; Glenn v. Burrows, 37 id. 602. Compare Broome v. Van Hook, 1 Redf. 444; Guarantee Sav., etc., Co. v. Moore, 35 App. Div. 421; 54 N. Y. Supp. 787.

⁵⁷ Columbus Watch Co. v. Hodenpyl, 61 Hun. 557; 16 N. Y. Supp. 337; affd., 135 N. Y. 430. In that case, the parties, in favor of whom judgment was confessed, were creditors of the

firm of which decedent and the executors were partners.

⁵⁸ Adair v. Brimmer, 74 N. Y. 540; Wheelwright v. Rhoades, 28 Hun, 57; 11 Abb. N. C. 332. One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate. (Bryan v. Stewart, 83 N. Y. 270.) Compare Barry v. Lambert, 98 id. 300. Where executors apply moneys, borrowed upon their promissory note, to the payment of valid claims against the estate, the note is a personal liability of the executors and cannot be enforced against the estate directly. In such a case the executors are entitled to be reimbursed out of the estate to the extent of the borrowed moneys which they have applied to the payment of valid claims against the same, and this being so, the person who advanced the moneys is entitled, in the event of the failure of the executors to repay the same, to be subrogated to the rights of the execu-

it is clear that executors are not entitled to be credited, in their accounts, with interest paid to raise money for advances to beneficiaries in excess of their distributive shares.⁵⁹ In regard to the right of the lender, if he receives, as security for the loan, assets of the estate, with knowledge, or reason to suspect, that the money was not borrowed for the benefit of the estate, but for the private use of the representative, he cannot hold the security as against the parties in interest.⁶⁰

§ 608. **Liability on failure to terminate decedent's tenancy.**—As to rent falling due after the tenant's death, the lessor would seem to have an option to sue the representative of the lessee, either personally, as assignee, or as executor or administrator.⁶¹ It has been held, in this State, that executors of a tenant from year to year, who omitted to terminate the tenancy, and continued to occupy the premises from year to year, were liable in their representative capacity, for the rent accruing during such occupancy by them.⁶² Where the representative is a tenant in common, with another, of the demised premises, his mere occupation of them, in the absence of an agreement to pay rent, does not render him liable to account to his co-tenant, for the rent of the premises.⁶³

§ 609. **Liability on covenants in lease.**—An executor is liable as such, upon the covenants contained in a lease, executed by his testator, whether he enters into possession of the demised premises or not; but if he does enter into possession, he thereby becomes personally liable, upon such covenants, as an assignee of the lease.⁶⁴ He is therefore bound to perform his testator's covenant to rebuild, in case of the destruction by fire of the demised premises.⁶⁵ A foreign executor, as such, cannot be sued, in a legal action in our courts, for rent accruing under a lease for a term of years, held by the testator at the time of his death.⁶⁶

tors and to compel payment of his claim out of the estate. (Hamlin v. Smith, 72 App. Div. 601.)

⁵⁹ Adair v. Brimmer, 74 N. Y. 540. See Hosack v. Rogers, 9 Paige, 461; Mann v. Lawrence, 3 Bradf. 424.

⁶⁰ White v. Price, 39 Hun, 394; Le Baron v. Long Island Bank, 53 How. Pr. 286. Compare Hamlin v. Smith, *supra*. See *post*, c. XIX, tit. 1.

⁶¹ Wms. on Exrs. (6th Am. ed.) 1619.

⁶² Pugsley v. Aikin, 11 N. Y. 494. As to the duty and liability of executors, in respect to terms for years, see

Fisher v. Fisher, 1 Bradf. 325. And see *post*, tit. 6, art. 2, of this chapter.

⁶³ Woolley v. Knapp, 18 Barb. 265; Dresser v. Dresser, 40 id. 300; Roseboom v. Roseboom, 15 Hun, 309; Matter of Dunn, N. Y. L. J., July 30, 1891.

⁶⁴ Howard v. Heinerschit, 16 Hun, 177.

⁶⁵ Chamberlain v. Dunlop, 126 N. Y. 45; 36 St. Rep. 373.

⁶⁶ Field v. Gibson, 20 Hun, 274. But, it seems, the landlord could maintain an action in equity for an accounting. (Ib.)

§ 610. Continuing decedent's business.—The executor or administrator has no authority to bind the estate for debts incurred by him in continuing the business or trade of decedent, after his death, except so far as such continuance is reasonably necessary for the preservation and profitable disposition of the money and property invested therein;⁶⁷ or unless such continuance is expressly authorized by decedent's will; but such authority will not be implied except from unequivocal language.⁶⁸ This does not mean that the representative is bound immediately upon the decedent's death to convert into cash the assets employed in his trade; on the contrary, where the best interests of the estate require it, he may, within reasonable limits, make purchases and incur liabilities which will bind the estate,⁶⁹ and may sue, in his character of representative, for goods sold by him in such continued business.⁷⁰

§ 611. Debts incurred in continued business.—But the power conferred by the will on the executor, to carry on the testator's business, after his death, does not authorize the executor to create debts in the execution of that trust, which can be collected out of the general assets. He cannot lawfully use the general assets for the purpose of supporting the special business carried on by the testator in his lifetime; and all persons dealing with him are charged with knowledge of the limitations of his powers.⁷¹ It follows that one having a claim for goods purchased

⁶⁷ *Hannahs v. Hannahs*, 68 N. Y. 610; *Thompson v. Brown*, 4 Johns. Ch. 619; *Johnson v. Kellogg*, 8 St. Rep. 413; *Ames v. Downing*, 1 Bradf. 321; *Hooley v. Gieve*, 9 Daly, 104; 9 Abb. N. C. 8, and note. Compare *Luers v. Brunjes*, 5 Redf. 32; *Boulle v. Tompkins*, id. 472; *Gilman v. Wilber*, 1 Dem. 547. The personal representatives of a part owner of a vessel are not bound to incur a liability for repairs, etc. (*Lunt v. Lunt*, 8 Abb. N. C. 83.) See *Matter of Chapman*, 32 Misc. 187; 66 N. Y. Supp. 235. The courts will not favor a claim upon the part of an executor (who was the surviving partner of the decedent), to charge the beneficiaries as his tenants, or otherwise, for the use of his property, where, instead of settling up the estate placed in his charge, he has kept it open and unadjusted, mingling its affairs with his own, without ascertaining what is due and payable to each of the beneficiaries in the way the law has

marked out. There is but one way to manage the estate, whether the executor or trustee be of the blood of the testator and the beneficiaries, or a stranger. (*Hannahs v. Hannahs*, *supra*.)

⁶⁸ *Willis v. Sharp*, 113 N. Y. 586; *Saperstein v. Ullman*, 49 App. Div. 446; 63 N. Y. Supp. 626.

⁶⁹ *Matter of Sharp*, 5 Dem. 516. Thus an executor is not personally liable for a loss occasioned by his carrying on a seminary for the balance of a year in the midst of which the principal, defendant's testator, had died. (*Matter of Benedict*, 13 Abb. N. C. 67.) The surrogate may allow the continuance of the business pending a contest of the probate of the will, on proper security being furnished. (*Matter of Dinsmore*, 2 L. Bul. 28.)

⁷⁰ *Varnum v. Taylor*, 59 Hun. 554; 14 N. Y. Supp. 242.

⁷¹ *Delaware & Lackawanna R. Co. v. Gilbert*, 44 Hun. 201; *affd.*, 112

by the executor, consumed in continuing the business, is not a creditor of the estate so as to entitle him to intervene, as an interested party, on the executor's accounting.⁷² There seem to be two exceptions to the general rule that obligations incurred by an executor in the continuation of decedent's business, even where the will directs such continuation, are not a charge against the estate, but against the executor personally. The first is, that when the will authorized the expenditure of assets for a particular purpose, which expenditure is necessary for the protection, reparation, or safety of the estate, and the executor has no funds, and is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the estate.⁷³ The other exception is the insolvency of the executor who continued the business and contracted the debt. In such case, the general assets may be made liable, *in equity*, for the debts incurred in such continued business.⁷⁴ The judgment, in such an action, can only be collected upon the settlement of the estate in the Surrogate's Court, or by either of the special proceedings provided in the Code.⁷⁵ It is, therefore, erroneous to

N. Y. 673. In that case, which was an action for such a claim in the ordinary common-law form against the executor in his representative capacity, held, that the court was not authorized, after trial and verdict for the plaintiff, to direct entry of a judgment providing that it shall be enforced against the property of the decedent's estate invested in the business carried on by the defendant as executor, as such direction was an attempt to change the action to one in equity, which is not maintainable without showing insolvency of the estate or some other ground for equitable interference. See *Matter of Hickey*, 34 Misc. 360; 69 N. Y. Supp. 844.

⁷² *Matter of Sharp*, 5 Dem. 516. It had been previously decided in the same estate (*Matter of Sharp*, N. Y. Daily Reg., Aug. 3, 1886), that such a claim was not "a debt" within the provision of the Code which entitles a creditor of the decedent to petition for the payment of his debt; and more recently, in *Matter of Stern* (N. Y. Law J., Feb. 13, 1890), it was held, that a party to whom a firm, composed of the surviving partner of the decedent and the executor of the latter (under a power contained in the

will), owed a debt for goods sold, was not "a creditor" of the estate of the deceased partner so as to entitle him to apply, under section 2685 of the Code, for the revocation of the executor's letters.

⁷³ In *Clapp v. Clapp* (14 Hun, 451), a testator left the control of his business to his son and executor with directions to continue the same; the latter employed an attorney to render services for the benefit of the estate, and which were of value to it, under a special agreement that such services should be paid out of the estate, the executor himself being insolvent and having no trust funds in his hands to pay such claim; and it appeared that the contract with the attorney had been acquiesced in and ratified by the other parties interested in the estate. Held, that the claim might be sustained as one against the estate. Compare *Johnson v. Kellogg*, 8 St. Rep. 413; *Zimmer v. Chew*, 34 App. Div. 504; 54 N. Y. Supp. 685.

⁷⁴ So held, on demurrer, in *Willis v. Sharp*, 113 N. Y. 586; s. p., *New v. Nicol*, 73 id. 131, and cases *ante*, § 552.

⁷⁵ Co. Civ. Proc., §§ 1825, 1827; and § 2722, as amended 1893, consolidating former §§ 2117, 2718.

appoint a receiver, and direct him to pay the judgment. Creditors of the decedent at the time of his death, unless they have assented to the carrying on of the business, have the right to insist that the estate, as it existed at the time of decedent's death, should be applied to the payment of their claims, to the exclusion of debts contracted subsequently by the executors, while the creditors of the business, if it prove successful, are alone entitled to the increase. On the other hand, if the business was carried on by the executors with the assent of the original creditors, they and the creditors of the business are entitled to share *pro rata* in the whole estate.⁷⁶ Where the business is continued by the executors, pursuant to authority in the will, they are entitled to the use, for that purpose, of the testator's real estate employed in the business, and may charge the profits with all bad debts contracted in the business, before the division among the beneficiaries. Losses by bad debts, and the cost of personal property purchased to replace similar articles worn out or used up in conducting the business by the executors, and expenditures for ordinary repairs on the real estate used therefor, are properly charged against, and deducted from, the income payable to the life tenants.⁷⁷ Nevertheless, the continuance of the business is largely at the personal risk of the representatives, and they may be held, on their accounting, to be liable to the estate for losses in the business sustained through their fault or negligence.⁷⁸

§ 612. **Continuing decedent's interest in a copartnership.**—It is entirely competent to provide, in articles of copartnership, that

⁷⁶ Willis v. Sharp, 115 N. Y. 396.

⁷⁷ Matter of Jones, 103 N. Y. 621; affg. 37 Hun, 430; s. c. as Daumat v. Jones, 2 Dem. 602. In that case, the language of the will authorized the deduction of all losses and expenses necessarily incurred in managing the estate and conducting the business, including ordinary expenses for repairs or improvements, and it was held not necessary that the specific items so to be deducted should be stated in the will.

⁷⁸ In Matter of Rumsey (45 St. Rep. 453; 18 N. Y. Supp. 402), the will provided that the business of a corporation, most of the stock in which was owned by the testator, should be carried on by the executors for a term of years, unless, in the judgment of a majority of the executors, it would prove unprofitable or disastrous to the estate.—Held, that while it was competent for the execu-

tors to carry on the business, it was largely at their risk, since if any profits were realized they went into the *corpus* of the estate, while if losses were sustained, through the fault or negligence of the executors, they would fall upon the executors personally. Where it was shown, therefore, that a substantial diminution of the indebtedness of the estate had occurred, during the time the business was carried on, and there was nothing to indicate that the same degree of prosperity would not attend it in the future, and it was the almost unanimous wish of those interested in the estate that the executors should continue to carry it on.—Held, that the court would allow them so to do, notwithstanding one of the three had no personal interest in the estate, and one creditor who was secured, objected. Compare McCue v. Finck, 20 Misc. 506.

the relation of partnership should continue between the survivor and the representatives of any deceased partner for a time specified, under the same firm name, on the same terms and for the same purposes, as the original copartnership, and it may be the duty of the survivor, under such an agreement, to continue the business for the benefit of himself and the estate during the time fixed by the articles.⁷⁹ Such an agreement does not, of itself, have the effect of creating a new partnership from the time of the death, between the survivor and the executor of the deceased partner, and where the executor did not act as a partner, or in any way interfere with the business or its management, and there was nothing to show that any relation of partnership existed between the executor and the surviving partner, the estate is not liable for debts contracted by the survivor in the business.⁸⁰ A surviving partner, though he has a legal right to the partnership effects, yet, in equity, is considered a trustee to pay the debts and dispose of the effects for the benefit of himself, and the estate of his deceased partner. The capital of the deceased partner is to be treated as trust property; and when it has been employed in carrying on the business of the concern, so much of the subsequent profits as can be attributed to the employment of such capital must be accounted for by those who have used it.⁸¹

§ 613. Forming a new firm.— A continuance of the decedent's capital in the business of his late firm, pursuant to the directions of his will, is not the same thing as leaving it with a new firm composed of the surviving partner, who is also the executor, and a third person. As to the executor, who was a partner, the same rule would apply as if he had employed the funds in his own individual business, and he could be required to account for their use at the highest legal rate of interest, or for actual profits, if the beneficiaries elected to compel him to do so.⁸²

⁷⁹ So held in a case where the sole survivor was the administrator of his deceased copartner. (*Matter of Laney*, 50 Hun. 15; *affd.*, 119 N. Y. 607.) But in *Matter of Leavitt* (28 Abb. N. C. 457), it was held, that where the sole executor was the surviving partner, he was disqualified from agreeing with himself as surviving partner, under a provision of the articles of copartnership that the business should be settled up by the consent of the survivor and the legal representatives of the party dying,—and could not, therefore, justify the

retention of the capital of his deceased partner in the business.

⁸⁰ *Stewart v. Robinson*, 115 N. Y. 328, 344. An executor of a deceased partner does not become liable as partner with the survivor, by a request that goods be delivered to meet the necessity of the business, and by a promise to pay therefor, or for goods previously so furnished, in due course of administration. (*Richter v. Poppenhausen*, 42 N. Y. 373.)

⁸¹ *Skidmore v. Collier*, 8 Hun. 50.

⁸² *Matter of Myers*, 131 N. Y. 409; 43 St. Rep. 265, 908; *Matter of*

§ 614. **Keeping property in repair, paying taxes and mortgage interest.**— The real estate of a decedent, in the absence of a contrary disposition by will, and when not needed for the payment of debts, passes directly to the heirs or devisees, and hence is as much beyond the authority and duty of the personal representatives as if it had not been the property of the testator or intestate. But whenever real estate of the decedent is lawfully in charge of the personal representative he is bound to exercise the same care and diligence in its preservation and protection as if it were personal property.⁸³ He is bound to exercise that degree of diligence and prudence in the care and management of the estate which men of discretion and intelligence in such matters ordinarily employ in their own like affairs.⁸⁴ It is, therefore, his duty to keep the property, intrusted to his care, in a reasonable state of repair, to insure it against loss by fire, to discharge taxes and assessments and, where necessary, to discharge liens or incumbrances on the same, or interest thereon, or to redeem lands sold for non-payment of taxes, or on foreclosure of mortgages.⁸⁵ On the other hand, if the representative is not lawfully in possession of the real estate, he will not be allowed for such expenditures, on his accounting, except under special circumstances.⁸⁶ As to third per-

Munzor, 4 Misc. 374. A reduction, by an executor, of the rate of interest on testator's capital, contributed to a firm of which both were members,— amounts to a liquidation, and makes the executor chargeable for the whole amount of such capital, without deduction for bad debts. (Matter of Foote, 43 St. Rep. 350; 17 N. Y. Supp. 44.) The profits are to be treated as income. (Matter of Slocum, 169 N. Y. 153; Matter of Rogers, 37 Misc. 54; 74 N. Y. Supp. 829.)

⁸³ See Woerner on Adm'n, § 518.

⁸⁴ Matter of Butler, 1 Connoly, 58; Matter of Van De Veer, 63 App. Div. 495; 71 N. Y. Supp. 849.

⁸⁵ Woerner on Adm'n, § 518; Matter of Archer, 23 N. Y. Supp. 1041; Smith v. Keteltas, 32 Misc. 111; 66 N. Y. Supp. 260, and cases *infra*. The actual necessity of repairs must be shown by the executor to entitle him to charge the estate for the amount expended therefor. Trustees may make necessary repairs, but not large improvements. Trustees holding for the life of one person and remainder over for some other person, must consult the interest of both the tenant for life and the remainderman. He must

act impartially, and not give either advantage at the expense or to the prejudice of the other. (Matter of Odell, 1 Connoly, 97.) As to necessity of repairs and the reasonableness of the sum expended, see Hancox v. Meeker, 95 N. Y. 528; Matter of Smith, 1 Misc. 269; 22 N. Y. Supp. 1067.

⁸⁶ Cornwell v. Deck, 2 Redf. 87. An administrator collected rents of real estate, charged himself with them, and paid them to the widow of the intestate, with knowledge of all the facts of the case.— Held, that the payments must be regarded as voluntary, and that he could not recover them back. (Laney v. Laney, 47 St. Rep. 99; 19 N. Y. Supp. 518.) But in Matter of Rolph (29 St. Rep. 64; 9 N. Y. Supp. 293), a widow, with young children of whom she was general guardian, paid off, as administratrix, the mortgage on her husband's farm, and completed the necessary repairs thereon and paid the taxes and insurance. Held, that she should be credited with such payments. Where the real estate was devised to others, but the executor was authorized to sell any part of it

sons, executors who are in the possession and control of the premises, owe the same duty as an owner, to keep them in a reasonable state of repair, and are *personally* liable to strangers lawfully on the premises, as well as to the tenants, for damages caused by neglect of this obligation.⁸⁷

§ 615. **Taxes and municipal assessments.**— Taxes and assessments laid or accruing subsequent to the decedent's death, where the land vests in the heir or devisee, belong to him to pay, and not to the executor or administrator.⁸⁸ But where, under a devise to the executors in trust, a duty is imposed upon them to pay taxes, they are bound to do so, and, neglecting this duty, they are personally chargeable with the amount of interest paid for default on taxes, where it appears that sufficient funds of the estate were in hand to discharge the same without penalty.⁸⁹ Questions frequently arise between the personal and real representative as to their respective obligations to discharge taxes and other liens on the decedent's real property. A devise to one for life, or for a term of years, imposes on the devisee the duty to keep down all incidental charges upon the land, which accrue during the continuance of his estate, such as repairs, taxes, and the like;⁹⁰ but municipal assessments for permanent improvements should be apportioned between the life tenant and remainderman.⁹¹ Taxes which accrue subsequent to the termination of such an estate are chargeable on the general estate.⁹² On the same principle, per-

to pay debts and funeral expenses.— Held, that he was to be allowed for taxes paid by him as being a lien on the estate, but not for repairs made after the death of the testatrix. (Matter of Perry, 5 Misc. 149.)

⁸⁷ Donohue v. Kendall, 50 N. Y. Super. 386; Norling v. Allee, 31 St. Rep. 412.

⁸⁸ Cornwell v. Deck, 2 Redf. 87; Matter of Selleck, 111 N. Y. 284; Matter of Bennedit, 15 St. Rep. 746; Matter of Turfler, 24 N. Y. Supp. 91; Matter of Spears, 89 Hun. 49; 35 N. Y. Supp. 35; Matter of Sworthout, 38 Misc. 56; Matter of Mansfield, 10 id. 296; 31 N. Y. Supp. 684. Though after the lapse of a long time, *c. g.*, twenty years, it will be presumed that an administrator, in paying the taxes, did so at the request of the heirs. (Broome v. Van Hook, 1 Redf. 444.)

⁸⁹ Tickel v. Quinn, 1 Dem. 425. To justify the payment of interest on taxes, the burden of proof lies upon the executors to show that there were

not enough funds of the estate to pay the taxes at the time they were due, otherwise the payment of interest will be disallowed. (Matter of Quin, 1 Connoly, 382.) See Disbrow v. Disbrow, 46 App. Div. 111; 61 N. Y. Supp. 614; *affd.*, 167 N. Y. 606.

⁹⁰ Matter of Braunsdorf, 2 App. Div. 73; Matter of Shipman, 82 Hun. 108; 31 N. Y. Supp. 571; Wilcox v. Quinby, 73 Hun. 524; 26 N. Y. Supp. 114.

⁹¹ Chamberlain v. Gleason, 163 N. Y. 214; Stevens v. Melcher, 152 id. 551. Compare Peltz v. Learned, 70 App. Div. 312; 75 N. Y. Supp. 104.

⁹² Bidwell v. Greenshield, 2 Abb. N. C. 427; Matter of Noyes, 3 Dem. 369; Matter of Gillespie, 18 Abb. N. C. 41; Smith v. Cornell, 111 N. Y. 554. A declaration in the will that the land was devised to the widow for life, as a home for herself and children, does not change the character of the holding so as to relieve her from the burden of paying the taxes. (Deraismes

sonal property specifically bequeathed,—as where a specified sum was directed to be invested by the executor, the income or interest to be paid to a legatee for life,—that particular property or fund, and not the general estate, must bear the burden of taxes imposed upon it, unless a contrary intention is manifested in the will.⁹³ This is the rule not only as between the real and the personal representatives, but as between the latter and the creditors of the decedent; so that where the executor and trustee, instead of applying the money in his hands to the payment of decedent's debts, used it in making repairs, and paying interest on mortgages, equity will charge the lands with the amount so paid, in favor of the creditors.⁹⁴

§ 616. Insurance.— It is competent, even for an administrator, to insure the real, as well as the personal, property, where he has trust authority over it, or has reason to believe that the estate is insolvent;⁹⁵ and he may become chargeable for neglect to insure, where the house is destroyed by fire.⁹⁶

§ 617. Foreclosing mortgages and buying in property.— As to keeping down interest on mortgages or other incumbrances upon the property, it is culpable negligence for the executor or trustee to fail to do so, when he has funds on hand sufficient for that purpose. The representative has a right, and it may be his duty, in the foreclosure of a mortgage belonging to the estate, to bid in the premises, on the sale thereof, and he may take a deed therefor in his own name, individually. The premises thus purchased

v. Deraismes, 72 N. Y. 154.) Compare *Clarke v. Clarke*, 145 id. 476; 65 St. Rep. 401. The testator devised a farm, upon which there was a mortgage, to his executors and trustees, and directed them to pay the rents to one whom they allowed to occupy it instead. Held, that the taxes, charges, and interest on the mortgage should have been paid by the occupant and should not be allowed, in the executor's accounts, as a charge against the estate. (*Bates v. Underhill*, 3 Redf. 365.) But where unimproved real estate, which has a prospective value, is carried by trustees for the benefit of the remaindermen, the annual taxes thereon are chargeable to principal and not to income. (*Matter of Martens*, 16 Misc. 245; 39 N. Y. Supp. 189.) A payment of expenses of real property, if made on the order of one of the heirs, who is also one of the next of kin, may be

treated as a payment to such person as one of the next of kin. (*Banks v. Taylor*, 10 Abb. Pr. 199.)

⁹³ *Wells v. Knight*, 5 Hun, 50. Where such fund has never been separated from the general estate and separately invested, the legatee is entitled to the entire interest upon the same, and cannot be compelled to contribute toward the payment of the taxes assessed upon the general estate. (*Ib.*) See *Matter of William-son*, 1 Connolly, 139.

⁹⁴ *Ferris v. Van Vechten*, 9 Hun, 12; *revd. on another point*, 73 N. Y. 113.

⁹⁵ *Herkimer v. Rice*, 27 N. Y. 163. See *Lee v. Adsit*, 37 id. 78; *Clinton v. Hope Ins. Co.*, 51 Barb. 653; *Cornwell v. Deck*, 2 Redf. 87; *Matter of Smith*, 1 Misc. 269; *Disbrow v. Disbrow*, *supra*.

⁹⁶ See *Tickel v. Quinn*, 1 Dem. 425, 431.

are to be regarded as personal property of the estate, and it is the duty of the representative to convert them into money, to be accounted for by him as part of such estate.⁹⁷ He is, therefore, authorized to enter into a contract for the sale thereof, and the vendee can be compelled to perform.⁹⁸ There is, however, no absolute obligation resting on an executor to buy in the equity of redemption at such a foreclosure sale.⁹⁹ It rests with him to exercise a sound judgment whether or not that course is necessary to prevent loss to the estate. If it is shown that it was not for the benefit of the estate to bid in the property, as where the price bid by a third party was a full and fair price, the executor will not be allowed to charge the estate with the auctioneer's fees, on his bidding in the property.¹ But a purchase by the representative, either directly or indirectly, for his own benefit is constructively fraudulent, and he assumes the burden of showing not only his good faith but the payment of full consideration.² In regard to purchases of property by the representative at an auction in a proceeding to sell real estate to pay debts, etc., the statute declares such purchase to be absolutely void.³

§ 618. Depositing funds in bank.— In respect to moneys temporarily in hand, it is the duty of the executor or administrator to deposit them with some solvent bank or banking institution for safe-keeping, in order that they may be paid over promptly to the person entitled by law to receive them. If, in the exercise of ordinary care, an executor, administrator, or other trustee, deposits funds with a banker of good credit, who becomes bankrupt, he is not responsible.⁴ He is only responsible for good faith and reasonable diligence in that regard.⁵ But where there are no

⁹⁷ *Matter of Butler*, 1 Connoly, 58; *Yonkers Sav. Bank v. Kinsley*, 78 Hun, 186; 28 N. Y. Supp. 925. See § 530, *ante*.

⁹⁸ *Valentine v. Belden*, 20 Hun, 537. See *Cook v. Ryan*, 29 id. 249; *Clark v. Clark*, 8 Paige, 152.

⁹⁹ *Matter of Kick*, 11 St. Rep. 688.

¹ *Matter of Quin*, 1 Connoly, 382. See note on executors, guardians, etc., buying in, 17 Abb. N. C. 429.

² *Terwilliger v. Brown*, 44 N. Y. 237; *Carpenter v. Carpenter*, 35 St. Rep. 512; 12 N. Y. Supp. 189. See *Mann v. Benedict*, 47 App. Div. 173; 62 N. Y. Supp. 259.

³ *Co. Civ. Proc.*, § 2774.

⁴ *Sheerin v. Public Adm'r*, 2 Redf. 421. On the question whether the administrator was negligent in leaving

testator's deposit in a savings bank after the bank had suffered from "a run," until it finally became insolvent, testimony of witnesses, as to distrust expressed by depositors and others, is not sufficient to establish such general reputation for unsoundness, as to raise a presumption of knowledge of its unsound condition on the part of the administrator, where all the witnesses who knew of its reputation and course of business testify that they had confidence in it up to the time of its failure. (Ib.)

⁵ *People v. Faulkner*, 107 N. Y. 477. This was the case of a surrogate depositing with a private banker, in good standing and credit, surplus moneys received by him on a foreclosure of a mortgage on an intes-

such recurring demands upon the trustee as require the money to be continued on deposit for the purpose of meeting them, but are left with the bank as an investment of the fund, which he supposed himself authorized to make, he is liable for the loss of the money by the failure of the bank.⁶ We think the rule may be stated to be that an executor, administrator, or other trustee is bound to deposit the trust fund safely, apart from his own funds, and if he mixes it with his private account in bank, he is responsible absolutely for it.⁷ But if he keeps it separate, in a bank of good repute, he is not liable in case of the bank's failure; provided always, that the deposit is placed to the credit of the estate or trust, or is so distinguished on the books of the bank as to indicate, in some way, that it is not his own, but trust money.⁸

tate's land. Held, that no negligence being shown, the sureties on his official bond were not liable for a loss by the failure of the banker. In *Matter of Scudder* (21 Misc. 179; 47 N. Y. Supp. 101), the funds of the estate were withdrawn from a bank where they had drawn 2 per cent. interest, and deposited by the executor in a bank of which he was cashier. It appearing that he did not realize any profit thereby, he was charged with the loss resulting from the failure of the bank and with only 2 per cent. interest from the time of the deposit. In *Harlow v. Mills* (58 Hun, 391; 34 St. Rep. 776; *affd.*, 128 N. Y. 650), an administrator, who had been discharged of his trust, received the proceeds of property of the estate sold thereafter. Held, he was personally responsible for the money when deposited in a bank which subsequently failed.

⁶ *Matter of Knight*, 21 Abb. N. C. 388. In that case, the fund had remained on deposit for two years, less two months, prior to the bank's failure. It is no defense, in such a case, that the will declared that the executors should not be responsible for the unavoidable loss of any property or money by reason of the insolvency of any bank, inasmuch as this was not an unavoidable loss; nor is it material that the deposit was originally made by the executor to whom he succeeded as trustee. In *Matter of Maxwell* (1 Connoly, 230), the trustee permitted, with the assent of the parties in interest, so far as the same could be given, a large part of the assets to

remain on deposit at interest in a bank, after trying unsuccessfully to invest the same on bond and mortgage. The trustee was also one of the directors of the bank, but it did not appear that he had any reason to believe the bank otherwise than solvent. He kept his firm account also in that bank, and business men of good repute, directors of the bank, had large sums of money on deposit therein and believed it to be solvent. The bank failed, the cause of the failure, or the condition of the bank prior thereto, not appearing, except that the cashier absconded at the end of the day before the failure. Held, that the trustee was not liable for the loss arising from the failure of the bank.

⁷ *Case v. Abeel*, 1 Paige, 393; *Killett v. Rathbun*, 4 id. 102; *Matter of Crosby*, 46 St. Rep. 442.

⁸ This is the rule with respect to the liability of an attorney for negligence in keeping his client's money. (2 *Shearman & Redfield on Neg.*, § 575.) On a collation of cases, *Judge Woerner* (Law of Adm'n. § 336) states the rule to be that "if the trustee deposit money in bank, together with money of his own, so that he may draw against the common fund in his own name, or in any manner mingle it with his own, this amounts to a conversion of the estate's money to his own use. The loss of the fund by the failure of the bank or otherwise must be borne by him, even if he had no other funds in such bank, and informed the officers at the time, that the funds were held in trust, and although deposited with the intention

If the deposit be made under an agreement that it shall remain for a time, thus rendering the transaction a loan and not a deposit, or if a deposit, originally made with prudence, is continued for such an unreasonable length of time as to involve a breach of duty, the representative is responsible for loss arising from the insolvency of the bank.⁹

§ 619. Duty to place temporary funds at interest.— Pending the period preliminary to final distribution among the next of kin, or among the legatees, as the case may be, it is commonly necessary for the representative to keep considerable sums on hand — how much and for how long a time must depend upon the circumstances of the particular estate. The statute does not enjoin upon executors and administrators, as it does upon temporary administrators,¹⁰ the duty of depositing the funds of the estate with a trust company or other depositary — with a view, in part, that interest may be earned; and on the other hand, it cannot be said that, in respect to the temporary placing of funds, the representative can take the time allowed to an executor or trustee to make a permanent investment, under the directions of the will. The rule is, that during the period of getting in the estate, paying the debts, etc., preliminary to final distribution or a permanent investment, under the will, whether the period be long or short, the representative is held to the same degree of care which a man of ordinary prudence would exercise, under the same circumstances, with respect to placing his own money so that it might earn interest. If the court can determine that, under the circumstances of the particular case, it was a breach of duty for the representative to let the money lie idle, he may be charged, on his accounting, for the amount of interest which, with reasonable diligence, he might have received.¹¹ If distribu-

to keep them there to repay the amount of the trust funds used by him." See *Matter of Barnes*, 140 N. Y. 468; 55 St. Rep. 790.

⁹ *Baskin v. Baskin*, 4 Lans. 90.

¹⁰ The duty of a *temporary administrator* to deposit the fund with a trust company is declared by statute (see § 419, *ante*); and where he fails to do so, he is chargeable with only so much interest as would have been received from the deposit if it had been made with a trust company, it not appearing that he had used the money or had derived any profit from the deposit of it in his own bank. (*Livermore v. Wortman*, 25 Hun. 341; *Har-*

rington v. Libby, 6 Daly. 259; *Haskin v. Teller*, 3 Redf. 316.)

¹¹ *Shuttleworth v. Winter*, 55 N. Y. 625; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *De Peyster v. Clarkson*, 2 Wend. 78; *Roosevelt v. Roosevelt*, 5 Redf. 264; *Matter of Childs*, 5 Misc. 560; 26 N. Y. Supp. 721. Where he draws the chief part of an estate from a trust company through fear of an attachment, and it lies idle for about a year, the administrator is chargeable with interest thereon. (*Matter of Bradley*, 1 Connolly, 106.) In *Matter of Mapes* (5 Dem. 446), an administrator who permitted \$29,000 to remain uninvested for more than a

tion is unreasonably delayed, he is chargeable with interest on the fund, the same as an executor or trustee would be for an unreasonable delay in making a permanent investment under the will. The reasonableness of the delay depends, of course, upon the circumstances of the particular case. He may keep in hand such sums as the distributees may call for at any time; if kept ready to be paid over, on demand, a delay of demand is no ground for charging interest.¹² It has been very generally held that, during the first year (though this will depend upon circumstances), the representative will not be charged with interest, provided he has kept the trust funds separate, not mixed with his private funds, and not employed by him for his own advantage, or to enhance his credit.¹³ If a delay occurs by reason of the pendency of a suit against him for an account and distribution, the representative should ask leave to pay the balance into court, or to invest it under direction of the court.¹⁴

§ 620. **Liability for personal use of funds.**— Outside of the question of the representative's liability to pay the interest, which he might have earned, with reasonable diligence, is his absolute liability to pay full legal interest, where he mingles the trust funds with his own, or where he employs them in his business or otherwise for his own purposes. In such a case he may be charged with the full legal rate of interest, or with the actual profits resulting from such use.¹⁵ On this principle, a representative can-

year after the administration was substantially wound up, was charged with $1\frac{1}{2}$ per cent. interest. See *Matter of Woodworth*, 5 Dem. 156. An executor who kept the assets for a year in a bank of which he was president, was charged with interest thereon at the rate the bank allowed on time deposits. (*Matter of Babcock*, 29 St. Rep. 947; 9 N. Y. Supp. 554.) See *Matter of Scudder*, 21 Misc. 179; 47 N. Y. Supp. 101; *Matter of Sudds*, 32 Misc. 182; 66 N. Y. Supp. 231. But where the bank in which the funds were deposited refused, three months before the accounting, to continue to pay interest, the mere failure of the executor to invest the fund in the meantime does not make him chargeable with interest. (*Matter of Clark*, 16 Misc. 405; 39 N. Y. Supp. 722.)

¹² *Jacot v. Emmett*, 11 Paige, 142; *Burtis v. Dodge*, 1 Barb. Ch. 77; *Has-*

ler v. Hasler, 1 Bradf. 248; *Price v. Holman*, 135 N. Y. 124; 48 St. Rep. 381.

¹³ *Ogilvie v. Ogilvie*, 1 Bradf. 356; *Minuse v. Cox*, 5 Johns. Ch. 441; *Collyer v. Collyer*, 6 St. Rep. 693; *Matter of Black*, 6 Dem. 331.

¹⁴ *Hosack v. Rogers*, 9 Paige, 461; *Lockhart v. Public Adm'r*, 4 Bradf. 21. If it appears that the executor has been unable to find real estate securities, he is justified in keeping the funds in a savings bank. (*Lansing v. Lansing*, 45 Barb. 182.) See *Matter of Howard*, 3 Misc. 170; 23 N. Y. Supp. 836.

¹⁵ *Matter of Myers*, 131 N. Y. 409; *Reynolds v. Sisson*, 78 Hun, 595; 29 N. Y. Supp. 492; *Matter of Goetschius*, 2 Misc. 278; 23 N. Y. Supp. 975. The employment of trust funds "in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial,

not anticipate the adjustment of his commissions, on the final settlement of his accounts; by appropriating any part of the assets to their payment before that time, he becomes chargeable with interest on the amount, from the date of the withdrawal to the date of the decree.¹⁶ So, an administrator who uses the intestate's personal property from the time of his death to the date of the sale of such property, is chargeable with the reasonable value of its use.¹⁷

or manufacturing enterprises or speculative adventures, has been uniformly condemned as illegal and as constituting a *devastavit* of the estate" (per Ruger, C. J., *Deobold v. Oppermann*, 111 N. Y. 538). (*Manning v. Manning*, 1 Johns. Ch. 527; *Matter of Prescott*, 1 Tuck. 430; *Matter of Hood*, id. 396; *Matter of Richardson*, 2 Misc. 288; *Matter of Thorp*, 31 id. 581; 65 N. Y. Supp. 575.) In the last case, the funds were deposited in a private bank owned by the representative. Where an executor and his testator were, prior to the death of the latter, copartners, and the former, without separating the interest of the latter in the firm property and assets, continued to employ and use the same in the business, he is properly chargeable, upon final settlement, with compound interest upon the value of the testator's share. (*Hannahs v. Hannahs*, 68 N. Y. 610.) See *Matter of Mitchell*, 36 App. Div. 542; 55 N. Y. Supp. 725; *affd.*, 161 N. Y. 654; *Matter of Nesmith*, 71 Hun. 139; 24 N. Y. Supp. 527; *affd.*, 140 N. Y. 609. In *Garniss v. Gardiner* (1 Edw. 128), it was held, that where an administrator caused stock of the testator to be transferred to his own name, and received and mingled the dividends with his own money, he should be charged with the dividends as they were received, and with interest on each from the time of its reception, and in case of any sale and reinvestment, the dividends or income of the reinvestment should be in like manner charged with interest. A trustee charged with 6 per cent. interest for using the fund and not depositing it in a trust company as required by the terms of the trust, may nevertheless be credited with payments to the *cestui que trust* though made as income, which was not, in fact, earned till the decree of the surrogate charging the trustee

with interest was granted. (*Matter of Muller*, 31 App. Div. 80; 52 N. Y. Supp. 565.)

¹⁶ *Freeman v. Freeman*, 4 Redf. 211; *Whitney v. Phoenix*, id. 195; *Wheelwright v. Rhoades*, 28 Hun. 57; U. S. Trust Co. v. Bixby, 2 Dem. 497; 67 How. Pr. 390; *Matter of Herrick*, 32 St. Rep. 1032; *Matter of Gerow*, 23 N. Y. Supp. 847. An executor cannot be allowed, on his accounting, for commissions paid to a co-executor before their judicial allowance. (*Matter of Butler*, 1 Connolly, 58; 9 N. Y. Supp. 641.) See § 1005, *post*. But an executor or administrator who, being also the residuary legatee, in good faith applies to his own use the assets remaining after paying legacies and all claims presented in the usual course, cannot be held accountable except for the actual value of the assets or be charged with the profits of a business into which he puts them. (*Matter of Mullon*, 145 N. Y. 98; 64 St. Rep. 551.) Where an executrix who is also a legatee has collected various sums of money which belong to the estate which she has applied to her own use, it is proper on an accounting to compute interest upon the legacy until the amount collected by her equals the interest, and then to credit it as a payment upon the legacy and to compute interest upon the balance until another payment is in a like manner credited. (*Stevens v. Melcher*, 152 N. Y. 551.)

¹⁷ *Matter of Saunders*, 4 Misc. 28; 23 N. Y. Supp. 829. In that case, the personal estate consisted, in part, of thirty-six dairy cows, one ox team, and one horse team, besides various farming tools and implements which the administrator used to a greater or less extent, from the death of the intestate to the sale thereof, and had the avails thereof for his own individual benefit.

§ 621. **Making and realizing on permanent investments.**—The case of a trustee, who is required to invest a fund, at the time or in the mode in which the will or the law itself has pointed out, is somewhat different from that of a representative, pending the ordinary administration of the estate. The liability of such a trustee to pay interest, even simple interest, does not arise from the mere fact that he deposited the trust moneys indiscriminately with his own; nor because he made use of them in his own business; there must be superadded a breach of trust, a neglect or refusal to invest the fund according to the directions of the trust-instrument or settled rules of law.¹⁸ “If he is guilty of fraud, or of mismanagement of the trust fund, or is guilty of a breach of trust, or has used the trust funds for his own purposes, and made a profit therefrom, he may be compelled to pay interest, and in extraordinary cases compound interest, so as to place the *cestui que trust* in the same situation as if the trustee had faithfully performed his proper duty.”¹⁹ In all cases where the executor has been held liable for interest on funds in his hands, one or more of the elements or facts of personal use of the funds, mingling the same with private moneys, unauthorized investments, failure to follow clear and specific directions as to the disposition of funds, retention of the funds where there was no reasonable excuse for so doing, or other circumstances showing a clear case of breach of trust, are present; and where these elements are all absent the executor will not be charged interest on money in his hands. Compound interest is allowable only in cases of gross delinquency or intentional violation of duty.²⁰ For mere neglect to invest, simple interest is generally imposed,²¹ especially

¹⁸ *Rapalje v. Hall*, 1 Sandf. Ch. 399; *Jacot v. Emmett*, 11 Paige, 142; *Matter of Barnes*, 140 N. Y. 468; 55 St. Rep. 790; *Matter of Nesmith*, 140 N. Y. 609; 56 St. Rep. 484.

¹⁹ *Per Earl, C. J.*, *Price v. Holman*, 135 N. Y. 124.

²⁰ *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 id. 182; 1 Abb. Pr. (N. S.) 280; *Tucker v. McDermott*, 2 Redf. 321. See *Reynolds v. Sisson*, 78 Hun, 595; 29 N. Y. Supp. 492. In *Freeman v. Freeman* (4 Redf. 211), the testator gave to his executors \$4,000, in trust, to invest in bond and mortgage on real estate in the city of New York, or its vicinity, and to apply the income thereof to the use of J., during life. The executors, with J.'s consent, took a mortgage on the testator's dwelling-house in New Jersey, which, by his

will, he devised to his daughter, and directed that it be valued at \$8,000. The will was not recorded in New Jersey, and the interest remained in arrears for several years. Held, that as the executors had acted in good faith, they were not chargeable with compound interest on the amount so invested; that the defect of title, through failure to record the will, could be remedied by a subsequent record of the same.

²¹ *Thorn v. Garner*, 42 Hun, 507; citing *Clarkson v. De Peyster*, Hopk. 424, 427; *Hannahs v. Hannahs*, 68 N. Y. 610; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Barney v. Saunders*, 16 How. (U. S.) 535, 542; *Remington v. Walker*, 99 N. Y. 626. And see *Matter of Butler*, 1 Connolly, 58; 9 N. Y. Supp. 641.

where no wrongful intention to misappropriate the funds is shown.²² In ordinary cases, six months after the fund, to be permanently invested, is ascertained, has been regarded as ample time within which to find a satisfactory investment.²³ A delay of more than one year by the executor in disposing of property to raise a trust fund, and depositing the same in the trust company designated in the will, was held, in one case, not to make him chargeable with more interest than he had received during the time a suit for the construction of the will was pending.²⁴

It is not inconsistent with the duties of an executor, whose duty it is to invest funds, to supplement the funds of the estate with his own or with other moneys legitimately obtained, in order to secure a profitable investment.²⁵ In such a case, if the trust moneys so invested are indistinguishable from the other moneys invested with them, the *cestui que trust* cannot claim a specific lien upon the property or funds constituting the investment.²⁶

§ 622. Character of investment.— If the will directs the manner of investment, the executor is bound to make good any loss resulting from an unauthorized or unnecessary disobedience of such directions.²⁷ A direction of the will to invest trust funds in a

²² *Wilmerding v. McKesson*, 103 N. Y. 329; *Estate of Kennedy*, N. Y. Law J., March 20, 1890. In *Matter of Rutherford* (5 Dem. 499), in charging a trustee for loss upon a loan to a co-trustee at a rate of interest higher than the legal rate prevailing at the time of the accounting, it was held, that although for his misconduct in assenting to such loan he could not be held for more than legal interest in the absence of evidence that he personally profited by the transaction, yet as he was sought to be charged for neglect in failing to collect interest at the contract rate as it became due, a charge against him of the full amount of such interest was proper.

²³ *Halsted v. Hyman*, 3 Bradf. 426; *Dunsecomb v. Dunsecomb*, 1 Johns. Ch. 508; *Gilman v. Gilman*, 2 Lans. 1; *Matter of McKay*, 5 Misc. 123; *Matter of Saunders*, 4 id. 28. It was said in *Matter of Butler* (1 Connolly, 58; 9 N. Y. Supp. 641), there is no indexible rule that where at the end of any year there remains a surplus of income, the executor is bound to invest the same at once, as such rule would preclude the application of the income of one year to the needs of

testator's family for another year, no matter what the exigencies that might call for so doing.

²⁴ *Foster v. Wetmore*, 37 St. Rep. 667; 14 N. Y. Supp. 194.

²⁵ *Barry v. Lambert*, 98 N. Y. 300, and cases cited.

²⁶ *Ferris v. Van Vechten*, 73 N. Y. 113.

²⁷ *Bohde v. Bruner*, 2 Redf. 333; *Freeman v. Freeman*, 4 id. 211; *Crabb v. Young*, 92 N. Y. 56; *Clark v. Clark*, 23 Misc. 272; 50 N. Y. Supp. 1041. Even though it takes the fund beyond the jurisdiction of the court. (*Ib.*; *Melden v. Devlin*, 20 Misc. 56; 45 N. Y. Supp. 333.) In *Shepard v. Patterson* (3 Dem. 183), the will directed the income of certain trust funds to be deposited "in some good savings bank," or devoted to some other safe investment, during the respective minorities of the beneficiaries; instead of which the executor advanced the income to the minors. He was charged, on his accounting, with interest, compounded semi-annually, at the rate of 5 per cent. upon all sums received, from the expiration of three months after the receipt to the date of filing the account, and at the rate of 3 per cent. thereafter until the

particular security, *e. g.*, in United States bonds, implies an authority to pay a premium therefor, if necessary;²⁸ and where an investment in real estate is authorized, the fund may be used for the erection of a building upon land forming part of the trust estate.²⁹ In the absence of specific directions, a trustee who acts in good faith and in the exercise of a reasonable discretion, and in the same manner as a prudent man would ordinarily do in regard to his own property, will not be held responsible for losses accruing in the management of the trust property.³⁰ This rule necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made. Although the English rule, that trust funds must be invested in the public debt, is not a part of the common law, and has no application to this country, it is a settled principle of law in this State, that trust funds should be invested in government or real estate securities, or in such others as the Legislature may designate,³¹ and that any other investment would be a breach of duty, and the trustee would be responsible,³²

entry of the decree on settlement. Compare *Matter of Stewart*, 30 App. Div. 368; *affd.*, 163 N. Y. 593. Under a power to vary investments, the trustee may assign a bond and mortgage before maturity. (*Spencer v. Weber*, 163 N. Y. 493.)

²⁸ *Brown v. Chesterman*, 30 St. Rep. 537; 9 N. Y. Supp. 187. As to the duty of the trustee to deduct, in such case, from the income a sufficient sum each year, to keep the principal intact. See *New York Life Ins. Co. v. Baker*, 165 N. Y. 484.

²⁹ *Stevens v. Melcher*, 152 N. Y. 551. Authority is given by statute to purchase land for the purpose of straightening boundaries. (L. 1898, c. 311.)

³⁰ *King v. Talbot*, 40 N. Y. 76; *McCabe v. Fowler*, 84 id. 314; *Ormiston v. Oleott*, id. 339; *Atlantic Trust Co. v. Powell*, 23 Misc. 289; 50 N. Y. Supp. 866; *Crabb v. Young*, 92 N. Y. 56. In the last case the will provided that the executors should not be liable for any loss or damages except such as occurred "from their willful default, misconduct, or neglect." Held, that, although the trustees were found, by the trial court, to have acted imprudently and carelessly in making an

investment in inadequate securities, yet such imprudence not being found to have been "willful," a judgment requiring the trustees to restore to the trust fund the amount so invested was erroneous. The court will regard them with leniency when they have acted in good faith. See *Hart v. Ten Eyck*, 2 Johns. Ch. 76; *Thompson v. Brown*, 4 id. 619; *Lansing v. Lansing*, 45 Barb. 182; *Barker v. Smith*, 1 Dem. 290.

³¹ *Matter of Wotton*, 59 App. Div. 584; 69 N. Y. Supp. 753; *affd.*, 167 N. Y. 629. The fact that the Legislature has designated particular securities, indicates that the power of trustees is restricted in this respect. (*Ib.*)

³² *King v. Talbot*, *supra*. See a collection of cases on the general subject of investments of trust funds in 40 Am. Dec. 506, note. The rule is less strict in other States. The cases are collated in *Lamar v. Micou*, 112 U. S. 468. In that case, the guardian of an infant, domiciled in Georgia but temporarily residing in this State, where also the letters of guardianship were issued, invested, during the war of the rebellion, the ward's money in the municipal bonds of southern cities is-

notwithstanding the will authorized the trustees to invest the fund "in such manner and upon such securities as to them shall seem advisable."³³ Accordingly, an executor is not authorized to loan funds of the estate on personal security³⁴ or upon a leasehold estate.³⁵ By a statute passed in 1899 (chapter 65), it was declared "lawful for executors, administrators, guardians, and trustees, and others holding trust funds for investment, to invest the funds so held by them in trust, in bonds or stocks of any of the cities of this State, issued pursuant to the authority of any law of this State."³⁶ Another statute³⁷ provides that trust moneys may be invested "in the same kind of securities as those in which savings banks of this State are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this State worth fifty per centum more than the amount loaned thereon."

§ 623. Decedent's investments.— The executor or trustee is not authorized to keep, beyond a reasonable time, securities found among the assets, which are not of such a character as to justify an investment of trust funds in them under the general rule above stated,³⁸ unless the will directs or empowers the trustee to hold the personal estate in the manner and form in which it may be invested at the time of the testator's death.³⁹

So, also, the possession by the testator, at the time of his death, of shares of the capital stock of a corporation, does not authorize the executors, upon an increase of the capital of the corporation, to subscribe for additional shares of such stock under a special privilege given to the stockholders of the corporation.⁴⁰

sued before the war, and in southern railroad bonds, indorsed by the State of Tennessee, and deposited the bonds in a bank in Canada. Held, that if in so doing he used due care and prudence, having regard to the best pecuniary interest of his ward, he was not accountable for loss by depreciation of the securities.

³³ *Matter of Keteltas*, 1 Connoly, 468; *Matter of Reed*, 45 App. Div. 196; 61 N. Y. Supp. 50; *Matter of Hall*, 164 N. Y. 196; *English v. McIntyre*, 29 App. Div. 439; 51 N. Y. Supp. 697.

³⁴ *Lefever v. Hasbrouck*, 2 Dem. 567; *Matter of Cant*, 5 id. 269; *Bogart v. Van Velsor*, 4 Edw. Ch. 722; *Matter of Foster*, 15 Hun. 387; *Jones v. Hopper*, 2 Dem. 14; *Matter*

of *Blauvelt*, 60 Hun. 393; 39 St. Rep. 774; *Matter of Vandevort*, 8 App. Div. 341; 40 N. Y. Supp. 791.

³⁵ *Matter of Stark*, 39 St. Rep. 393; 15 N. Y. Supp. 729.

³⁶ The substance of this statute was carried into the Personal Property Law (L. 1897, c. 417, § 9).

³⁷ L. 1902, c. 295.

³⁸ *McRae v. McRae*, 3 Bradf. 199; *Matter of Campbell*, 21 Misc. 133; 47 N. Y. Supp. 29.

³⁹ *Matter of Cant*, 5 Dem. 269; *Matter of Wolfe*, 1 Connoly, 102; *Lawton v. Lawton*, 35 App. Div. 389; 45 N. Y. Supp. 760; *Dunklee v. Butler*, 30 Misc. 58; 62 N. Y. Supp. 921.

⁴⁰ *Lacey v. Davis*, 4 Redf. 402, and again, 5 id. 301.

They are bound, within a reasonable time after the death of the testator, to realize assets in the nature of personal securities and stocks; and if without justification they retain such assets, and, in good faith, make a further investment, which is intended to and does protect such assets, they cannot, upon their accounting, be allowed the amount of this latter investment, since they are not justified in using the money of the estate in protecting stock which should not have been in their possession.⁴¹

The duty of a trustee is not confined to looking after the securities, in which he himself has invested the trust fund. Even though a loan on bond and mortgage was amply secured at the time the testator made it, the executors are not relieved from exercising supervisory care in regard thereto. They must keep themselves informed, and take notice of all things affecting the investment which a man of fair judgment, care, and prudence, would take into consideration in the matter of a loan of his own moneys, and likewise take all lawful means with a fair degree of promptness to recover the debt, and thereby and by all prudent means prevent a loss to the estate. The falling behind in the payment of interest upon a loan made by testator is sufficient to put the executor to an inquiry as to the safety of the investment. A demand alone is not sufficient, and, while the executor is not called upon to initiate legal proceedings immediately upon a default of payment of interest, on the other hand, the limit of delay is not indefinite. Between these two extremes lies the medial line, which must

⁴¹ *Ib.* In *Matter of Herrick* (32 St. Rep. 1032), the executors, having transferred certain stocks of the estate to a legatee on account of a legacy, subsequently, after they had depreciated in value, took them back, paying therefor the funds of the estate to the amount at which they had been originally valued. Held, that the investment was unauthorized, and the executors were chargeable with the resulting loss. In *Barker v. Smith* (1 Dem. 290), the testator owned, at the time of his death, railroad stock which was regarded as worthless and was so inventoried. By a reorganization these shares became convertible into those of the stock of another railroad company and became valuable. The executor effected the conversion, and after an interval during which the stock fluctuated in price, bought the shares so converted by him, at private sale for his own account, the parties being

disposed to sanction the purchase. Held, that in the absence of bad faith, the executor was only chargeable on his accounting for the market price on the day of sale, and not with the highest price the stock had attained down to the time of his purchase. See *ante*, § 598. In *Adams v. Van Vleck* (4 Dem. 343), it was held, the question, whether a testamentary trustee has retained stocks and securities owned by the decedent at the time of his death, and which were not investments which would be sanctioned by a court, for more than a reasonable time to effect their conversion, could not be raised upon the accounting of the trustee, had before a sale of such securities. *It seems*, that the remedy of the beneficiaries, in such case, is to institute proceedings for the removal of the trustee or to compel the furnishing of a bond.

depend upon all the circumstances of the case under investigation, where the law says the executor would, in the exercise of ordinary prudence, go forward to protect the trust estate, or, in default of so doing, become personally responsible.⁴²

§ 624. **Foreign investments.**—It is a general, though not inflexible, rule that an executor or trustee, residing in this State and deriving his authority from a will executed and proved here, cannot invest trust funds in mortgages of real estate situated in another State.⁴³

This rule is not so rigid as to admit of no possible exceptions, for it is merely an outgrowth or consequence of the broader and admitted proposition that the duty of a trustee in making investments is to employ such diligence and such prudence as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. Such an exception to the rule is a case where the executors bought in, at a sale under a mortgage-foreclosure commenced by the testator in his lifetime, real estate situated in another State, and afterward sold the same, and took back a mortgage for a part of the purchase price.⁴⁴

§ 625. **Trustee purchasing trust property.**—While there is no rule of law which absolutely prevents a trustee from purchasing from a *cestui que trust* his interest in the trust estate, the courts will examine all such transactions with care, in order to see that no undue advantage has been taken of the *cestui que trust*.⁴⁵

It is a fundamental principle that a trustee assumes the burden of showing not only that his dealings, with respect to the trust property or with the *cestui que trust*, were fair, but that they were had after the fullest disclosure of all he knew in regard to the subject-matter, thus putting the latter upon an equal footing with himself. If he becomes the purchaser of the trust property, either

⁴² Matter of Butler, 1 Connolly, 58. See Isham v. Post, 141 N. Y. 100. As to when executor is not chargeable with the amount of a second mortgage that he had not attempted to foreclose, see Matter of Thomson, 14 St. Rep. 615. For the general rule as to the liability of a trustee for neglect of duty under a trust mortgage, see Merrill v. Farmers' Loan & Trust Co., 24 Hun. 297; rule reiterated in 4 St. Rep. 122. In Hollister v. Burritt (14 Hun. 291), the executrix left, in the hands of the testator's attorney, a judgment which was a fourth lien upon the debtor's

land. The attorney collected small amounts on the same by virtue of executions, but did not enforce it against the land, though the prior judgments ceased to be liens thereon. Upon an accounting, the executrix was held personally liable for the amount due on the judgment, by reason of her failure so to enforce the same. See § 628, *post*.

⁴³ Ormiston v. Olcott, 84 N. Y. 339.

⁴⁴ Denton v. Sanford, 103 N. Y. 607. See Freeman v. Freeman, 4 Redf. 211.

⁴⁵ Graves v. Waterman, 4 Hun. 687; Lytle v. Beveridge, 58 N. Y. 593. See § 617, *ante*.

directly or through a third person (unless he is also individually interested),⁴⁶ the purchase is, by construction of law, fraudulent, and no showing of good faith or of the payment of a full consideration, can sustain it against the objection of the *cestui que trust*, so long as the property remains in his hands or in the hands of any one who takes it with knowledge or notice of the facts.⁴⁷

The *cestui que trust* may affirm the sale,⁴⁸ and long acquiescence may amount to an affirmance;⁴⁹ or he may repudiate it, and call upon the trustee to restore the property,⁵⁰ or, if that has become impossible, to account for whatever benefit he has received from the purchase.

The rule applies to a case where one of several trustees, who is also one of the beneficiaries of the trust, with his co-trustees, sells and conveys the trust estate to himself, or to another for his benefit; and such sale can be repudiated by the other *cestuis que trust*.⁵¹ It also applies where the property bought by the trustee, though not itself trust property, is yet such that by means of it the trust was to be worked out.⁵²

The rule also extends to the case of a purchase by a trustee, for his own benefit, of property which, although not the subject of the trust, is connected with it in such a way that a sale of the property for less than its value will diminish the trust fund; and a purchase by him for less than the value of the property inures to the benefit of the *cestui que trust*.⁵³

⁴⁶ *Corbin v. Baker*, 167 N. Y. 128.

⁴⁷ *Terwilliger v. Brown*, 44 N. Y. 237. See *Mann v. Benedict*, 47 App. Div. 173; 62 N. Y. Supp. 259.

⁴⁸ *Read v. Knell*, 143 N. Y. 484; 63 St. Rep. 847; *Greagan v. Buchanan*, 15 Misc. 580; 37 N. Y. Supp. 83.

⁴⁹ *Marsh v. Whitmore*, 21 Wall. 178; *Broome v. Van Hook*, 1 Redf. 444; *Rose v. Rose*, 6 Dem. 26; *Kahn v. Chapin*, 152 N. Y. 305. The presumption of fraud in sale by executors of their testator's estate to themselves is overcome where a legatee voluntarily receives her portion of the proceeds of the sale, executes a full release to them, and remains acquiescent for thirteen years before commencing an action to set the sale aside. (*Geyer v. Snyder*, 69 Hun. 115; 140 N. Y. 394.) See *Matter of Dedrich*, 68 Hun. 396; 22 N. Y. Supp. 978.

⁵⁰ *Merrick v. Waters*, 51 App. Div. 83; 64 N. Y. Supp. 542.

⁵¹ *Tiffany v. Clark*, 58 N. Y. 632.

⁵² *Woodruff v. Boyden*, 3 Abb. N.

C. 29. In that case, B., a creditor of R. executed to W., another creditor, a declaration of trust, whereby B. agreed to hold a certain judgment in his own favor against R., for the joint benefit of himself and W., in the proportion of their respective claims. On a sale of the judgment debtor's property under execution, issued by B. on his judgment, and purchase by B. of such property, it was held, that he could not be allowed to claim he had bought it for his own benefit: but must be deemed to have bought it for the joint benefit of himself and W. under the terms of the trust agreement, and must account to W. for its real value. See *Matter of Yetter*, 44 App. Div. 404; 61 N. Y. Supp. 175; affd., 162 N. Y. 615.

⁵³ *Fulton v. Whitney*, 66 N. Y. 548. No actual fraud on the part of a trustee so purchasing need be shown, to give to the *cestui que trust* the benefit of the purchase. (Ib.) An administrator who induces one of the

A person, though named in a will as one of the executors, to whom letters testamentary have not been issued, is not incapacitated from purchasing property from the executors who have qualified.⁵⁴ An administrator may foreclose a mortgage held by him individually on the real estate of his testator and purchase the property on the foreclosure, as in such case there is no relation of trust between the administrator and those entitled to the realty.⁵⁵

§ 626. Liability for profits realized or losses incurred on securities.

— In the management of a trust, the principle is that the trustee may lose but cannot gain. If by any improper use of the fund profits are made, he is to be charged with the principal and interest. Any profits which may have accrued at any particular time are a mere accretion to the fund, and the trustee can be charged with them only on the ground that he has appropriated them to his own use. If no profits have been made he is chargeable with interest only. But the *cestui que trust* has an option to claim the investment as made, or the replacement of the original fund, with interest, according as the one or the other may be most for his benefit.⁵⁶

next of kin to sell his share, which such administrator subsequently acquires, by threats of unfounded litigation which will use up the estate, is liable to such next of kin for damages sustained by making such sale at an inadequate price. (Button v. Monroe, 22 Week. Dig. 407.) So the sale by an administrator of a deceased partner's interest in a partnership to the survivor, and the subsequent purchase by the administrator individually, is unlawful. (Matter of Barlow, 15 St. Rep. 721.) See Matter of Randall, 80 Hun, 229; 29 N. Y. Supp. 1019; *revd.*, on other grounds, in 152 N. Y. 508.

⁵⁴ Valentine v. Duryea, 37 Hun, 427. The wife of a trustee, who as such holds a second mortgage upon real estate, may purchase the property on a foreclosure of the first mortgage, and her deed gives a good title to the property. (Potter v. Sachs, 45 App. Div. 454; 61 N. Y. Supp. 426.)

⁵⁵ Matter of Monroe, 142 N. Y. 484; 60 St. Rep. 102.

⁵⁶ See § 620, *ante*. In Baker v. Disbrow (18 Hun, 29; *affd.*, 79 N. Y. 631), the executors under a will were authorized to sell real estate, and directed to invest the proceeds upon bond and mortgage, or other good se-

curity, and pay the income to certain minor children, but bought with such proceeds real estate, which they subsequently resold at a profit, and continued buying and selling real estate, the income from which the *cestui que trust* received, until finally the trustees lost a large part of the fund. Held, that the purchase of real estate was unauthorized, but that the *cestui que trust*, on becoming of age, could not ratify the first transactions which resulted in a profit, and call upon the trustees to account for the fund as so increased, from the date of the increase, disavowing the subsequent transactions, and that the trustees were only liable to account for the fund they had in their hands before the purchase of any real estate, with interest from the time when the *cestui que trust* ceased to reap the benefit from the real estate bought. S. P., English v. McIntyre, 29 App. Div. 439; 51 N. Y. Supp. 697; Matter of Porter, 5 Misc. 274. In Rose v. Rose (6 Dem. 26), the will directed the executor to sell the real property, at such times and in such lots as would be to the best advantage, invest the proceeds and apply the interest to the support of his widow and children during the minority of the latter, and

Losses incurred by the depreciation of the market value of securities are not chargeable against the trustee, where there is nothing to show that the trustee has been wanting in due diligence and prudence. Thus a trustee who purchased at a premium for investment, from time to time, United States bonds, which, being called in by the government, declined in market value so that the premiums paid were lost, is not liable for the loss,⁵⁷ nor is he liable for the depreciation of real estate security, occurring in consequence of a general financial panic.⁵⁸

A profit, arising from the sale of the trust securities, inures to the benefit of the principal of the trust, and is not distributable to those entitled to the income; *per contra*, a loss, if any, must be that of the principal.⁵⁹ Extraordinary dividends of cash,⁶⁰ or of stock,⁶¹ are distributable as income.

§ 627. **Unavoidable losses.**— The statute declares that no profit shall be made by executors or administrators by the increase of the estate in their hands; nor, on the other hand, shall they sustain any loss by the decrease, without their fault, of any part of the estate; but they shall account for such increase, and shall be allowed for such decrease, on the settlement of their accounts.⁶² The statute also provides for an allowance to an accounting party for property of the decedent perished or lost without his fault.⁶³ If an executor, acting in good faith, makes a mistake — as if he agrees to surrender a term for less than its worth, supposing it forfeited — he is not liable for the loss incurred; but if, after

ultimately to divide the principal. The executor erected, with the funds of the estate, a dwelling-house upon a parcel of land, which was afterward sold, with the improvements, at a loss of \$650. The evidence did not clearly disclose by whom the sale and conveyance were made. Held, that if the sale was made by the executor, he was liable for the deficit, having exceeded the authority conferred by the will; but that if the beneficiaries sold the property, they conveyed a good title, and must be deemed to have taken the land and dwelling in lieu of the proceeds of sale, thereby ratifying the executor's act in erecting the latter.

⁵⁷ *Brown v. Chesterman*, 30 St. Rep. 537; 9 N. Y. Supp. 187; *Valentine v. Valentine*, 3 Dem. 597.

⁵⁸ *Matter of Blauvelt*, 60 Hun, 394; 39 St. Rep. 774; *revd.*, on other points, 131 N. Y. 249.

⁵⁹ *Farwell v. Tweddle*, 10 Abb. N. C.

94; *People v. Davenport*, 30 Hun, 177; 117 N. Y. 549; *Whittemore v. Beekman*, 2 Dem. 275; *Bergen v. Valentine*, 63 How. Pr. 221; *Matter of Hutchinson*, N. Y. Law J., Feb. 29, 1892; *Matter of Philbin*, *id.*, July 9, 1892. Compare *Matter of Hoyt*, 160 N. Y. 607.

⁶⁰ *Matter of Kernochan*, 104 N. Y. 618.

⁶¹ *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 *id.* 102; *Simpson v. Moore*, 30 Barb. 637; *Clarkson v. Clarkson*, 18 *id.* 646; *Matter of Woodruff*, 1 Tuck. 58; *Matter of Prime*, N. Y. Law J., March 6, 1891. In England and Massachusetts, such a dividend is regarded as forming a part of the capital of the estate. See 2 *Perry on Trusts* (4th ed.), § 545.

⁶² Co. Civ. Proc., § 2729, as amended 1893; adopting 2 R. S. 93, § 57.

⁶³ Co. Civ. Proc., § 2729, as amended 1893 (former § 2741).

discovering the mistake, he goes on to complete the transaction and releases the right, he becomes liable.⁶⁴ If an executor is robbed of assets, he will in general be exonerated, but this depends largely upon the question of negligence.⁶⁵

§ 628. **Loss of debts due the estate.**— The loss of a debt due to the estate by a solvent person, through the neglect of the representative to prosecute it,⁶⁶ or by reason of the incompetency of his attorney, will not be allowed him on his accounting.⁶⁷ The burden of proof is on him to show a fair reason why he did not prosecute. If his omission was directed by a reasonable judgment, and in accordance with the *bona fide* advice of counsel, he will not be held liable for the consequent loss.⁶⁸ He will be charged (if a sole representative) with the amount of his own indebtedness to the decedent. If the validity or amount of the alleged debt is disputed, the Surrogate's Court is given jurisdiction to try and determine the contest, upon the judicial settlement of the represen-

⁶⁴ *People v. Pleas*, 2 Johns. Cas. 376.

⁶⁵ *Furman v. Coe*, 1 Cai. Cas. 96. An administratrix kept a large amount of money (the collections from the sale of goods in a store, and of notes and accounts of the intestate) in a trunk in a bedroom occupied by her crippled son, being one of the rooms occupied by her family adjoining the store. Part of such collections had been kept there over a year. The nearest bank was twelve miles from where she lived. The money having been stolen, it was held that, had it been only a portion of the estate lately collected, and had the rest been deposited in a bank, she might have been justified in keeping the same where she did, until a proper opportunity to deposit it in the bank occurred; but as the whole, or nearly all, of the fund had been allowed to remain in such an insecure place for nearly a year, when it was stolen, it was such a violation of the ordinary laws of prudence as constituted negligence for which she was liable. (*Cornwell v. Deck*, 8 Hun. 122.) See *McCabe v. Fowler*, 84 N. Y. 314.

⁶⁶ *Hollister v. Burritt*, 14 Hun. 291; *Matter of Hosford*, 27 App. Div. 427; 50 N. Y. Supp. 550; *Matter of Childs*, 26 id. 721. The fact that the solvent debtor lives in another State does not absolve the representative from the duty of trying to collect it. (*Matter*

of *Millard*, 27 St. Rep. 789; 9 N. Y. Supp. 126.)

⁶⁷ An executor who employs a person to bring a suit who is not authorized to practice, may be held personally liable for any losses that may ensue from his irregular proceedings. (*Wakeman v. Hazleton*, 3 Barb. Ch. 148.) Where an executor gave securities, due to his testator, to an attorney to collect, and six years after the death of the executor the attorney collected the money, and applied it to his own use, and became insolvent, it was held, that the estate of the executor was not chargeable with the loss. (*Rayner v. Pearsall*, 3 Johns. Ch. 578.)

⁶⁸ *O'Connor v. Gifford*, 117 N. Y. 275; *Matter of Ball*, 55 App. Div. 284; 66 N. Y. Supp. 874; *Matter of Hosford*, 62 App. Div. 626; 71 N. Y. Supp. 163. See *Matter of Olmstead*, 52 App. Div. 515; *affd.*, 164 N. Y. 571. An executor is not liable for failure to take steps to recover alleged assets where there were reasonable grounds for believing that they would be ineffectual and he acted in good faith. (*Matter of Hall*, 16 Misc. 174; 38 N. Y. Supp. 1135.) Nor is he chargeable with the amount of a note in favor of his testator, the existence of which was unknown to him. (*Matter of Guldenkirch*, 35 Misc. 123; 71 N. Y. Supp. 310.)

tative's account.⁶⁹ Indeed, the Surrogate's Court is the only forum where the question of the individual liability of a sole representative, upon an alleged indebtedness to the intestate, can be determined.⁷⁰

§ 629. Authority to sell or compound debts due to decedent.—The common-law power of executors and administrators to compound with debtors of their decedent,⁷¹ has been confirmed by statute, which empowers the surrogate to “authorize the executor or administrator (1) to compromise or compound a debt or claim, on application, and for good and sufficient cause shown, and (2) to sell at public auction, on such notice as the surrogate prescribes, any uncollectible, stale, or doubtful debt or claim belonging to the estate.” It is also provided that “any party interested in the final settlement of the estate may show, on such settlement, that such debt was fraudulently compromised or compounded.”⁷² It will be observed that the statute does not extend to claims *against* the estate, though it would seem that a power to permit the compounding of such claims might prove equally beneficial.⁷³ There has never been any doubt that the representative of a decedent had ample power, at common law, to compound a debt due the latter, in his lifetime; and, irrespective of the statute, it is his duty to compound and release a debt, when the interest of the estate requires such action.⁷⁴ Hence, he may settle and discontinue

⁶⁹ Co. Civ. Proc., § 2731, as amended 1893. He is chargeable, on his accounting, for the unpaid principal, together with accrued interest. (Matter of Clark, 34 St. Rep. 523; 11 N. Y. Supp. 911.) Where an executor satisfied of record his own mortgage, given to his testator, in his lifetime, to secure his own bond, but did not pay the bond, his estate, on his death, is liable, at the instance of testator's heir, for the amount due on the bond. (Matter of Brownell, 39 St. Rep. 918; 15 N. Y. Supp. 475.)

⁷⁰ Burkhalter v. Norton, 3 Dem. 610. An application for adjudication as to the amount due from an executor to the estate and directing the deposit thereof in a trust company, will not be granted pending a reference upon the executor's accounting, which can determine the facts upon which the application was necessarily based. (Matter of Gilman, 3 St. Rep. 340.)

⁷¹ See Chouteau v. Suydam, 21 N. Y. 179; Van Horne v. Fonda, 5 Johns.

Ch. 388; Gillespie v. Brooks, 2 Redf. 349.

⁷² Co. Civ. Proc., § 2719, as amended 1893; adopting L. 1847, c. 80, §§ 1, 2. The law of 1847 had been amended by L. 1888, c. 571, and by L. 1893, c. 100, but it, and the amendatory act of 1888, were repealed by L. 1893, c. 586. The amendatory act of 1893, c. 100, was not expressly, though it was impliedly, repealed with the original statute.

⁷³ See Matter of Bronson, 69 App. Div. 487; 74 N. Y. Supp. 1052. But executors and administrators have the power to submit to *arbitration*, disputed claims or demands, in favor of, or against, the estate. (Wood v. Tunnicliff, 74 N. Y. 38.)

⁷⁴ Leland v. Manning, 4 Hun. 7; Matter of Scott, 1 Redf. 234; Matter of Albrecht, 1 Connoly, 12; Murray v. Blatchford, 1 Wend. 583. A provision in the will authorizing the executors to compound with debtors of the estate who were unable to pay,

an action commenced by his decedent in his lifetime, without leave of the surrogate and without being substituted as plaintiff in the action.⁷⁵ The power of the surrogate is not confined, as has been supposed, to the compromise of claims against insolvent debtors,⁷⁶ but extends, as well, to claims against solvent debtors, where there is any reason to doubt either the legality of the claim,⁷⁷ or the existence of a valid set-off.⁷⁸ The application to the surrogate for leave to compromise may be *ex parte*, and should disclose all the facts and circumstances warranting the compromise proposed, such as the condition of the estate, the amount of the claims against it, whether presented under a published notice or otherwise; in short, the same facts should be shown as would be required if the question of the propriety of the compromise was before the court on a judicial settlement of the petitioner's account, on the objection of parties interested.⁷⁹ The court will not sanction the executing, by the representative, of a composition-deed, by which a long extension of credit is given the debtor, without present payment of any part of the debt. This is not a "compromise" of the debt, which means the acceptance of a part in satisfaction of the whole.⁸⁰ Where the debt is a part of a trust estate, the amount received, on the compromise, though, in part, it represents the interest accumulated on the debt, belongs to the principal of the trust.⁸¹

§ 630. Misapplication of assets.— The representative is held to a faithful and intelligent application of the assets to actual and existing liabilities, such as the assets are legally applicable to; and if he assumes to pay a demand which has no legal foundation,

or wholly to forbear suing them, does not authorize the executors to abstain from deducting, from a legacy for the benefit of a poor person, a debt due from him to the testator. (*Stagg v. Beekman*, 2 Edw. 89.)

⁷⁵ *Auken v. Kiener*, 9 St. Rep. 669.

⁷⁶ *Howell v. Blodgett*, 1 Redf. 323; *Patten's Estate*, 1 Tuck. 56.

⁷⁷ *Shepard v. Saltus*, 4 Redf. 232.

⁷⁸ *Berrien's Estate*, 16 Abb. Pr. (N. S.) 23.

⁷⁹ *Matter of Richardson*, 31 St. Rep. 957; 9 N. Y. Supp. 638. If the representative compromises, without the authority of the surrogate, a judgment held by him, he must establish affirmatively the propriety of such settlement. (*Matter of Quinn*, 30 St. Rep. 210; 9 N. Y. Supp. 550.)

⁸⁰ *Matter of Loper*, 2 Redf. 545.

⁸¹ In *Matter of Philbin* (N. Y. Law J., July 9, 1893), the executor had compromised a debt of \$1,500 due the estate for \$1,350. The accounting executor claimed that the compromise represented the principal of the debt, with interest accrued up to the time of the compromise, and to the extent that the sum received in compromise represented interest, it should be appropriated to the fund to be paid over to the life tenants. Held, that the amount received from the debtor formed part of the *corpus* of the trust, and could not be considered in the same light as bonds or interest-bearing securities passing to the executor on testator's death: consequently the rule of *Riggs v. Cragg* (26 Hun, 90) did not apply.

and could not have been recovered, the claim may properly be disallowed on his accounting.⁸² And if he negligently allows an invalid claim to go to judgment, without employing counsel, to attend the trial, or taking an appeal, he may be charged with the amount paid on the judgment.⁸³ He cannot allow claims which, though otherwise valid, are barred by the Statute of Limitations, whether the claim is his own⁸⁴ or another's;⁸⁵ nor can he revive a debt so barred by a new promise.⁸⁶ It is no part of the duty of a representative to subject the estate of his decedent to a demand from which it is by law exempt. If he can do it in any manner, it must at all events be by a positive contract. A provision in the will for the payment of all just debts does not revive a debt barred by the statute.⁸⁷ Where the representative has allowed a claim against the estate, it is not *res adjudicata* against the creditors or next of kin. On the final accounting, the wisdom of his action in allowing the demand against the estate may be litigated by them against the representative, and passed upon, even though such a course may involve the trial of a disputed claim.⁸⁸ An

⁸² Dye v. Kerr, 15 Barb. 444.

⁸³ Matter of Saunders, 23 N. Y. Supp. 829; 4 Misc. 28.

⁸⁴ Rogers v. Rogers, 3 Wend. 503. See *ante*, § 565.

⁸⁵ Bloodgood v. Bruen, 8 N. Y. 362; Matter of Hill, 26 St. Rep. 290; 7 N. Y. Supp. 328; Hamlin v. Smith, 72 App. Div. 601; Matter of O'Rourke, 12 Misc. 248; 34 N. Y. Supp. 45; Matter of Oosterhoudt, 15 Misc. 566; 38 N. Y. Supp. 179. After a lapse of upward of twenty years since the payment, by an executor, of a debt barred by the Statute of Limitations, the court may presume that the executor, in paying it, had evidence of a new promise by the testator; and credit may be allowed accordingly for such payment. (Broome v. Van Hook, 1 Redf. 444.) So the payment of a judgment, obtained against the executor on a demand barred by the statute, on proof of a new promise made by him, was held a proper charge against the estate. Every presumption must be given in favor of the executor, after a long lapse of time—*e. g.*, twenty-one years—that he had good and sufficient reason for making the new promise. (Ib.) An administrator will not be charged with compound interest in a case where he has acted in good faith, and apparently refused to interpose the defense of the

Statute of Limitations, where there has been long acquiescence by the next of kin. (Matter of Kennedy, 30 St. Rep. 215; 9 N. Y. Supp. 552.)

⁸⁶ Matter of Kendrick, 107 N. Y. 104; Bucklin v. Chapin, 1 Lans. 443; Flynn v. Diefendorf, 51 Hun, 194; 4 N. Y. Supp. 934; Visscher v. Wesley, 3 Dem. 301; Cotter v. Quinlan, 2 id. 29; Shute v. Shute, 5 id. 1; Matter of Bradley, 25 Misc. 261; 54 N. Y. Supp. 555; Hamlin v. Smith, 72 App. Div. 601; Spicer v. Raplee, 4 id. 471; 38 N. Y. Supp. 806; Balz v. Underhill, 19 Misc. 215; 44 N. Y. Supp. 419. See Schutz v. Morette, 146 N. Y. 137; 66 St. Rep. 271.

⁸⁷ Bloodgood v. Bruen, *supra*.

⁸⁸ Matter of Strickland, 1 Connolly, 435; 22 St. Rep. 902. It was said, in that case, that section 2730 (now section 2728) of the Code, permitting any party "to contest the account with respect to a matter affecting his interest in the settlement and distribution of the estate," did not conflict with section 2743, for the dispute of the validity of a debt or claim there mentioned, but it has reference to a dispute by the administrator or executor. See Butler v. Johnson, 41 Hun, 206; Visscher v. Wesley, 3 Dem. 201. The surrogate may on a judicial settlement of the account determine the validity of any claim against the

application of assets pursuant to an invalid direction contained in the will, *e. g.*, paying for masses to be said for the repose of testator's soul — although the invalidity of such a direction had not been judicially declared at the time, will not, it seems, entitle the executor to be credited therewith, on his accounting.⁸⁹ And where, with full knowledge, he distributes the assets to legatees, without reserving sufficient to pay debts due himself, or his commissions, he is not entitled, on his accounting, to an order that the legatee refund.⁹⁰ A representative who pays, from the personal assets, a debt which is properly chargeable only upon the real property, may be held to account, as if no such payment had been made, and must look to the real property for reimbursement.⁹¹ Personal property, although specifically bequeathed by the will, must be applied to the payment of the debts of the estate, before land devised can be made chargeable therefor. Consequently, where the executor first applies the rents of the real estate to the payment of the debts, it is a misappropriation of the fund, for which he will be held personally liable.⁹² Before the personal estate of a testator will be discharged from the burden of paying the debts, it must clearly appear that it was intended that it should be, which will not be inferred from the fact that authority is given to sell all or some part of the real estate for the payment of debts, especially in a case where no disposition is made of the personalty.⁹³ Where a testator had given a mortgage upon lands, to secure an accommodation indorser of his note, the amount of the note is payable out of the personal property before recourse can be had to the land.⁹⁴

estate, and the fact that a claim is in favor of the administrator is immaterial. (Matter of Williams, 1 Misc. 35; 22 N. Y. Supp. 906.)

⁸⁹ O'Connor v. Gifford, 117 N. Y. 275; 27 St. Rep. 453. But a creditor, who failed to present his claim within the time prescribed by the published notice, cannot object to the allowance, where it was consented to by the residuary legatee. (Ib.)

⁹⁰ Lang v. Howell, 29 Abb. N. C. 117; 21 N. Y. Supp. 102.

⁹¹ Johnson v. Corbett, 11 Paige, 265. Compare Matter of Hosford, 27 App. Div. 427; 50 N. Y. Supp. 550. Executors may lawfully pay out of the estate the amount due on a contract for the purchase of land executed by the testator, which land has been devised by him. (Matter of Davis, 43 App. Div. 331.)

⁹² Nagle v. McGinniss, 49 How. Pr. 193. See Matter of Oosterhoudt, 15 Misc. 566; 38 N. Y. Supp. 179.

⁹³ Sweeney v. Warren, 127 N. Y. 426. The testator leased certain of his lands, in his lifetime, and it was agreed that the lessee should erect a barn thereon, and that in case the lessor died pending the lease, the lessee should have a legal claim against lessor's estate for the value of the barn. Held, that the claim was valid, but that the fact that the decedent lessor had no personal property did not make the claim a charge upon the real estate in the nature of an equitable mortgage. (Matter of Williams, 1 Misc. 35.)

⁹⁴ Cochrane v. Hawver, 54 Hun, 556; 28 St. Rep. 1.

TITLE SIXTH.

LIQUIDATION AND PAYMENT OF DEBTS AND TAX.

ARTICLE FIRST.

LIQUIDATION OF CLAIMS.

SUBDIVISION 1.

ASCERTAINING CREDITORS.

§ 631. **Liquidation of debts before the Revised Statutes.**—Executors and administrators are required to proceed “with diligence” to pay the debts of the decedent.⁹⁵ The present system of ascertaining the creditors, and liquidating the debts of the decedent, differs materially from that prevailing before the adoption of the Revised Statutes. The changes introduced tend to discourage multiplicity of suits, and to secure a perfect equality among creditors of the same class, which before was frequently not the case. A brief statement of the former system will shed light upon the one at present prevailing. Under the old system, a personal representative, immediately upon his appointment, or, if none was appointed, then any person who intermeddled with the estate as an administrator *de son tort*, was liable to an action for the recovery of a debt due by decedent. The estate was always presumed to be solvent, and sufficient to pay all claims in full, and, therefore, it was not necessary to allege, in the declaration, that the representative-defendant had assets. If this presumption was not rebutted by plea and proof, and judgment was had against the personal representative, whether by default or on demurrer, upon verdict on any plea, except *plene administravit*, or admitting assets to such a sum in *riens ultra*, he was concluded from denying that he had assets to satisfy the judgment.⁹⁶ Unless, therefore, the representative was prepared to admit that he had assets applicable and sufficient for the payment of the claim, he was obliged to contest the action, though prepared to admit the claim to be a just one. Thus, to an action on a simple contract debt of the decedent, the representative could plead that he had fully administered all the goods, etc., of the decedent, which had come into his hands to be administered — technically, a plea of *plene administravit*. If he admitted the possession of a certain amount of

⁹⁵ Co. Civ. Proc., § 2719, as amended 1893; adopting 2 R. S. 87, § 27.

⁹⁶ 3 Wms. on Exrs. (6th Am. ed.) 2670; *People v. Judges of Erie*, 4 Cow. 445.

assets, but not enough to pay the debt in suit, this was a plea of *plene administravit præter*; or he might admit assets and plead that there were other debts to which they were applicable, in preference to the debt in suit. Thus, to an action on a simple contract debt, he could plead that he had fully administered, except as to one hundred dollars, and that there was an unpaid judgment debt for more than that amount, or a bond debt, or a simple contract debt upon which a suit had been commenced, or a debt due to himself for which he had retained.⁹⁷ With few exceptions, where a plea was found against an executor or administrator, he became personally liable for the costs, and when he pleaded that he was never executor or administrator (*ne unques executor* or *administrator*), or that a release had been given, he was personally liable for the damages as well as the costs, the reason given being that he had pleaded a plea which he knew to be false, and had thus unnecessarily delayed the plaintiff.⁹⁸ Indeed, the whole reason for subjecting representatives to personal liability for costs was their having pleaded falsely; but a plea which the decedent might have made, such as *non assumpsit* or *non assumpsit sex annos*, was not considered technically a false plea, though the jury found for the plaintiff.⁹⁹

The form of the judgment against a representative depended upon the pleadings. If the defendant pleaded that he had never been executor, etc., or a release to himself, and the issue was found against him, the judgment was that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator, etc., if the defendant have so much, but if not, then that both the debt and costs be levied out of the defendant's own goods. If the defendant pleaded any other plea, except the two above mentioned, the judgment directed the execution to be levied out of the goods of the testator, etc., if the defendant had so much, and if not, then the costs to be levied out of the goods of the defendant. If the executor pleaded *plene administravit*, either general or special, and *nulla bona* or *nulla bona ultra*, and the plaintiff was satisfied of the truth of the plea, or, on issue joined, it was found for the defendant, then the judgment was for execution to be levied of future assets *quando acciderint*. The difference between these two sorts of judgment is not so great as would at first appear, for although the judgment was only *de bonis testatoris*, yet the executor, upon

⁹⁷ See 2 Chitty Pl. (17th Am. ed.) 382 *et seq.*; 3 Wms. on Exrs., 1941 *et seq.* ⁹⁸ *Osterhout v. Hardenbergh*, 19 Johns. 266; *Evans v. Pierson*, 1 Wend. 30.

⁹⁹ *People v. Judges of Erie*, *supra*.

a deficiency of assets, was ultimately obliged to pay the debt and the costs out of his own property, because the judgment, as above stated, was conclusive proof of assets in his hands sufficient to satisfy it; and where the executor, to a writ of execution in such a case, *de bonis testatoris*, did not produce assets sufficient to satisfy the judgment, the sheriff might return a *devastavit* by the executor, and, upon this return, an execution *de bonis propriis* might issue.¹ By taking a judgment to be levied on future assets, the plaintiff admitted full administration of the estate up to that time, and could not have execution until some assets came into the hands of the defendant, when he might bring an action of debt on the judgment, or take a proceeding *scire facias* to have execution issued on the judgment, and, in such action or such proceeding, the liability of the executor for assets that had come to his hands, or that he might have collected after the judgment, was determined.² It will be seen, therefore, that actions at law against executors and administrators were used as means, not only of establishing the legality of claims against the estate, but also of determining the question of the proper conduct and management of the estate by the representative, and the amount of assets for which he was accountable.

§ 632. Liquidation of debts under the Revised Statutes.—The Revised Statutes altered the whole system of the common law in this regard. A judgment against an executor or administrator now proves nothing more than the amount of the indebtedness of the estate to the plaintiff. The jurisdiction as to the accounts is given to the Surrogate's Court or a court of equity; and the judgment creditor cannot have a distribution of the estate, except through the medium of those tribunals, nor can he lawfully issue execution on his judgment, except on the order of the surrogate. The judgment is in fact only a liquidation of the debt, and does not conclude the executor or administrator, on the question of assets at all.³ "The old system of preferential administration having been almost entirely subverted, all the pleadings and other parts of the ancient superstructure, in so far as it was raised for the protection of that system, have gone with it."⁴ Since questions relating to the due administration of the estate cannot now, as formerly, be determined in an action for the decedent's debt,

¹ *People v. Judges of Erie*, 4 Cow. 445.

³ *Ginochio v. Porcella*, 3 Bradf. 277.

⁴ Per Cowen, J., *Parker v. Gainer*,

² 2 Archbold's Pr. 86; 1 Paine & Duer's Pr. 51.

17 Wend. 559. See *Allen v. Bishop*, 25 id. 414.

against the personal representatives of the debtor, a judgment in such an action is no longer evidence of assets or of want of them." It seems clear, therefore, that the provision of the statute, retaining the old form of judgments against executors and administrators, was incongruous and out of harmony with the modern system.⁶

§ 633. **Equality among creditors.**— The general principle pervading the present system of settling decedents' estates is, that the executor or administrator is to be deemed a trustee for all the persons interested in the estate, and that all such persons, whose claims are equally meritorious, are equally entitled to payment; the whole of the assets are brought under the control of the Surrogate's Court, and not a dollar can be reached, by execution or otherwise, without his assent. Nothing is gained, therefore, by a creditor in obtaining a judgment against the representatives, beyond the liquidation of the debt.⁷ It is clearly a principal object of the present system to produce equality among the creditors of a decedent, giving a preference to certain classes of debts only.

§ 634. **Representative's duty to ascertain creditors.**— It is, therefore, important for the representative to ascertain, before proceeding to discharge a debt, the probable amount of the assets applicable to the payment of debts, and also the nature and extent of the decedent's indebtedness; otherwise, if after paying some of the debts there is not enough left to pay the others in full, he is chargeable with the excess of the *pro rata* paid.⁸ The personal representative is a trustee for *all* the creditors.⁹ To enable him, therefore, to ascertain all the creditors, and to determine definitely the amount of all the claims against the decedent, he is authorized, by public notice, to require all such claims to be presented to him within a certain time. The principle on which the statute proceeds is, that the representative, being a trustee, is, like all trustees where the names of the *cestuis que trust* are not given in the deed,

⁵ Ginochio v. Porcella, 3 Bradf. 277. See now, Co. Civ. Proc., § 1824.

⁶ 2 R. S. 88, §§ 31, 39. In Allen v. Bishop (25 Wend. 414), Nelson, Ch. J., said: "There are some sections in the Revised Statutes which it is impossible to reconcile with the general system prescribed in respect to the settlement of estates of deceased persons. The system itself does not seem to have been fully comprehended by its authors. A *pro rata* distribution among the creditors of a class, in case

of a deficit of assets, is a fundamental principle, for the enforcement of which abundant provision has been made." See Parker v. Gainer, 17 Wend. 559.

⁷ See Mills v. Thursby, 2 Abb. Pr. 432.

⁸ Nichols v. Chapman, 9 Wend. 452; Clayton v. Wardell, 2 Bradf. 1; Veeder v. Mudgett, 95 N. Y. 295; Matter of Keef, 43 Hun, 98.

⁹ Buckhout v. Hunt, 16 How. Pr. 407.

bound to exercise the utmost care before he accepts a claim as entitled to payment, and the law will afford him a reasonable time to examine it.

§ 635. **Ad-interim restraint on creditors.**—In furtherance of the same object, judgment creditors are restrained by statutory provision from issuing execution upon a judgment against an executor or administrator, unless on an order of the surrogate who appointed him. And if there is a deficiency of assets, execution can issue only for the sum that appears to be a just proportion of the assets applicable to the judgment.¹⁰ As a further restraint upon creditors, it is provided that costs cannot be recovered against executors or administrators, except in certain cases where the claims sued on have been rejected by the executors. The creditor's right of action, however, is not absolutely suspended; he may prosecute his action, but he must do so at his own cost and expense, and not at the cost and expense of the estate, unless he can show that the executor has been guilty of some laches or illegal act in regard to the adjustment of his claim.¹¹

§ 636. **Notice to creditors to present claims.**—At any time after the granting of letters, the executor or administrator may insert a notice, once in each week for six months, in one or more newspapers printed in the county, as the surrogate directs, "requiring all persons having claims against the deceased, to exhibit the same, with the vouchers therefor, to him at the place to be specified in the notice, at or before the day therein named, which shall be at least six months from the day of the first publication of the notice."¹² The surrogate will grant an order for the publication

¹⁰ Co. Civ. Proc., §§ 1825, 1826. The rule at common law was, that every one was conclusively presumed to have knowledge of what was transacted in the king's courts, and that the record was constructive notice to every one affected thereby of all therein contained; and an executor or administrator could not excuse himself for having consumed the estate in paying debts of an inferior degree, by showing want of knowledge of the judgment. And this is still the rule, unless the representative avails himself of the right to publish notice, etc.

¹¹ *Buckhout v. Hunt*, 16 How. Pr. 407. See subd. 3 of this article, *post*.

¹² Co. Civ. Proc., § 2718, as amended 1893; adopting 2 R. S. 34, as amended L. 1890, c. 456. Before the amend-

ment of 1890, the notice was to be first published "after the expiration of at least six months since the granting of letters"—for no reason that any one was ever able to discover. The requirement that the claim should be presented at the representative's "place of residence or transaction of business," is also happily done away with. It was held, under the former statute, that the notice need not specify, as the place of presentment, the place where the representative transacted his own personal business, or his private residence. He might select a place as his place of business or residence, so far as his relation to the estate is concerned, *e. g.*, the office of his attorney; and the designation of such place in the notice made that

of the notice upon the application of the representative or his attorney. The application is usually in writing, but verification is not required. If the surrogate is desired to designate more than one newspaper for the publication of the notice, either in the county or elsewhere, he should be informed of any facts and circumstances calculated to influence his selection.¹³ Publication in one newspaper printed in the county, pursuant to the order of the surrogate, is sufficient, unless he directs a publication in some other newspaper also.¹⁴

The notice is for the protection of the executor or administrator, and of the estate; there is no absolute obligation to give it at all.¹⁵ Hence, his omission to publish a notice will not have the effect of subjecting him to costs, in an action by a creditor for a debt due by decedent.¹⁶ Immaterial errors or omissions in the notice will not affect its validity, *e. g.*, the omission of the middle letter of the name of the testator in the notice is immaterial, as the law recognizes but one christian name;¹⁷ or using the word "requested" instead of "required" in the notice to creditors.¹⁸

SUBDIVISION 2.

PRESENTATION AND PROOF OF CLAIMS.

§ 637. **What claims may be presented.**—Claims which have been established by judgment,¹⁹ or which have been decided upon

the residence or place of business of the executor, for that purpose, within the meaning and object of the statute. (*Hoyt v. Bonnett*, 58 Barb. 529; *revd.*, on other grounds, 50 N. Y. 538; disapproving *Murray v. Smith*, 9 Bosw. 689.) But the notice was held defective if it required presentment to be made to the attorney of the executors as such, instead of to the executors themselves. (*Hardy v. Ames*, 47 Barb. 413; *Whitmore v. Foote*, 1 Den. 159.)

¹³ The statute provides for a notice "in a newspaper or newspapers printed in the county;" but there is no reason why, as heretofore, the court should not designate, besides a paper printed in the county, another paper printed in another county.

¹⁴ *Dolbeer v. Casey*, 19 Barb. 149. It was said to be doubtful under the former statute (but without good reason), whether a mere order of publication is sufficient, without a formal adjudication that a publication in

such newspaper alone is deemed most likely to give notice to creditors, as required by the statute and whether a publication in one paper was sufficient. See *Murray v. Smith*, 9 Bosw. 689. In New York county, the notice must be published in *The New York Law Journal*, and the surrogate designates another paper in addition.

¹⁵ *Field v. Field*, 77 N. Y. 294; *Bullock v. Bogardus*, 1 Den. 276; *Russell v. Lane*, 1 Barb. 519; *Fort v. Gooding*, 9 id. 388; *Comstock v. Olmstead*, 6 How. Pr. 77.

¹⁶ *Bullock v. Bogardus*, *supra*; overruling, on this point, *Harvey v. Skillman*, 22 Wend. 571. In the earlier case of *Knapp v. Curtiss* (6 Hill. 386), the court declined to be governed by the rule in *Harvey v. Skillman*, *supra*, which case, however, it attempted to distinguish.

¹⁷ *Cornes v. Wilkin*, 79 N. Y. 129.

¹⁸ *Prentice v. Whitney*, 8 Hun. 300.

¹⁹ *Matter of Phyfe*, 5 N. Y. Leg. Obs. 331; *Matter of Browne*, 35 Misc.

by the representative,²⁰ before or during the publication, need not be presented after the publication of the notice; but the necessity of presentation is not avoided by the knowledge of their existence by the representative.²¹ Any claim of whatever character may be presented, provided it existed against the deceased in his lifetime, and provided further that it is one which survives him. A claim for services, rendered after the testator's death, is against the executor personally and not against the estate.²² So a claim by the personal representative of a deceased executor, for debts paid by such executor in administering the estate of his testator, is not a claim against the decedent.²³ Nor does the statute extend to the liability of the estate of a deceased executor, for assets held by him as such at his death,²⁴ nor to claims made by the executor against other parties, and in favor of the estate, except strictly in the way of set-off.²⁵ To the extent of the assets which have come into their hands to be administered, executors or administrators are liable on all contracts made by the testator or intestate, whether broken before or after his death,²⁶ except contracts limited to, and not broken during, the lifetime of the deceased, and except covenants in law, not broken during the lifetime of the deceased. Their liability is not affected by the fact

362: 71 N. Y. Supp. 1034. Where the representative has been substituted for a deceased defendant in a pending action, he is not entitled to presentation of the demand. (*Tindal v. Jones*, 11 Abb. Pr. 258; 19 How. Pr. 469.) See *Matter of Clarke*, 57 App. Div. 430; 68 N. Y. Supp. 243.

²⁰ *Field v. Field*, 77 N. Y. 294.

²¹ *Matter of Morton*, 7 Misc. 343; 28 N. Y. Supp. 82.

²² *Clark v. Todd*, 41 St. Rep. 758; 16 N. Y. Supp. 491; *Matter of Arkenburgh*, 13 Misc. 744; 35 N. Y. Supp. 251. Where a testator, in his will, gave to his widow as much as she would need for support, an account for support furnished by a third person, is not a claim against the decedent. (*Godding v. Porter*, 17 Abb. Pr. 374.)

²³ *Stewart v. O'Donnell*, 2 Dem. 17.

²⁴ *Sands v. Craft*, 10 Abb. Pr. 216; 18 How. Pr. 438. But see *Fowler v. Hebbard* (40 App. Div. 108; 57 N. Y. Supp. 531), which was the case of a claim against decedent founded upon his liability as guardian.

²⁵ *Akely v. Akely*, 17 How. Pr. 21.

²⁶ See 2 R. S. 113, §§ 1-5. Thus, a balance due from a deceased partner

to a surviving co-partner, on account of the partnership transactions (*Babcock v. Lillis*, 4 Bradf. 218; s. c., *sub nom. Sellis' Case*, 3 Abb. Pr. 272; *Payne v. Matthews*, 6 Paige, 19; but compare *Kirby v. Carpenter*, 7 Barb. 373; *Arnold v. Arnold*, 90 N. Y. 580); the purchase money of land contracted but not paid for by the decedent, unless the vendors elect to look to the land (*Johnson v. Corbett*, 11 Paige, 265), and an order for judgment as in case of nonsuit, against the decedent in his lifetime, entered in the minutes of the court, though the record be not signed or filed till after his death (*Salter v. Neaville*, 1 Bradf. 488), are examples of this class of liabilities. For other cases, see *Riblet v. Wallis*, 1 Daly, 360; *Hall v. Bennett*, 49 N. Y. Super. 301; *Gilman v. Wilber*, 1 Dem. 547; distinguishing *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216; *Terry v. Bale*, 1 Dem. 452. Services of a son on his father's farm.—Held not to be a legal claim against the father's estate. (*Wamsley v. Wamsley*, 48 App. Div. 330; 62 N. Y. Supp. 954.) See *Otis v. Hall*, 117 N. Y. 131.

that a concurrent remedy exists against the heir or devisee, *e. g.*, on a covenant which runs with the land, and, therefore, descends to the heir,²⁷ though, as we have seen, the executor cannot himself sue on such a covenant, unless substantial damages were caused, by the breach, to the personal estate.²⁸ The rule extends to implied contracts. Thus, the liability of a stockholder, imposed by law,²⁹ for a debt of the company incurred before its capital stock was paid in, survives his death and may be enforced against his estate.³⁰ But a cause of action given by the statute,³¹ against the trustees of a corporation, for a failure to file a report as required, is penal in its character and does not survive a trustee's death.³²

§ 638. Decedent's joint obligation.— The former rule, that the estate of a person jointly liable on contract, with others, is discharged by his death,³³ is now abrogated, and where an action is pending, the court may cause the decedent's representative to be brought in, or, where the liability is also several, it may direct a severance.³⁴ Contingent liabilities, for which the estate is not primarily liable, and upon which its liability has not been fixed — *e. g.*, claims against the estate of a deceased partner, for partnership debts, while the survivor is living and the remedy against him has not been exhausted — may properly be presented under the notice.³⁵ Hence, the provision of the statute limiting the time for commencing suits upon claims disputed or rejected, includes claims which are contingent, as well as those where the liability is certain and fixed.³⁶ A claim for a possible deficiency on a mortgage foreclosure and sale, for which the decedent would have been liable, if living, should be provided for by the representative, and hence may be presented under the notice.

The claims which an executor or administrator is competent to adjust and settle are not confined to claims arising on contract, nor to those cognizable in the common-law courts. The object of the statute is to allow a presentment of all claims against the

²⁷ Wms. on Exrs. (6th Am. ed.) 1591; Dicey on Parties, 315.

²⁸ See § 542, *ante*.

²⁹ L. 1849, c. 308.

³⁰ Chase v. Lord, 16 Hun. 369. See Mahoney v. Bernhardt, 27 Misc. 339; 58 N. Y. Supp. 748.

³¹ L. 1848, c. 40, § 12.

³² Bank of California v. Collins, 5 Hun. 209; Reynolds v. Mason, 54 How. Pr. 213.

³³ Risley v. Brown, 67 N. Y. 160; Hauck v. Craighead, *id.* 432.

³⁴ Co. Civ. Proc., § 758. See Randall v. Sackett, 77 N. Y. 480.

³⁵ Hoyt v. Bonnett, 50 N. Y. 538; Selover v. Coe, 63 *id.* 438; Whitlock's Estate, 1 Tuck. 491; Francisco v. Fitch, 25 Barb. 130; White v. Story, 43 *id.* 124; Harbeck v. Pupin, 23 Abb. N. C. 190.

³⁶ Cornes v. Wilkin, 79 N. Y. 129. See Williams v. Eaton, 3 Redf. 503; Matter of Saunders, 4 Misc. 28.

estate, whether of a legal or an equitable nature,³⁷ such as a claim against the estate for a tort of the deceased — *e. g.*, the conversion of personal property³⁸ and unliquidated claims by a surviving partner, against the estate of deceased partner, growing out of the partnership, including payments made after his death.³⁹ Where a member of a co-partnership procured credit for his firm by means of false and fraudulent representations, and subsequently died, a judgment, recovered against the surviving partner for the debt contracted by means of such representations, does not merge the right of action, against the decedent's executor or administrator, for the deceit.⁴⁰ Suing the surviving partner on the debt does not waive the right of action against the decedent's representative for the tort, as the plaintiffs are not bound to elect, but are entitled to recover of the former whatever they can secure under the contract, and also to obtain, against the latter, redress for whatever damage they may have sustained from the fraud.⁴¹ The statute provides that causes of action for wrongs to the property, rights, or interest of any person, survive as against the representatives of the wrongdoer,⁴² except as stated.⁴³ But though an action will not lie against executors for a fraud of the testator which does not benefit the assets, it will lie on a contract fraudulently performed.⁴⁴ Actions to recover damages for negligence of an innkeeper, common carrier, bailee, surgeon, attorney, etc., are in reality founded upon a contract, express or implied, and are usually brought in the form *ex contractu*. Such causes undoubtedly survive; so, a cause of action for trespass *de bonis asportatis*.⁴⁵

§ 639. **Effect of not presenting claim.**— The neglect of a creditor to present his claim within the time specified in the published notice does not bar his right of action on the claim, nor prevent

³⁷ Skidmore v. Post, 32 Hun, 54; Brockett v. Bush, 18 Abb. Pr. 337; White v. Story, 43 Barb. 124; 28 How. Pr. 173. Compare Cornes v. Wilkin, 79 N. Y. 129; Hoyt v. Bonnett, 50 id. 538.

³⁸ Brockett v. Bush, *supra*.

³⁹ Francisco v. Fitch, 25 Barb. 130. In York v. Peck (9 How. Pr. 201), an opinion was intimated that the statute applied to claims of a legal nature only. The same view was taken in Sands v. Craft (10 Abb. Pr. 216), where an order awarding costs against an executor, granted on the ground that he had refused to refer a strictly equitable cause, was set

aside. But the mere fact that the executor has an equitable defense, has never been held to be a ground for his refusing to refer. (Robertson v. Sheill, 3 Dem. 161.)

⁴⁰ Morgan v. Skidmore, 3 Abb. N. C. 92. See Matter of Pierson, 19 App. Div. 478; 46 N. Y. Supp. 557.

⁴¹ *Ib.* See Harbeck v. Pupin, 23 Abb. N. C. 190.

⁴² 2 R. S. 447, § 1. See Bond v. Smith, 4 Hun, 48.

⁴³ See § 543. *ante*.

⁴⁴ Troup v. Smith, 20 Johns. 33.

⁴⁵ Heinmuller v. Gray, 13 Abb. Pr. (N. S.) 299.

his presenting it on the accounting of the representative, or moving on it to compel the representative to account and pay his claim.⁴⁶ But if it is not presented he cannot complain of a distribution of the personal estate to the parties entitled.⁴⁷ Its only effect is to limit his recovery, in any action he may bring on the claim, to the amount of the assets remaining in the representative's hands unadministered at the commencement of the action,⁴⁸ and to deprive him of the right to costs. It is only in case a consent to the determination of the claim by the surrogate is not filed or the claim is not referred or prosecuted within six months after its dispute or rejection, that he is forever barred from maintaining an action upon it, against the representative.⁴⁹

§ 640. **Verification of claim.**— In speaking of the requisite proof of claims, a distinction should be made between disputed claims, that is, claims which the representative rejects and which are afterward disposed of on trial, and those claims which the representative allows, on their being verified to his satisfaction. The statute declares that "he *may* require satisfactory vouchers in support of any claim presented, and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no set-offs against the same" to his knowledge.⁵⁰ The verification of a claim gives it the character of an "undis-

⁴⁶ *Cotter v. Quinlan*, 2 Dem. 29; *Matter of Mullan*, 145 N. Y. 98; 64 St. Rep. 551; *Lesser v. Keller*, 29 N. Y. Supp. 829.

⁴⁷ *Matter of Morton*, 7 Misc. 343; 28 N. Y. Supp. 82.

⁴⁸ Co. Civ. Proc., § 2718, as amended 1893. See *Mayor, etc. v. Gorman*, 26 App. Div. 191; 49 N. Y. Supp. 1026.

⁴⁹ Co. Civ. Proc., § 1822, as amended 1895; *Baggott v. Boulger*, 2 Duer, 160; *Erwin v. Loper*, 43 N. Y. 521. The subject of the limitation of actions against executors and administrators will be considered hereafter. The presentment of a claim, and a consent to refer, furnish no ground for denying a motion to revive a pending action on the same claim against the decedent. Such presentment and consent do not amount to the commencement of another action, available as a defense. (*Dalton v. Sandland*, 4 Civ. Proc. Rep. 73.)

⁵⁰ Co. Civ. Proc., § 2718, as amended 1893; adopting 2 R. S. 88, § 35. "The statute authorizing an executor or ad-

ministrator to exact proof of a specified character is not compulsory upon the personal representative, but is a privilege accorded to him which he may take advantage of or not. There is nothing in the statute which necessarily requires that the evidences of the debt should be laid before the executor or administrator, or that claimant should make oath of the justice of the claim, unless required to do so by the executor or administrator." (*Ransom, S., in Matter of Sears*, N. Y. Law J., June 6, 1890.) It is enough if the statement shows the transaction out of which the claim arose, its general character and amount. (*Titus v. Poole*, 145 N. Y. 414; 65 St. Rep. 344.) The claimant is not required to specify in his affidavit an independent demand conceded to be due from him to the estate, but which the administrator may or may not plead as a counterclaim, at his option. (*Osborne v. Parker*, 66 App. Div. 277; 72 N. Y. Supp. 894.)

puted debt.”⁵¹ The claimant is not bound to furnish other evidence of the debt, unless required to do so by the representative.⁵² He may be required to furnish a bill of particulars, or make his claim more definite and certain.⁵³ The claim need not be presented to each of two representatives.⁵⁴ But it is a general principle that claims withheld during the life of an alleged debtor, and sought to be enforced after his death, are always to be carefully scrutinized, and only admitted upon satisfactory proof; and where it appears that there was a subsequent dealing in which the pretended creditor was a debtor, and did not present his claim in diminution of the debt, distinct and definite proof will be required, and the clearest indications of honesty and fairness.⁵⁵

§ 641. Debt due representative from decedent.—The representative is not permitted to liquidate his personal claim against the decedent, by admitting it in his representative capacity, as he may do in the case of claims presented by other creditors. He is expressly forbidden to “satisfy his own debt or claim out of the property of the deceased until proved to, and allowed by, the surrogate:” and this, to the end that “it shall not have preference over others of the same class.”⁵⁶ From the common-law right which an executor or administrator had, to retain, as a creditor, so much of the assets as might be necessary to discharge his claim, a conclusive presumption arises in favor of the payment of his debt, where, during his lifetime, the representative made no claim that his debt had not been paid.⁵⁷

⁵¹ *Lambert v. Craft*, 98 N. Y. 342. An allowance by an executor of a note made by his testator as a claim against the estate implies that it has not been paid. (*Matter of Kellogg*, 104 N. Y. 648.)

⁵² *Russell v. Lane*, 1 Barb. 519; *Gansevoort v. Nelson*, 6 Hill, 389.

⁵³ *Townsend v. New York Life Ins. Co.*, 4 Civ. Proc. Rep. 398; *Weller v. Weller*, 4 Hun, 196.

⁵⁴ *Lambert v. Craft*, 98 N. Y. 342; *Genet v. Binsse*, 3 Daly, 239.

⁵⁵ *Kearney v. McKeon*, 85 N. Y. 137; *Matter of Smith*, 1 Misc. 253. See § 653, *post*.

⁵⁶ Co. Civ. Proc., § 2719, as amended 1893; adopting 2 R. S. 88, § 33. The fact that the executor secured his private debt by a mortgage on chattels held by him as executor carries with it its own condemnation, and the mortgagee cannot hold them as against those having a prior right to the

same. (*Clark v. Coe*, 52 Hun, 379.) In *Matter of Hill* (26 St. Rep. 290; 7 N. Y. Supp. 328), the administrator presented his personal claim, a greater part of which was barred by the Statute of Limitations, to himself and his co-administrator. He subsequently, without consideration, assigned the claim to his daughter, who, upon a reference of it as a disputed claim, obtained a judgment upon the testimony of a person incompetent under Co. Civ. Proc., § 829. On the administrator's accounting, held, that judgment having been collusively obtained, would not be allowed.

⁵⁷ *Ellwood v. Northrup*, 106 N. Y. 172, 182. The settled rule is that the representative cannot *pay* the claim to himself before it is judicially established on his accounting. (*Matter of Babcock*, 29 St. Rep. 947; 9 N. Y. Supp. 554.) Although a representative cannot retain from moneys in his

§ 642. Surrogate's jurisdiction to determine representative's claim.

— “Where a contest arises between the accounting party and any of the other parties, respecting property alleged to belong to the estate, but to which the accounting party lays claim, either individually or as the representative of the estate, or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party,” the Surrogate's Court has jurisdiction to try and determine either the representative's alleged title, or the validity of the alleged debt, on the judicial settlement of his account;⁵⁸ thus making an exception to the general rule that Surrogates' Courts have no jurisdiction to try and determine the disputed claims of creditors.⁵⁹ It was not the intention of the Legislature to deprive the court of power to examine the proof presented by the representative, and to determine its sufficiency, even where no contest arises over it by the parties, and it has been held that the surrogate may entertain a proceeding by the representative for the proof of his claim, in advance of the accounting.⁶⁰ It is the duty of the court theoretically, at least, to examine every voucher, including that of the representative himself, whether contested or not, to see if it justifies the allowance and payment of the claim.⁶¹ The surrogate is expressly au-

hands the amount of a debt due him from the intestate, until it has been legally established and allowed, yet the parties in interest may assent thereto, and such assent will take the place, and answer the purpose, of formal proof and adjudication thereon, and bind the parties assenting in the absence of proof of fraud or mistake as to the claim. (*Ledyard v. Bull*, 119 N. Y. 62.)

⁵⁸ Co. Civ. Proc., § 2731, as amended 1895 (former § 2739). The representative is not confined to this statutory remedy: he has forfeited no right as a creditor by assuming another character: his assignee may, therefore, maintain an action on it, the same as any other creditor. (*Snyder v. Snyder*, 96 N. Y. 88.) But the representative himself cannot maintain an action against himself and his co-representative for its recovery. (*Starbuck v. Farmers' L. & T. Co.*, 28 App. Div. 308; 51 N. Y. Supp. 8.) The fact that the representative has died is no bar to the proof of the claim. (*Matter of Cooper*, 6 Misc. 501.)

⁵⁹ *Lambert v. Craft*, 98 N. Y. 342; *Matter of Haxton*, 33 Hun. 364; *Stil-*

well v. Carpenter, 2 Abb. N. C. 242; *Matter of Ryder*, 38 St. Rep. 29; 13 N. Y. Supp. 542. See *Neille v. Neille*, 89 N. Y. 352.

⁶⁰ *Matter of Marcellus*, 165 N. Y. 70. *Matter of Rider* (129 N. Y. 640), holding the contrary, was decided with reference to a time when L. 1837, c. 460, giving the surrogate power to determine a representative's claim, had been repealed. Subsequently section 2719 was amended (L. 1893, c. 686) by inserting the provisions of the Act of 1837. Therefore the previous decisions under the latter act are pertinent and controlling. (*Kyle v. Kyle*, 67 N. Y. 400; *Shakespeare v. Markham*, 72 id. 400; *Boughton v. Flint*, 74 id. 476.)

⁶¹ *Kyle v. Kyle*, *supra*; *Shakespeare v. Markham*, *supra*; *Smith v. Christopher*, 3 Hun. 585. The representative is entitled to interest on his claim, until a final settlement of his accounts, though, some time before such settlement, he received funds sufficient to reimburse himself from a sale of the personal estate. (*Matter of Saunders*, 23 N. Y. Supp. 829; 4 Misc. 28.)

thorized to examine the accounting party, under oath, touching his receipts and disbursements, or touching any other matter relating to his administration of the estate, or any act done by him under color of his letters, etc.⁶² The only claims which the surrogate has jurisdiction to try and determine, under the statute referred to, are held to be those of which the representative is the sole owner, and, consequently, the representative cannot prove a claim due a firm of which he is a member;⁶³ though it has been held, that the fact that others were jointly interested with the representative, or that he acquired an additional interest by assignment, after he became such, did not affect the authority of the surrogate to adjudicate in regard to it.⁶⁴

§ 643. Character of proof required.—It is said that a representative's claim requires stricter proof than the claims of other creditors. The rule is general that the claimant's own affidavit verifying his claim is not, of itself, the proof required. The existence of the debt must be established by legal evidence,⁶⁵ in addition to the verification of the claim by the representative himself;⁶⁶ and such verification must be, in each particular, the same as the verification which he may require of another creditor. Thus, where the administrator (sworn on his own behalf, without objection) failed to testify that no payments had been made on account of his claim, or that there were no offsets against it, the claim was rejected, as these were held to be affirmative facts to be established by the claimant.⁶⁷ It was said, indeed, that a representative's claim against the estate is to be regarded with suspicion, when not based upon some written obligation of the decedent.⁶⁸

But this is a hard, if not altogether erroneous, view of the law. In an ordinary action for debt, the plaintiff is not required

⁶² Co. Civ. Proc., § 2729.

⁶³ *Matter of Jones*, 2 Misc. 221; 23 N. Y. Supp. 767.

⁶⁴ *Shakespeare v. Markham*, 72 N. Y. 400. But, it seems, a different question would arise where the representative, after he became such, purchased a claim in which he had no prior interest. (*Ib.*) And see *Schreyer v. Holborrow*, 63 How. Pr. 228, explaining *Serantom v. Bank of Rochester*, 24 N. Y. 424.

⁶⁵ *Underhill v. Newburger*, 4 Redf. 499; *Keller v. Stuck*, *id.* 294; *Williams v. Purdy*, 6 Paige, 168; *Matter of Stevenson*, 86 Hun, 325; 33 N. Y. Supp. 493; *Matter of Arkenburgh*, 58

App. Div. 583; 69 N. Y. Supp. 125; *Matter of Humfreville*, 6 App. Div. 535; 39 N. Y. Supp. 550; *Matter of Marcellus*, 165 N. Y. 70.

⁶⁶ *Terry v. Dayton*, 31 Barb. 519; *Clark v. Clark*, 8 Paige, 152; *Matter of Babzer*, 23 Week. Dig. 305; *Matter of Saunders*, 4 Misc. 28; *Matter of Childs*, 5 *id.* 560; *Matter of Weeks*, 23 App. Div. 151. See *Brooks v. Brooks*, 4 Redf. 313.

⁶⁷ *Wood v. Rusco*, 4 Redf. 380; *Matter of Clapsaddle*, 4 Misc. 355; 24 N. Y. Supp. 313. But see *Matter of Neil*, 35 Misc. 254.

⁶⁸ *Ib.* And see *Wright v. Wright*, 4 Redf. 345.

to show affirmatively, as a condition of recovery, nonpayment, the nonexistence of any set-off or other such affirmative defenses. These defenses could, ordinarily, be proved only by the claimant himself, and as he would be incompetent to testify, under section 829 of the Code, the anomaly of requiring a specific kind of proof to establish the claim, while the statute disqualifies the only person competent to prove the fact from testifying thereto, will not be tolerated.⁶⁹

§ 644. Statute of Limitations against the debt, suspended.—In view of such possible contest, on the judicial settlement of the representative's account, the statute provides, that "from the death of the decedent, until the first judicial settlement of the accounts of the executor or administrator, the running of the Statute of Limitations against a debt due from the decedent to the accounting party, or any other cause of action, in favor of the latter against the decedent, is suspended, unless the accounting party was appointed upon the revocation of former letters issued to another person; in which case, the running of the statute is so suspended, from the grant of letters to him, until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator, the Statute of Limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent."⁷⁰ The statute does not run between the decedent's death and the first judicial settlement of the executor's account, although the period of such suspension continues more than six years succeeding one year after the granting of letters.⁷¹

⁶⁹ *Matter of Freeman*, N. Y. Law J., July 11, 1891. "As a condition of receiving the benefits which the statutes accord to a creditor thus presenting his claim, he must make the proof therein set forth, if required by the personal representative; but if the claim is rejected, the Revised Statutes require no other or different evidence than would be necessary in an ordinary suit to recover upon a similar contract or claim, in which no personal representative was interested." (Ib., per Ransom, S.) See *Matter of Macomber*, 31 St. Rep. 963; *affd.*, 33 id. 912. In *Lerche v. Brasher* (104 N. Y. 161), which was an action by an administrator to recover compensation for services rendered to the

decedent, it was held, that the plaintiff was not required to prove nonpayment of the sum due; that payment was an affirmative defense, the burden of establishing which was upon the defendant. See *Matter of Rowell*, 45 App. Div. 323; *Hicks v. Walton*, 14 id. 199.

⁷⁰ Co. Civ. Proc., § 2731, as amended 1895 (former § 2739). See *Treat v. Fortune*, 2 Bradf. 116; *Moyer v. Weil*, 1 Dem. 71; *Matter of Gardner*, 5 Reaf. 14. The statute does not apply to a debt due a third person, and assigned to the executor. (*Matter of Robbins*, 17 Misc. 264.)

⁷¹ *Matter of Powers*, 124 N. Y. 361; 36 St. Rep. 347; *O'Flynn v. Powers*, 136 N. Y. 412; 21 N. Y. Supp. 905.

SUBDIVISION 3.

DETERMINING DISPUTED CLAIMS.

§ 645. **Accepting or rejecting claims.**—The executor or administrator ought to decide upon the claims presented to him with reasonable dispatch. He may reject the claim outright, or he may settle it by compromise.⁷² If he has reason to doubt the justice of the claim, he may agree to a determination thereof by the surrogate upon his accounting or he may consent to refer it to a referee, to hear and determine, or he may admit some items of the claim and reject others so as to set the Short Statute of Limitations running.⁷³ On the other hand, it is of the first importance, to the creditor, to know explicitly whether, and if so when, his claim is rejected, and whether the representative consents to a judicial determination thereof. For in case the claim is disputed or rejected, and a consent to the determination of the same by the surrogate is not filed, the creditor's right of action on the claim, if it, or any part of it, is then due, is barred after six months from such dispute or rejection.⁷⁴ The creditor is barred, not only of his action against the representative, but also of every other remedy to enforce payment, out of the decedent's property.⁷⁵

§ 646. **Short limitation of action on rejected claim.**—The statute provides, that "where an executor or administrator disputes or rejects a claim against the estate of the decedent, exhibited to him either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, unless a written consent shall be filed by the respective parties with the surrogate, that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator, as provided by section 2743, the claimant must commence an action, for the recovery thereof, against the executor or administrator, within six months after the dispute or re-

⁷² As already pointed out (*ante*, § 629), the representative may, under the authority of the surrogate, compromise or compound a debt due to the estate, but no provision is made for the submission to the surrogate for his direction in regard to the compromise of debts due *by* the estate. The representative must, therefore, rely upon his own judgment in settling such an indebtedness.

⁷³ *Wintermeyer v. Sherwood*, 77 Hun, 193; 28 N. Y. Supp. 449.

⁷⁴ Co. Civ. Proc., § 1822, as amended 1895. The court has power, upon the accounting, to determine whether a claim against the estate has been rejected or admitted by the accounting executor. (*Browne v. Lange*, 3 How. Pr. (N. S.) 162; *Matter of Von der Lieth*, 25 Misc. 255; 55 N. Y. Supp. 428.)

⁷⁵ *Selover v. Coe*, 63 N. Y. 438.

jection, or, if no part of the debt is then due, within six months after a part thereof becomes due; in default whereof, he, and all persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof, out of the decedent's property."⁷⁶ The statute is said to be highly penal, and must, therefore, be strictly construed.⁷⁷ In general, the statute may be said to apply to any claim, provable under the notice to creditors, *e. g.*, a contingent claim,⁷⁸ or a claim for funeral expenses.⁷⁹

§ 647. **When statute begins to run.**—Under the statute, as it has stood since the amendment of 1882, publication of notice to creditors is not necessary to set running the period of limitation;⁸⁰ the limitation applies to demands exhibited to the representative either *before* or *after* the commencement of the publication of the notice. Claims may be presented at any time after the representative qualifies and enters upon the discharge of his duties; and the effect of his decision on the claim is the same, whether presented before or after publication of such notice.⁸¹

§ 648. **What amounts to a rejection of claim.**—There must be decisive evidence of the rejection of the claim, before the statute will be held to apply.⁸² The disputing or rejecting must be unequivocal; refusing to pay as at present advised, and asking particulars, is not disputing, within the statute.⁸³ Mere silence on the

⁷⁶ Co. Civ. Proc., § 1822, as amended 1895. See 2 R. S. 89, § 38. This statute does not apply where the executor was, at testator's death, and has continued to be, a nonresident. (Hayden v. Pierce, 144 N. Y. 512.)

⁷⁷ Elliot v. Cronk, 13 Wend. 35.

⁷⁸ Cornes v. Wilkin, 79 N. Y. 129; Hoyt v. Bonnett, 50 id. 538.

⁷⁹ Koons v. Wilkin, 2 App. Div. 13; 37 N. Y. Supp. 640. As to the meaning of "debts" and "creditor," see Co. Civ. Proc., § 2514, subd. 3, as amended 1900.

⁸⁰ Snell v. Dale, 43 St. Rep. 498; 17 N. Y. Supp. 575; Wintermeyer v. Sherwood, 77 Hun. 193; 28 N. Y. Supp. 449. But see Ulster County Sav. Inst. v. Young, 161 N. Y. 23; 55 N. E. 483, containing *obiter* remarks to the contrary. Prior to the amendment of 1882, the limitation applied only to demands exhibited *after* the commencement and *before* the completion of the publication of notice to creditors; that being the construction

given to the original statute. (Tucker v. Tucker, 4 Abb. Ct. App. Dec. 428; 4 Keyes, 136; Flagg v. Ruden, 1 Bradf. 192.) But now the rule is changed as above. See Cramer v. Bedell, 27 Week. Dig. 340. The entry of an order of reference is the commencement of an action for the purpose of determining the period of limitation. (Leahy v. Campbell, 70 App. Div. 127; 75 N. Y. Supp. 72.)

⁸¹ Field v. Field, 77 N. Y. 294. When the claim is absolutely rejected, suit may be brought at once. (Matson v. Abbey, 70 Hun. 475; 141 N. Y. 179.)

⁸² Reynolds v. Collins, 3 Hill. 36.

⁸³ Hoyt v. Bonnett, 50 N. Y. 538; overruling in effect, Cooper v. Felter, 6 Lans. 485. In Cooper v. Felter it was held, that if, upon the presentation of a claim, an executor does not admit or reject it, he must be regarded as disputing it. There is also a *dictum* to the same effect in Tucker v. Tucker, 4 Abb. Ct. App. Dec. 428;

part of the representative does not authorize the inference that the claim has been admitted.⁸⁴ Even an unreasonable delay in objecting to a claim does not preclude the defense of the Statute of Limitations, in an action on the claim.⁸⁵ A mere neglect to pay an honest debt upon demand, or even a refusal to pay it, if put upon any other ground than that the debt, or some part of it, is not legally or equitably due, is not a disputing or rejection within the statute.⁸⁶ The rejection may be oral, or in writing,⁸⁷ but, however expressed, it must be made to the claimant personally, or to his authorized agent;⁸⁸ merely filing it is not sufficient.⁸⁹ Service of a written notice may be made, instead of personally, by leaving it at the claimant's place of residence or otherwise, as prescribed by section 979 of the Code.⁹⁰

4 Keyes, 136. In *Hoyt v. Bonnett*, the plaintiffs presented to the executors certain claims against the estate. The latter caused to be served upon the former a written notice, stating in substance that, as at present advised, they declined to pay the claims, and stated that as they had no other means of information, they would be greatly obliged if the plaintiffs would furnish them with a bill of particulars. No action was commenced by plaintiffs within six months after the service of notice, nor did they make any offer to refer. In the account presented by defendants, upon their final accounting, plaintiffs' claims were omitted. They appeared and objected to the account upon that ground. The surrogate overruled the objection, passed the accounts, and decreed distribution without reference to plaintiffs' claims. Held, error; that defendants had not disputed or rejected the claims so as to put the statute in operation, and the action was not barred. In *Matter of Miller* (27 St. Rep. 784; 9 N. Y. Supp. 60), upon the presentation of a verified claim to the executor by the claimant, a conversation was had in reference thereto, but it was not clear that the claimant would have understood from it that his claim was rejected. Held, that the executor could not rely on such conversation as a legal rejection of the claim, within the meaning of the statute, especially as it also appeared that the executor himself, by subsequently serving a formal rejection, did not regard the conversation as final. See *Spencer v. Hall*, 30 Misc.

75; 62 N. Y. Supp. 826. In *Matter of Eichman* (33 Misc. 322; 68 N. Y. Supp. 636), a written notice that the executors "doubt the justice of the claim" and offering to refer, was held not to amount to a dispute and rejection.

⁸⁴ *Matter of Callahan*, 152 N. Y. 320; *Schutz v. Morette*, 146 id. 137; 66 St. Rep. 271; *Matter of Pierson*, 19 App. Div. 478; 46 N. Y. Supp. 557; *Matter of Doran*, 38 id. 544; 73 St. Rep. 593. In *Matter of Whitney* (39 St. Rep. 899; 15 N. Y. Supp. 468), a claim rejected by executors, two years after it was presented, was held to have been properly considered as a "disputed claim." To the same effect, *Matter of Edmonds*, 47 App. Div. 229; 62 N. Y. Supp. 652. See *contra*, *Matter of Miller*, 27 St. Rep. 784; 9 N. Y. Supp. 60.

⁸⁵ *Bucklin v. Chapin*, 1 Lans. 443.

⁸⁶ *Kidd v. Chapman*, 2 Barb. Ch. 414.

⁸⁷ *Peters v. Stewart*, 2 Misc. 357; 21 N. Y. Supp. 993. The rejection may be by written notice, signed by the attorney of the representative, done at the latter's request. (*Selover v. Coe*, 63 N. Y. 438; *Wintermeyer v. Sherwood*, 77 Hun, 193; 28 N. Y. Supp. 449.)

⁸⁸ An agent of the creditor who, under authority, presented the claim to the representative, has like authority, on behalf of the creditor, to receive notice of the rejection of the claim. See *Peters v. Stewart*, *supra*.

⁸⁹ *Potts v. Baldwin*, 67 App. Div. 434; 74 N. Y. Supp. 655.

⁹⁰ *Peters v. Stewart*, *supra*.

§ 649. **Waiver of statute.**— Prior to the amendment of 1895, the reference of the claim was necessary in order to avoid the short statute, and it was held that the representative's offer to refer, though accepted by the claimant, if not followed by an *actual* submission, was not a waiver of the statute. To constitute such a waiver, the offer should be accepted within the six months, and this followed by an actual submission.⁹¹ This principle, it would seem, is still applicable. Where an executor, to whom a claim was presented, rejected it, but afterward entertained negotiations in reference to settlement, and procured delay, it was held, that the first rejection could not be deemed to make effectual the statute bar, but must be deemed waived by the subsequent acts of the executor, and that the statute only began to run from the time when he finally rejected the demand.⁹² But where the claim is once rejected, the statute cannot be evaded by successive presentations, though varying in form and detail.⁹³ Where the executor or administrator admits the validity of a debt, by paying the interest from time to time, or a part of the principal, it is tantamount to a formal admission of its justice, upon presentment under the notice.⁹⁴ After account filed and a hearing and report thereon, the representative cannot serve a notice rejecting a petitioner's claim, as the account is equivalent to an admission thereof.⁹⁵

§ 650. **Reference of disputed claims.**— If a consent to the determination of the claim by the surrogate is not filed, the latter, of course, has no further power respecting it, and the creditor must resort to another remedy. "If the executor or administrator doubts the justice of any claim presented, he may enter into an agreement in writing with the claimant, to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement, and approval of the surrogate, in the office of the clerk of the Supreme Court in the county in which the parties, or either of them, reside, an order shall be entered by the clerk, referring the matter in controversy to the person or persons so selected."⁹⁶ The agreement to refer should present substantially the issue between the parties. It is

⁹¹ *Cornes v. Wilkin*, 79 N. Y. 129; *Snell v. Dale*, 43 St. Rep. 498; 17 N. Y. Supp. 575. See *Bank of Fish-kill v. Speight*, 47 N. Y. 668.

⁹² *Calanan v. McClure*, 47 Barb. 206; *Adler v. Davis*, 31 Misc. 47; 63 N. Y. Supp. 241.

⁹³ *Titus v. Poole*, 145 N. Y. 414; 65 St. Rep. 344; *Wintermeyer v. Sher-*

wood, 77 Hun. 193; 28 N. Y. Supp. 449.

⁹⁴ *Johnson v. Corbett*, 11 Paige. 265.
⁹⁵ *Wright v. Beirne*, 2 Dem. 539.

⁹⁶ Co. Civ. Proc., § 2718, as amended 1893; adopting and modifying 2 R. S. 88, § 36, as amended L. 1859, c. 261, § 2.

a substitute for the pleadings in an ordinary action.⁹⁷ Only those claims can be referred which the representative is legally competent to adjust and settle;⁹⁸ consequently, a personal claim of the representative against the decedent is not referable, though all the parties consent thereto.⁹⁹ Several claims of different individuals cannot be united in one claim and referred.¹

§ 651. **Steps necessary to confer jurisdiction.**— To confer jurisdiction, the necessary steps are (1) the agreement to refer, (2) approval by the surrogate, and (3) the filing thereof, and entry of the order of reference in the proper office.² A substantial compliance with the terms of the statute is enough to confer jurisdiction on the referee, to decide the controversy, and on the court to confirm his report. Thus, an order signed by the surrogate, reciting the presentation of the claim, and that the parties had agreed to a reference, and a consent to the order signed by the attorneys on behalf of the parties, amount to an agreement in writing to refer, which is sufficient under the statute. The naming of the referee in the order is sufficient evidence that he was approved by the surrogate.³ The order should be entitled in the Supreme Court, though it is no objection that it was entitled in the Surrogate's Court. The order and agreement should be filed with the county clerk, but it may be filed *nunc pro tunc*, to sustain the judgment on the referee's report.⁴

§ 652. **Naming the referee.**— Although a reference can be directed only on consent, the court can appoint another person as referee, in the place of the one agreed on, but declining to act; unless the stipulation provides otherwise.⁵ Where the contro-

⁹⁷ Woodin v. Bagley, 13 Wend. 453. An agreement between the executor and a creditor to "submit" the matter in controversy to certain persons to "determine and award" upon the same, and that judgment shall be entered "upon such award and determination," is not an agreement, under the statute, to refer. (Akely v. Akely, 17 How. Pr. 21.)

⁹⁸ See § 637, *ante*; Van Slooten v. Dodge, 145 N. Y. 327; 64 St. Rep. 682. See Shorter v. Mackey, 13 App. Div. 20; 43 N. Y. Supp. 112.

⁹⁹ Shakespeare v. Markham, 10 Hun. 311; *affd.*, 72 N. Y. 400.

¹ Myers v. Cronk, 45 Hun. 401; *affd.*, 113 N. Y. 608, where it was also held, that, in this proceeding, the referee could not decree the specific performance of a contract.

² Wait v. Van Demark, 18 St. Rep. 1; 2 N. Y. Supp. 265.

³ Bucklin v. Chapin, 53 Barb. 488; 35 How. Pr. 155. An executor who consents to a reference and participates in the proceedings until the final submission, thereby waives an objection that the stipulation was approved by the surrogate of the wrong county, and a motion to vacate the reference on that ground is too late. (Montgomery v. Burgess, 92 Hun. 289; 36 N. Y. Supp. 711.)

⁴ Bucklin v. Chapin, *supra*. See Comstock v. Olmstead, 6 How. Pr. 77; Robert v. Ditmas, 7 Wend. 522.

⁵ Hustis v. Aldridge, 144 N. Y. 508; 64 St. Rep. 40, thus overruling Le-coq v. Pottier, 65 Hun. 598, so far as that case holds the contrary.

versy before the original referee, named in the agreement, has proceeded to a decision and report by him, it may thereafter be treated as one in an action in which the court, on setting aside the referee's report, may direct a reference, without consent, to another referee; the original consent and reference having been a waiver of a trial by jury.⁶

§ 653. **Proceedings before referee.**— It is not necessary to give notice of the proceeding to beneficiaries under the will or to next of kin.⁷ The reference is to proceed as in an ordinary action.⁸ The statute declares, that "the same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control, as if the reference had been made in an action in which such [Supreme] court might by law direct a reference."⁹ It is stated, generally, that claims against a deceased person not presented to him during his lifetime, but sought to be enforced against his estate, after death, are to be carefully scrutinized, and only admitted upon satisfactory proof.¹⁰ The referee should determine the claim, upon the whole case presented; and if enough does not appear to authorize the submission of the case to a jury, it should be dismissed.¹¹ The representative standing upon his denial, in the agreement to refer, of the justice of the claim, may make any defense that the decedent might have made if alive, and as if the same were properly pleaded in an action brought upon the claim.¹²

⁶ *Adams v. Brady*, 67 Hun, 521; 22 N. Y. Supp. 466; *Masten v. Rudington*, 18 Hun, 105. See *Raynor v. Laux*, 28 id. 35.

⁷ *Mayer v. Gilligan*, 2 St. Rep. 702.

⁸ Testimony of a witness out of the State may be taken by commission. (*Paddock v. Kirkham*, 102 N. Y. 597.)

⁹ Co. Civ. Proc., § 2718, as amended 1893.

¹⁰ *Kearney v. McKeon*, 85 N. Y. 137; *Ulrich v. Ulrich*, 42 St. Rep. 216; *Yates v. Root*, 4 App. Div. 439; 38 N. Y. Supp. 663; *Winne v. Hills*, 91 Hun, 89; 36 N. Y. Supp. 683; *Hughes v. Davenport*, 1 App. Div. 182; 37 N. Y. Supp. 243; *Rowland v. Howard*, 75 Hun, 1; 26 N. Y. Supp. 1018; *Van Slooten v. Wheeler*, 140 N. Y. 624; 55 St. Rep. 554; *Wheeler v. Eastwood*, 88 Hun, 160; 34 N. Y. Supp. 513; *O'Neill v. Barry*, 20 App. Div. 121; 46 N. Y. Supp. 752; *Matter of Pearl*, 62 App. Div. 519. But the rule does not apply where no right of action ex-

isted until decedent's death. (*Matter of Mallory*, 13 Misc. 595; 35 N. Y. Supp. 155.) See *Van Wagner v. Royce*, 46 St. Rep. 380; 19 N. Y. Supp. 143. Conversations and admissions by decedent are unsatisfactory evidence. (*Ib.*); *S. P. Hewlett v. Jewesson*, 46 St. Rep. 144; 19 N. Y. Supp. 193. See *Gallagher v. Brewster*, 153 N. Y. 364; *Kellogg v. Ogden*, 27 App. Div. 214; *Matter of Smith*, 1 Misc. 253; 22 N. Y. Supp. 1025. The rule that uncontradicted testimony of a disinterested witness is to be taken as true and cannot be disregarded, does not apply to a claim against a decedent's estate. (*Hughes v. Davenport*, *supra*.)

¹¹ *Forbes v. Chichester*, 30 St. Rep. 370; 8 N. Y. Supp. 747.

¹² *McLaughlin v. Webster*, 141 N. Y. 76; 59 St. Rep. 541. By making the stipulation to refer, the executor is estopped from denying that his testator left a will, and that letters testa-

As the agreement to refer need not notice matters of defense to the claim, every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, is admissible on the hearing, including set-off,¹³ estoppel,¹⁴ payment in whole, or in part,¹⁵ and the Statute of Limitations.¹⁶ And, as no pleadings are used in these proceedings,¹⁷ the court will examine the proofs made by the parties, in order to ascertain the grounds of recovery or defense.¹⁸

§ 654. **Effect of the amendment of 1893.**— Before the readoption of the original statute into the Code in 1893, with the added provision that on the entry of the order of reference, “the proceeding shall become an action in the Supreme Court,”¹⁹ the reference, under the statute, was declared to be a special proceeding and not an action; that it was founded solely upon the statute, and, therefore, the referee possessed only those powers which were expressly conferred thereby or were fairly inferable from its provisions.²⁰ Hence he had no power over the subject of costs;²¹ could not render an affirmative judgment on a counterclaim in favor of the estate (defendant);²² could not require a bill of particulars, or allow the plaintiff for items of an account, not covered by the claim presented to the representative;²³ and could not allow an amendment of the claim or vary the matter referred.²⁴ The

mentary were issued to him. (*Banfield v. Rumsey*, 4 Sup. Ct. [T. & C.] 322.)

¹³ *It seems*, the proper course is for the personal representative to bring an action or put the claimant to an action, as it is uncertain whether, having set off part of such a demand, the representative can bring any action for the residue. (*Mowry v. Peet*, 88 N. Y. 453.) A joint obligation against claimant and another cannot be set off. (*Matter of Miller*, 23 Misc. 319.) See § 569, *ante*. As to set-offs to claims of creditors, when presented on the judicial settlement, of a trustee's account, under Co. Civ. Proc., § 2812, see *Matter of Mitchell*, 61 Hun. 372; 16 N. Y. Supp. 180.

¹⁴ *Crawford v. Ormsbee*, 6 App. Div. 50; 39 N. Y. Supp. 740.

¹⁵ Although slight proof of payment may defeat the claim, some proof must be given. (*Steinan v. Scheuer*, 15 App. Div. 5; 43 N. Y. Supp. 1112; *Matter of Rowell*, 45 App. Div. 323; 61 N. Y. Supp. 382.) See *Hicks-Alixanian v. Walton*, 14 App. Div.

199; 43 N. Y. Supp. 541. The declaration of the claimant, while decedent was alive, that payment had been made, is enough to warrant its disallowance. (*Stark v. Robbins*, 2 App. Div. 615; 38 N. Y. Supp. 48.) To the same effect, *Crawford v. Ormsbee*, *supra*.

¹⁶ *Tracy v. Suydam*, 30 Barb. 110; *Converse v. Miner*, 21 Hun. 367. But the objection must be taken before judgment, not on appeal. (*Faburn v. Dimon*, 20 App. Div. 529; 47 N. Y. Supp. 227.)

¹⁷ *Rutherford v. Soep*, 85 Hun. 119; 32 N. Y. Supp. 636.

¹⁸ *Raynor v. Laux*, 28 Hun. 35.

¹⁹ Co. Civ. Proc., § 2718, as amended 1893.

²⁰ *Roe v. Boyle*, 81 N. Y. 305. See *Paddock v. Kirkham*, 102 id. 599.

²¹ *Smith v. Velie*, 60 N. Y. 106.

²² *Mowry v. Peet*, 88 N. Y. 453.

²³ *Townsend v. N. Y. L. Ins. Co.* (Ct. of App.), 4 Civ. Proc. Rep. 398.

²⁴ *Eldred v. Eames*, 115 N. Y. 401; 26 St. Rep. 277. In that case, it was held error for the referee to allow,

distinction between statutory references and others, which is inherent in the nature of the proceeding, was declared not obliterated by the general language of the statute giving referees therein the same powers possessed by referees in actions. "While the statements and proceedings stand in lieu of pleadings, they still are not pleadings, and are not governed in all respects by the same rules which apply to the construction and office of pleadings in an action."²⁵ It was further held, that, as a statutory proceeding, the only authority for a judgment therein was the report of the referee, to be first confirmed by the court,²⁶ and that the successful plaintiff was not entitled, as of right, to taxable costs as in an action, or even as in a special proceeding, under the Code, the provisions of which relating to costs did not apply to a reference of this kind, the plaintiff being only entitled, as a matter of right, to recover his disbursements as allowed by the Revised Statutes.²⁷ On the other hand, it had been loosely stated that as the filing of the agreement, with the approval of the surrogate, was, "in effect, a mode of commencing an action" by the creditor, he was liable for costs in case of failure to recover, the same as unsuccessful plaintiffs in other actions;²⁸ and again, that the reference "stood in the place of an action," and that the entry of the order of reference was to be deemed the commencement of an action, for the purpose of determining whether, under the Statute of Limitations, an action had been brought within the time limited thereby.²⁹

Upon the amendment taking effect, the question necessarily arose whether the "inherent distinction" between this kind of statutory reference and references in ordinary actions, was destroyed by the provision which declares the proceeding to be an

under objection and exception, the plaintiff to withdraw several large items of the claim on the credit as well as the debit side of his account. It was held, however, in another case, that the omission to specify interest in the presentation of the claim did not prevent its recovery on the reference. (*Fredenburg v. Biddlecome*, 17 Week. Dig. 25.) See *Morrell v. Van Buren*, 77 Hun. 569; *Von Hermann v. Wagner*, 81 id. 431.

²⁵ Per *Ruger, C. J.*, in *Eldred v. Eames*, *supra*.

²⁶ *Smith v. Velie*, 60 N. Y. 106; *Coe v. Coe*, 37 Barb. 235; 14 Abb. Pr. 86; *Radley v. Fisher*, 24 How. Pr. 404.

²⁷ *Larkins v. Maxon*, 103 N. Y. 681;

Denise v. Denise, 110 id. 562; *Krill v. Brownell*, 40 Hun. 72; *Hatch v. Stewart*, 42 id. 164; *Hallock v. Bacon*, 64 id. 90; 45 St. Rep. 485; *Matter of McQueen*, 58 Hun. 172; 33 St. Rep. 807; *Vaughn v. Strong*, 66 Hun. 278; 21 N. Y. Supp. 154; *Roberts v. Pike*, 13 id. 559; 19 Civ. Proc. Rep. 422.

²⁸ *Munson v. Howell*, 20 How. Pr. 59; 12 Abb. Pr. 77; *Linn v. Clow*, 14 How. Pr. 508; *Boyd v. Bigelow*, id. 511.

²⁹ *Bucklin v. Chapin*, 1 Lans. 443; *Tracy v. Suydam*, 30 Barb. 110; *Sanford v. Sanford*, 4 Sup. Ct. (T. & C.) 686; *Leahy v. Campbell*, 70 App. Div. 127; 75 N. Y. Supp. 72.

action. An opinion may be ventured that it was the intention of the Legislature, by the clause in question, to supersede the settled rule, above stated, that referees, in these proceedings, had only limited powers, and could not vary the matter referred. Thus, it is now within the power of the referee to allow an amendment of the claim,³⁰ to consider those of an equitable nature,³¹ and to adjudicate upon the question of costs.³² One object of the provision seems to have been to settle the much-vexed question as to costs in these proceedings, and the applicability thereto of that provision of the Code which specifies the cases in which costs may be awarded against an executor or administrator in a civil action in which he is an unsuccessful defendant.³³ Another object clearly was, to do away with the practice under the Revised Statutes, which continued to govern this proceeding, in accordance with which, before judgment, a rule *nisi* was entered, and either party dissatisfied could move to set aside the report; if the court refused to set aside the report, judgment was rendered.³⁴ The practice, in this respect, is now assimilated to that in ordinary actions. It is no longer necessary to move to confirm the report, as heretofore;³⁵ but "judgment may be entered on the report of the referee, and such shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process, and the practice on appeal therefrom shall be the same as in other civil actions."³⁶

§ 655. *Referee's report, and judgment thereon.*—The referee is to report to the Supreme Court, making findings of fact and conclusions of law, as in ordinary actions.³⁷ As noted above, the old practice, under the Revised Statutes, according to which judgment could be entered only by order of court, on motion, has been superseded by the amendment of 1893.³⁸ The only way to obtain

³⁰ Lee v. Lee, 85 Hun. 588; 33 N. Y. Supp. 115; Lounsbury v. Sherwood, 53 App. Div. 318; 65 N. Y. Supp. 676.

³¹ Matter of Zinke, 90 Hun. 127; *sub nom.* Zinke v. Zinke, 35 N. Y. Supp. 645.

³² Jenkinson v. Harris, 27 Misc. 714; 59 N. Y. Supp. 548; Fisher v. Bennett, 21 Misc. 178; 47 N. Y. Supp. 114.

³³ Co. Civ. Proc., §§ 1835, 1836. "In determining questions of costs, the referee shall be governed by" these sections. (Co. Civ. Proc., § 2718, as amended 1893.) See § 656, *post*.

³⁴ Graham's Practice, 576; Boyd v. Bigelow, 14 How. Pr. 511.

³⁵ Jenkinson v. Harris, *supra*. See Radley v. Fisher, 24 How. Pr. 404, and § 656, *post*.

³⁶ Co. Civ. Proc., § 2718, as amended 1893.

³⁷ Shea v. Cornish, 29 Abb. N. C. 289; 22 N. Y. Supp. 168; Matter of Sunderlin, 23 id. 648.

³⁸ The court had no power to order judgment *against* the report of the referee. It had to be confirmed, and judgment ordered thereon, or be set aside; in which case a new trial followed before the same referee, or another appointed in his place. (Coe v. Coe, 14 Abb. Pr. 86; 37 Barb. 232.) In Sharpe v. Freeman (45 N. Y. 802),

a review of the rulings of the referee was by motion made, at Special Term, on a case and exceptions, to set aside the report, or for a new trial; or by an appearance and exceptions taken on the confirmation of the report.³⁹ But now judgment may be entered on the report by the clerk, as in other actions. The rule that the referee had no power to pass upon the question of costs, that matter being for the court to determine, upon a special application, showing the facts on which a right to costs was based,⁴⁰ no longer exists. Formerly, an appeal, if taken, was from the order of the Special Term confirming the referee's report and not merely from the judgment entered on it;⁴¹ but now the practice is the same as in other civil actions.

§ 656. Awarding costs and disbursements to successful party.—

The Code amendment of 1893 put to rest a question frequently raised, and differently determined, whether the successful claimant was entitled to costs and disbursements in these proceedings *as a matter of right*, as in ordinary actions, or whether both costs and disbursements, or, if not both, which, *were discretionary*. It was early held,⁴² under the Revised Statutes,⁴³ that *costs* in these proceedings could be awarded to the creditor only where he would be entitled to costs in an action on his claim against the representative; that the statute was the only authority for giving costs at all, and that there was no reason in the nature of the proceeding, nor growing out of the policy of the statute, why costs should be given in *an action*, and withheld in this sort of proceeding, and, finally, that the conditions precedent to the right of the court to award costs in *an action* against executors, as prescribed by the statute, were equally controlling on the question of awarding costs in this proceeding. It was consequently held, that the statutory condition — *e. g.*, that the representative had unreasonably resisted or neglected to pay the claim — must be shown to

it was held, that the judgment entered did not render the claim a judgment debt as to the grantee of heirs-at-law, and did not preclude the heirs from setting up the Statute of Limitations to the claims upon which it was recovered.

³⁹ *Baumann v. Mosely*, 63 Hun. 492; 18 N. Y. Supp. 563; *Schreyer v. Holborrow*, 63 How. Pr. 229; *Raynor v. Laux*, 28 Hun. 35. See *Goddling v. Porter*, 17 Abb. Pr. 374. The provision of Code (§ 1002), that a trial by a referee cannot be reviewed by a motion for a new trial, etc., did not ap-

ply to this proceeding. (*Denise v. Denise*, 110 N. Y. 562.)

⁴⁰ *Smith v. Randall*, 67 Barb. 377; *Mersereau v. Ryerss*, 12 How. Pr. 300; *Howe v. Lloyd*, 2 Lans. 336; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Hall v. Brennan*, 64 Hun. 394; 19 N. Y. Supp. 623. See § 654, *ante*. For provisions as to the award of costs, see § 656, *post*.

⁴¹ *Hatch v. Stewart*, 42 Hun. 164.

⁴² *Robert v. Ditmas*, 7 Wend. 522.

⁴³ 2 R. S. 90, § 41: substantially reenacted by §§ 1835, 1836, of the Code of Civil Procedure.

have been violated by the representative, to entitle the claimant to costs. That is to say, neither in an action nor in this proceeding was the representative liable to costs unless he was guilty of a violation of some duty.⁴⁴ This is now made the rule under the present practice, by the provision that the question of costs, in this proceeding, shall be governed by sections 1835 and 1836 of the Code;⁴⁵ a provision which supersedes a number of decisions on this point;⁴⁶—rulings that the court had no power, in these proceedings, to grant an extra allowance, or anything more than

⁴⁴ Robert v. Ditmas, 7 Wend. 522; also Carhart v. Blaisdell, 18 id. 531. By the Code of Procedure (old Code) no provision was made as to costs in these proceedings, and the Legislature seems to have intended that no costs at all could be awarded therein, if we may draw an inference from an interpolation in section 317, which provided that "whenever any claims against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law." (So held in Van Sickler v. Graham, 7 How. Pr. 208; Avery v. Smith, 9 id. 349. *Contra*, Linn v. Clow, 14 id. 508; Radley v. Fisher, 24 id. 404. See Pursell v. Fry, 19 Hun, 595; 58 How. Pr. 317.) This clause of section 317 of the old Code is not found in the present Code of Civil Procedure; but it was not repealed by the General Repealing Act of 1880 (c. 245), and was in full force and effect (Larkins v. Maxon, 103 N. Y. 680; Krill v. Brownell, 40 Hun, 72; Hatch v. Stewart, 42 id. 164; Overheiser v. Morehouse, 16 Abb. N. C. 208; Sutton v. Newton, 15 id. 452; Hale v. Edwards, 37 How. Pr. 262. *Contra*, Miller v. Miller, 32 Hun, 481; Daggett v. Mead, 11 Abb. N. C. 116), until the amendment of 1893. And see Osborne v. Parker, 66 App. Div. 277; 72 N. Y. Supp. 894.

⁴⁵ "Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section" (§ 1835). "Where it appears, in a case specified in the last section, that the plaintiff's demand was presented within the time limited by a notice, published as pre-

scribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section 1822 at least ten days before the expiration of six months from the rejection thereof, the court may award costs against the executor or administrator, to be collected either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the Supreme Court, the facts must be certified by the judge or referee, before whom the trial took place." (§ 1836, as amended 1897.)

⁴⁶ In *Denise v. Denise* (110 N. Y. 562), it was held, that the conditions of section 1836, on which alone a representative, or the estate, can be charged with costs in an action, do not control the court in the matter of costs in a special proceeding of this kind; and that the court has power to award costs to a successful creditor on a reference of his claim, notwithstanding he had violated one of the conditions of section 1836, to wit, in not having presented his claim "within the time limited by a notice published as prescribed by law, requiring creditors to present their claims." As this decision was interpreted, the court had no power in these proceedings to award any costs at all, as such, but only the fees of the referee and necessary disbursements, to which the party is entitled as a right under section 317 of the old Code. (*Hendricks v. Isaacs*, 52 Hun, 100, and cases *supra*.) It was so held, also, in some cases, under the Code of Procedure. (*Van Sickler v. Graham*, 7 How. Pr. 208. But see *contra*, Linn v. Clow, 14 id. 508; Radley v. Fisher, 24 id. 404.)

his disbursements, to a successful defendant, the representative.⁴⁷ As the proceeding is no longer "a special proceeding," the Code provision — that costs therein "may be awarded to any party, *in the discretion of the court*, at the rates allowed for similar services in an action brought in the same court"⁴⁸ — does not apply.

§ 657. **When costs allowed and by whom.**— As the right to recover costs in these proceedings is now the same as in actions against an executor or administrator on a claim which he refused to pay, the Code provisions⁴⁹ regulating costs in such actions are properly mentioned here. Where a judgment for a sum of money is awarded against the representative, in an action against him, the statute prescribes certain conditions precedent to the right of the plaintiff to recover costs, to wit: it must appear (1) that the plaintiff's demand was presented within the time limited by the public notice, and (2) that payment was unreasonably resisted or neglected, or (3) that the defendant failed to file a consent to the determination thereof by the surrogate within a certain time.⁵⁰

⁴⁷ Hopkins v. Lott, 111 N. Y. 577; Van Sickler v. Graham, 7 How. Pr. 208; Walker v. Gardener, 8 Misc. 468. *Contra*, Munson v. Howell, 20 id. 59; Newton v. Sweet, 4 How. Pr. 134. It is settled that since the amendment a successful defendant is entitled to costs as of right. (Adams v. Olin, 78 Hun, 309; 29 N. Y. Supp. 131; Winne v. Hills, 91 Hun, 89; 36 N. Y. Supp. 683.) In Hendricks v. Isaacs (52 Hun, 100; 22 St. Rep. 563; *revd.*, on other points, 117 N. Y. 411), the claimant having succeeded on a new trial, granted on defendant's appeal, with costs to him in the event of his success on such new trial, the claimant was held entitled to recover such costs. It may be noted that (in July, 1889), after the decision of Hendricks v. Isaacs (*supra*), the same General Term (Bertholf v. Carr, 24 St. Rep. 805) concluded to follow Miller v. Miller 32 Hun, 481 — which has been frequently discredited — and held, that section 3246 of the present Code was a substitute for section 317 of the Code of Procedure, and that section 3246 did not give to the successful claimant the right given him by the old Code to his disbursements. See Krill v. Brownwell, 40 Hun, 72, and cases *supra*.

⁴⁸ Co. Civ. Proc., § 3240. It was held in Fredenburg v. Biddlecome (17 Week. Dig. 25) that this section did

not apply to these proceedings, though sections 1835, 1836, 3246 did. In Hearn v. Sullivan (13 Abb. N. C. 371), costs in addition to disbursements were awarded, as allowable under section 3240. In Vaughan v. Strong (66 Hun, 278; 21 N. Y. Supp. 154), it was held not proper to direct that costs, if allowed, be the same as in an action; that the same rule should apply as in an action against executors and administrators, and where such claim is not unreasonably resisted, the successful claimant should only recover his disbursements; that section 3240 of the Code applied to such a proceeding, and that where the claim was unreasonably contested the court might award costs, in addition to the disbursements which the prevailing party is entitled to under section 317 of the old Code of Procedure.

⁴⁹ Co. Civ. Proc., §§ 1835, 1836. See Henning v. Miller, 83 Hun, 403; 31 N. Y. Supp. 878; Ellis v. Filon, 85 Hun, 485; 33 N. Y. Supp. 138; Mulligan v. Cannon, 25 Civ. Proc. Rep. 349.

⁵⁰ This condition takes the place of the executor's "refusal to refer," contained in section 1836, prior to the amendment of 1895. Under the former statute it was held that it was the duty of the claimant to offer to refer his claim, and that such offer

On such conditions the court, having reference to the facts appearing on the trial, may award costs against the executor or administrator, to be collected out of his individual property or out of the property of the decedent; and such costs are a *matter of right*.⁵¹ An extra allowance may also be granted.⁵² These conditions apply only to actions *against* executors, etc.;⁵³ provision is made for costs in actions *by* executors in section 3246 of the Code.⁵⁴ And they do not apply to actions commenced against the decedent in his lifetime, and continued, after his death, against the executor, etc.;⁵⁵ nor to actions upon claims created since his

might be oral (*Lanning v. Swarts*, 9 How. Pr. 434; *Roberts v. Pike*, 13 N. Y. Supp. 559), and that until such offer, the representative could not be said to have refused it. (*Proude v. Whiton*, 15 How. Pr. 304; *affd.*, *id.* 304, note.) See *Burnett v. Gould*, 27 Hun, 366. It was also held, that refusal to refer could not be implied from a rejection of the claim. (*Proude v. Whiton*, *supra*; *Buckhout v. Hunt*, 10 How. Pr. 407; *Ehrenreich v. Lichtenberg*, 29 Misc. 305.) In *Fort v. Gooding* (9 Barb. 388), it had been held, that if the executor unqualifiedly rejected the claim, the person who set it up was not bound to demand a reference, in order to charge the executor with the consequences of refusing such reference, but could construe such rejection as a refusal to refer. This point was expressly overruled in *Proude v. Whiton*, *supra*, however. In *Gorham v. Ripley* (16 How. Pr. 313), the creditor's demand having been rejected, he offered to refer to referees to be approved by the surrogate. The executors, instead of accepting this offer, offered to refer to three referees named by themselves, to be approved by the surrogate. Held, a refusal to refer, which rendered them liable for costs in an action on the demand.

⁵¹ *Snyder v. Snyder*, 26 Hun, 324; *Rooney v. Lennon*, 3 L. Bul. 101; *Brainerd v. De Graef*, 29 Misc. 560; 61 N. Y. Supp. 953.

⁵² *Niblo v. Binsse*, 47 Barb. 435; 32 How. Pr. 92; *Roberts v. Pike*, 13 N. Y. Supp. 559; 19 Civ. Proc. Rep. 422.

⁵³ *Fox v. Fox*, 22 How. Pr. 453; *Woodruff v. Cook*, 14 *id.* 481; *Curtis v. Dutton*, 4 Sandf. 719; *Howe v. Lloyd*, 2 Lans. 336; 9 Abb. Pr. (N. S.) 257; *Morgan v. Skidmore*, 3 Abb. N.

C. 92; overruling *Fish v. Crane*, 9 Abb. Pr. (N. S.) 252.

⁵⁴ See § 571, *ante*. An executor is required to begin an action upon a claim, alleged to be due the estate which he represents, by virtue of transactions taking place between his testator and the defendant while the former was alive, in his name as executor, and is not chargeable individually with the costs of an unsuccessful prosecution thereof, in the absence of bad faith; nor does the fact that he would be entitled as a beneficiary to a share of the recovery, render him chargeable with a proportion of the costs as a person beneficially interested in the recovery. (*Hone v. De Peyster*, 106 N. Y. 645.)

⁵⁵ *Benedict v. Caffé*, 3 Duer, 669; *Lemen v. Wood*, 16 How. Pr. 285; *Tindall v. Jones*, 19 *id.* 469; 11 Abb. Pr. 258; *Merritt v. Thompson*, 27 N. Y. 225; *Mitchell v. Mount*, 17 Abb. Pr. 213; *Yorks v. Peck*, 9 How. Pr. 201. *Merritt v. Thompson* (*supra*) expressly overrules *McCann v. Bradley* (15 How. Pr. 79), which had given a contrary construction of the statute, but in which another ground for denying plaintiff's motion to be allowed costs existed, and was noticed by the court. *Mitchell v. Mount* (*supra*), decided at about the same time as *Merritt v. Thompson*, was followed by *Lemen v. Wood* (*supra*), and a view in harmony therewith was adhered to in *Tindall v. Jones* (*supra*). The same conclusion as that in *Merritt v. Thompson* is said to have been reached, in the General Term, in *Haight v. Hayt*, which, however, is not reported upon this point, but was affirmed on the merits by the Court of Appeals (19 N. Y. 464), and the costs of the several appeals allowed, on the ground that an appeal is in the

decease, by or under the direction of the executors;⁵⁶ nor does the statute apply to costs on appeal, or interlocutory costs.⁵⁷ In order to avail himself of the statutory exemption from costs, the executor or administrator must bring himself clearly within the conditions contemplated by the statute. The rule prevails now as from the beginning, that the representative must have been guilty of some violation of duty, such as an unreasonable neglect or refusal to pay the claim when presented, before he can be properly charged with costs, in addition to referee's fees and disbursements; and no such violation of duty being shown, it is error to allow costs. In any event, the award of costs is governed by section 3228 of the Code, and unless the claimant recovers more than fifty dollars, the defendant is entitled to costs.⁵⁸

§ 658. Necessity of presentation of claim.— As to the first condition, it is fatal to a claim for costs that the creditor (plaintiff) had not presented his claim⁵⁹ in the time prescribed by the notice, if a notice was published. It is not necessary that the claim should be presented after the publication of the notice has begun; it may be presented at any time after the representative qualifies and enters upon the discharge of his duties; and his decision on the justice of the claim has the same effect as though the claim was presented after the publication of the notice.⁶⁰ It is wholly immaterial, therefore, whether the executor ever advertised at all for the presentation of claims.⁶¹ It does not matter that the representative unreasonably resisted and neglected to pay or refer; plaintiff is not entitled to costs, if his claim was not presented within the statutory limitation.⁶²

nature of a new action, and that, as to the appeal, the executors ceased to be defendants.

⁵⁶ *Smith v. Patten*, 9 Abb. Pr. (N. S.) 205.

⁵⁷ *Benjamin v. Ver Nooy*, 168 N. Y. 578; *Hunt v. Connor*, 17 Abb. Pr. 466; *Judah v. Stagg*, 22 Wend. 641. The statute does not apply to equitable actions. (*Richards v. Stillman*, 57 App. Div. 182; 68 N. Y. Supp. 188; *McBride v. Chamberlain*, 26 id. 94; 56 St. Rep. 431; *Marryatt v. Riley*, 2 Abb. N. C. 119.) To warrant the charging of the costs on the representative personally, he must be found to be guilty of mismanagement or bad faith in the defense. (Co. Civ. Proc., § 3246.) See *ante*, § 571.

⁵⁸ *Lamphere v. Lamphere*, 54 App. Div. 17; 66 N. Y. Supp. 270.

⁵⁹ A verbal notice is not sufficient (*King v. Todd*, 27 Abb. N. C. 149; 21 Civ. Proc. Rep. 114. See § 637, *ante*); nor is a mere demand enough. (*Miles v. Crocker*, 88 Hun. 312; 34 N. Y. Supp. 761.)

⁶⁰ *Field v. Field*, 77 N. Y. 294; *Clark v. Post*, 45 Hun. 265; *revd.*, on other points, 113 N. Y. 17.

⁶¹ *Brinker v. Loomis*, 43 Hun. 247. Certainly it is no ground for giving costs to plaintiff that no notice was ever published. (*Snyder v. Young*, 4 How. Pr. 217; *Van Vleck v. Burroughs*, 6 Barb. 345; *Bullock v. Bogardus*, 1 Den. 276.)

⁶² *Supplee v. Sayre*, 51 Hun. 30; *King v. Todd*, *supra*. The rule is not altered by the fact that the creditor was unaware of the publication of notice to present claims, until the statu-

§ 659. **Unreasonable resistance.**— As to the second condition — that, to charge defendant with costs, he must be shown to have “unreasonably resisted or neglected” to pay the claim,—in deciding whether such resistance or neglect was reasonable or not, the court must have “reference to the facts which appear on the trial.” If the court finds that the defense was reasonable and proper, it is sufficient to exempt the defendant from costs, although in the end he was unsuccessful.⁶³ Where there is reason, in the complicated nature of the accounts involved, in the great amount of business transacted and in the supposed and actual existence of grave counterclaims, to justify the defense actually made, especially if it appears that the judgment was rendered for a much smaller sum than the original claim, costs should not be awarded to plaintiff.⁶⁴ It must appear, however, that the defendant had good reason to believe that there was a valid defense to the claim, in whole or a material part of it, or that the defense would probably have been successful, if, for example, he could have procured the attendance, at the trial, of a certain witness.⁶⁵ Where the claim is materially reduced on the trial, it cannot be said to have been unreasonably resisted.⁶⁶ The claim on which

tory period allowed therefor had expired. (*Clarkson v. Root*, 18 Abb. N. C. 462.) *Horton v. Brown* (29 Hun, 654), so far as it holds that the first condition must have been complied with *and one* of the subsequent conditions must have also happened, in order to entitle plaintiff to costs, has been overruled.

⁶³ But though no costs are awarded, the claimant may be allowed his disbursements. (*Outhouse v. Odell*, 84 Hun, 494; 32 N. Y. Supp. 388; *Mulligan v. Cannon*, 25 Civ. Proc. Rep. 349; *Lounsbury v. Sherwood*, 53 App. Div. 318.)

⁶⁴ *Johnson v. Myers*, 103 N. Y. 666.

⁶⁵ *Stephenson v. Clark*, 12 How. Pr. 282. He will not be charged with costs for resisting a claim referred under the statute, where he has acted with reason and good faith, although the claim be finally allowed. (*Vaughn v. Strong*, 66 Hun, 278; 21 N. Y. Supp. 154.) In that case, which was a reference in a special proceeding, it appeared that defendant found, among papers of deceased, documents in his handwriting from which she had a right to assume that the claims were unjust; and that, on two successive trials, referees had found in defend-

ant's favor. Held, erroneous, on judgment being rendered against her, on the third trial, to grant a motion for costs on the ground that payment had been unreasonably resisted. Where an administrator did not expressly refuse to pay the claim until suit was brought, and the year allowed for the payment of claims had not expired,—Held, that he should not have been taxed with costs. (*Patterson v. Buchanan*, 40 App. Div. 493; 58 N. Y. Supp. 179.)

⁶⁶ *Cruikshank v. Cruikshank*, 9 How. Pr. 350; *Comstock v. Olmstead*, 6 id. 77; *Buckhout v. Hunt*, 16 id. 407; *Harrison v. Ayres*, 18 Hun. 336; *Pursell v. Fry*, 19 id. 595; 58 How. Pr. 317; *Pinkernelli v. Bischoff*, 2 Abb. N. C. 107; *Daggett v. Mead*, 11 id. 116; *Webster v. Nichols*, 21 Week. Dig. 566; where the claim was reduced one-third. But a reduction of one-fifth, in a claim for services, in consequence of a difference of opinion as to value, where there had not been a denial of the whole claim, does not relieve from costs. (*Fort v. Gooding*, 9 Barb. 388.) For other illustrations, see *Darling v. Halsey*, 2 Abb. N. C. 105; *Healy v. Murphy*, 21 Civ. Proc. Rep. 13; *Rauth v. Davenport*, 45 St.

the recovery is had must be substantially the same as the one which was presented to, and rejected by, the executor.⁶⁷ But the fact that the plaintiff was allowed to amend his complaint so as to claim a larger recovery, and to prove and to recover a larger compensation for services, than that stated in the claim presented to the executors, does not change the claim from that originally presented;⁶⁸ nor does the fact that the action was for a smaller sum than the amount claimed in the account as presented and rejected, deprive plaintiff of his costs.⁶⁹

§ 660. **Failure to file consent.**— As to the third condition — that to charge the defendant with costs, he must have failed to “file the consent as provided in section 1822,” — the foregoing considerations are entirely applicable. A failure to consent is a fact, and not a conclusion of law, and before costs can be included in the judgment, the fact of a failure must be found or certified to by the referee, or if the certificate does not state all the facts, fully and fairly, they may be shown by affidavits on a motion for costs.⁷⁰ Under the statute as it stood prior to the amendment of 1895 the reply of the representative, on rejecting the claim, to the claimant’s suggestion of a compromise and reference, that the claim had better take its course at law, was held a refusal to refer, entitling the latter to costs, on a recovery.⁷¹ The condition that the consent must be filed, in order to exempt the representative from liability for costs, applies to a claim rejected prior to the amendment,⁷² but where the claimant brings an action on the claim within the time allowed the representative to file the statutory consent, the former’s right to costs is deemed to have been waived.⁷³

Rep. 926; 22 Civ. Proc. Rep. 121; *Dukelow v. Searles*, 48 St. Rep. 91; *Wells v. Disbrow*, 48 St. Rep. 746; 20 N. Y. Supp. 518; *Ryan v. McElroy*, 15 App. Div. 216; *Anderson v. McCann*, 14 id. 365; *Davis v. Myers*, 86 Hun, 236; *Matter of Raab*, 47 App. Div. 33.

⁶⁷ *Genet v. Binsse*, 3 Daly, 239.

⁶⁸ *Field v. Field*, 77 N. Y. 294.

⁶⁹ *Carter v. Beckwith*, 104 N. Y. 236. It is not necessary for plaintiff to show that, after the rejection of the claim, he offered to refer the matter before the commencement of the action. (Ib.) But in *Nellis v. Duesler* (44 St. Rep. 228; 18 N. Y. Supp. 315), it was held, that where an executor rejected a claim and refused to refer it, the claimant, though recovering only a small part of the amount de-

manded, was entitled to costs. To the same effect, *Davis v. Gallagher*, 37 App. Div. 627; *Adler v. Davis*, 31 Misc. 47.

⁷⁰ *Ely v. Taylor*, 42 Hun, 205. Under the former statute, the certificate of the referee, based upon a concession of the defendant, on the trial, that he had refused to refer the claim, should be conclusive upon the court in awarding costs. (Ib.) See *Russell v. Lane*, 1 Barb. 525; *Wilkinson v. Littlewood*, 67 How. Pr. 474; *Meltzer v. Doll*, 91 N. Y. 365.

⁷¹ *Clark v. Corwin*, 39 St. Rep. 784; 21 Civ. Proc. Rep. 138.

⁷² *Carter v. Barnum*, 24 Misc. 220; 53 N. Y. Supp. 539.

⁷³ *Hart v. Hart*, 45 App. Div. 280; 61 N. Y. Supp. 131; *Hoye v. Flynn*,

The rule has always been that costs against executors, can only be allowed on special order of the court.⁷⁴ In actions in the Supreme Court, the Code requires the facts to be certified by the judge or referee, before whom the trial took place.⁷⁵ Where the costs were not imposed upon the defendant personally, but were ordered to be paid out of the estate, he is not injured, and will not be heard to complain of the absence of the certificate of the judge or referee who tried the cause.⁷⁶

ARTICLE SECOND.

PAYMENT OF DEBTS.

SUBDIVISION 1.

CLASSES OF DEBTS AND ORDER OF PRIORITY.

§ 661. **Whole estate liable for debts.**— Having considered the methods by which the creditors of the decedent are ascertained, and their claims determined, we proceed to the subject of the payment of the liquidated⁷⁷ debts out of the surplus remaining after the discharge of the expenses of the administration.⁷⁸ It is well to remark here that the whole estate, both real and personal, is liable, under all circumstances, for debts contracted by the decedent in his lifetime, without regard to any disposition he may have made of his property by will, as the will operates only on what remains after payment of his just debts.⁷⁹

§ 662. **What law governs priorities as between creditors.**— The established American rule is, that, so far as creditors are concerned, the assets are to be disposed of according to the laws of the place of their location, and the place where the representative

30 Misc. 636; 64 N. Y. Supp. 252. See *contra*, De Kalb Ave., etc., Church v. Kelk, 30 Misc. 367; 62 N. Y. Supp. 393.

⁷⁴ Hall v. Brennan, 64 Hun. 394; 19 N. Y. Supp. 623; *affd.*, 140 N. Y. 409; Effray v. Masson, 45 St. Rep. 296, and cases in § 655, note 40, *ante*.

⁷⁵ Watson v. Abbey, 141 N. Y. 179; 56 St. Rep. 690; Whitecomb v. Whitcomb, 92 Hun. 443; 36 N. Y. Supp. 607; Lounsbury v. Sherwood, 53 App. Div. 318; 65 N. Y. Supp. 676; Matter of Raab, 47 App. Div. 33; 62 N. Y. Supp. 332. Such certificate may be made by a referee, independent of, and after, his report. (Brainerd v. De

Graef, 29 Misc. 560; 61 N. Y. Supp. 953.)

⁷⁶ Meltzer v. Doll, 91 N. Y. 365; Effray v. Masson, 45 St. Rep. 296.

⁷⁷ A claim allowed by the representative is a liquidated debt. (Matter of Lydecker, 17 St. Rep. 702.) See § 648, *ante*.

⁷⁸ The right of the representative to be reimbursed for the just and reasonable expenses of the administration is paramount to the demands of any creditors. (Hardenberg v. Manning, 4 Dem. 437.) See § 552, *ante*.

⁷⁹ Matter of McComb, 17 St. Rep. 723.

obtains his authority to act; and not by the laws of the decedent's domicile at the time of his death. But the distribution of the residuum, after the payment of debts, etc., is governed by the law of the decedent's domicile.⁸⁰ Another principle, however, governs the case of the unauthorized removal of assets from the State of the decedent's domicile, after his death, into a foreign jurisdiction, where principal letters of administration are granted upon them. In such a case, the assets thus removed from the decedent's domicile without authority and brought irregularly into another jurisdiction, ought not to be sequestrated for the use of creditors of the latter jurisdiction to the prejudice of those of the former. Where called upon, in such case, to determine the rights of the creditors of decedent's domicile in a foreign State, and his creditors in this State, with respect to the priority of the former, the surrogate will act as if he were sitting in the foreign State and administering its laws, and not our own. If the law of the testator's domicile,—from which, after his death, his assets were, without right or authority, brought into this State,—gives a preference of payment to the debt due to the physician who attended decedent in his last illness (as the statute of New Jersey does), over general creditors, the surrogate here will give him such preference over a domestic judgment creditor, to the extent of the assets thus brought into this State.⁸¹

§ 663. The order of preference among creditors.—The common-law rule, which prevailed in this State before the adoption of the Revised Statutes, prescribed the following order for the payment of a decedent's debts: (1) funeral charges and the expenses at the probate office; (2) debts due to the State; (3) debts of record, as judgments, recognizances, and final decrees; (4) debts due for rent, and debts by specialty, as bonds and sealed notes, and,

⁸⁰ 2 Kent's Comm. 419. note c; Story on Conflict of Laws, §§ 524, 525; Lawrence v. Elmendorf, 5 Barb. 73. In Lynes v. Coley (1 Redf. 405), the testator, at the time of his death, was domiciled in Connecticut, in which State his will was admitted to probate, and letters were issued. Ancillary letters were subsequently issued to the executor here. Held, he could be called upon to account here for only such assets as the testator left in this State, and which were here at the time the letters ancillary were granted, and that the accounting of the executor here was to be carried no further than was necessary to enable

our own citizens to secure their claims out of the assets situated within our own jurisdiction; after which, and the payment of expenses, the further administration was to be left to the jurisdiction where the estate was to be finally closed. Hence, a *legatee*, resident here, could not compel the executor to account here for assets not left by the testator in this State.

⁸¹ Hardenberg v. Manning, 4 Dem. 437. In that case, there was no domiciliary administrator, to whom the court could order the transmission of the assets, as in the case of an ancillary administration.

lastly, debts by simple contract.⁸² Besides these classes of preferred debts, it was possible, in various ways, to obtain a preference of one debt over others of the same class,—*e. g.*, by obtaining a judgment—the judgment first obtained having a preference over others: and the executor or administrator might confess judgment; so he might retain for a debt due to himself in preference to other debts of the same class, due to strangers.⁸³ By the statute,⁸⁴ the executor or administrator, after discharging the funeral expenses and the cost of the administration, is required to pay the debts of the decedent in the following order of classes:

“1. Debts entitled to a preference, under the laws of the United States;

“2. Taxes assessed upon the estate of the deceased, previous to his death;

“3. Judgments docketed, and decrees entered, against the deceased, according to the priority thereof, respectively;

“4. All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.”

§ 664. **Preferences prohibited.**—No preference can be given in the payment of any debt, over other debts of the same class, except those specified in the third class, *i. e.*, judgments and decrees, which are to be paid according to the time of their docketing.⁸⁵ But rents due or accruing, upon leases held by the deceased at the time of his death, may, by order of the surrogate, be paid before debts of the fourth class, if it appears to the satisfaction of the surrogate that such a preference will benefit the estate.⁸⁶ Debts not due are on an equality with debts due and payable,⁸⁷ and may be paid by an executor or administrator, according to the class to which they belong, after deducting a rebate of legal

⁸² 2 Kent's Comm. 416; 2 Wms. on Exrs. (7th ed.) 991; Toller, 259.

⁸³ Decker v. Miller, 2 Paige, 149; Rogers v. Hosack, 18 Wend. 319; 6 Paige, 415. See § 641, *ante*. A testator could not (and cannot now) defeat the rules of law as to precedence of debts, by directing his executors to make an equal distribution of his assets among all his creditors. (2 Wms. on Exrs. 990.)

⁸⁴ The provisions of the Revised Statutes (2 R. S. 87, §§ 27–30, 33), on this subject, were carried into Co. Civ. Proc. (§ 2719) by L. 1893, c. 686, with only unimportant verbal changes.

⁸⁵ Co. Civ. Proc., § 2719, as amended 1893 (formerly 2 R. S. 87, § 28). The entry, by a justice of the peace, of a judgment in his docket, does not make it a debt of record. (Sherwood v. Johnson, 1 Wend. 443.) And unless a transcript is filed, and the judgment is docketed, in the county clerk's office, it is not a “judgment docketed” entitled to a preference. (Stevenson v. Weisser, 1 Bradf. 343.)

⁸⁶ Co. Civ. Proc., § 2719, as amended 1893 (formerly 2 R. S. 87, § 30).

⁸⁷ *Id.* (formerly 2 R. S. 87, § 28).

interest upon the sum paid, for the unexpired term of credit, without interest.⁸⁸ The commencement of a suit for the recovery of a debt, or the obtaining a judgment thereon against the executor or administrator, does not entitle such debt to any preference over other debts of the same class.⁸⁹ A debt due to an executor or administrator has no preference over others of the same class, and he cannot retain funds in his hands for the payment of such debt or claim, until it has been proved to, and allowed by, the surrogate.⁹⁰

§ 665. Preference under United States laws.— By the Federal statute, whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and every executor or administrator who pays any debt due by the estate for which he acts, before he satisfies and pays the debts due to the United States, is answerable in his own person and estate for so much as remains unpaid.⁹¹ It is also provided that whenever the principal in any bond given to the United States is deceased, and his estate and effects are insufficient for the payment of his debts, and in case any surety in the bond, or his executor, administrator, or assignee, pay to the United States the money due on the bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of the deceased principal as is secured to the United States, and may maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon.

§ 666. Taxes.— On the theory that the people of the State succeeded, at the revolution, to the prerogatives of the crown of Great Britain, within the limits of the State, it has been said that, independently of the statute, all debts due to the State, *e. g.*, taxes,

⁸⁸ *Id.* (formerly 2 R. S. 87, § 29).

⁸⁹ *Id.* (formerly 2 R. S. 87, § 28).

⁹⁰ *Id.* (formerly 2 R. S. 87, § 33).

⁹¹ U. S. R. S. 691, §§ 3466, 3468. The last clause was, no doubt, put into the statute to meet a doubt expressed whether the original statute created a lien on the assets in the hands of representative; and whether, if, without notice of the debt being a preferred one, he distributes the estate without providing for it, he would be liable personally. (Per Marshall, C. J., in *United States v. Fisher*, 2

Cranch, 390; concurred in by Platt, J., in *Aiken v. Dunlap*, 16 Johns. 85.)

This preference would exist in favor of the United States, independently of the statutes of this State, if it be true, as has been held (*U. S. v. Duncan*, 4 McLean, 207), that the laws of the United States control all State laws for the distribution of estates, and supersede all State laws upon the subject that come within their provisions. (*U. S. v. Duncan*, 12 Ill. 523.)

should have a preference in payment over debts of the same rank due to individuals.⁹² But since the adoption of the Revised Statutes, the State has no right of priority in payment, except as conferred by that statute, on the principle of *expressio unius est exclusio alterius*. The taxes upon the real property of the deceased, which are to be paid out of the personal estate, are only those which were assessed previous to the death of the deceased.⁹³ It does not change the rule that proceedings had not been had upon the assessment necessary to create a lien on the land;⁹⁴ all that is required is that the assessment of the tax shall have been so far completed, in the name of the person designated as owner, as that it could not, thereafter and before the owner's death, be changed or altered by the assessment officers.⁹⁵ Taxes are chargeable to the *corpus* of the estate, and are not payable by the heir or devisee.⁹⁶ A direction in a will for the payment over to trust beneficiaries, of the net income, "after payment of all taxes and assessments," does not show an intention to relieve the *corpus* of the estate, and make the taxes assessed at testator's death a charge on the income; it could only have been intended to provide for the annual current expenses, after his death.⁹⁷ But where the direction is that the executor shall remain in charge of land until the youngest child comes of age, and that all rents and interest be paid by the executor to the wife, out of which she shall pay all taxes, the executor is entitled to credit, against the income fund, for taxes paid by him.⁹⁸ The representative is not warranted in paying taxes assessed subse-

⁹² See 2 Kent's Comm. 416.

⁹³ Matter of Mansfield, 10 Misc. 296; 31 N. Y. Supp. 684. See *ante*, § 615. So taxes assessed during decedent's lifetime, upon real property in which he had a life interest, are entitled to preference under the statute. (Coleman v. Coleman, 5 Redf. 524.) See Krueger v. Schlenger (19 Misc. 221; 43 N. Y. Supp. 305), where it was said that the word "taxes" in the statute, referred only to personal taxes.

⁹⁴ Matter of Babcock, 115 N. Y. 450, s. c. as Matter of Detmold, 4 N. Y. Supp. 903; Matter of Franklin, 26 Misc. 107; 56 N. Y. Supp. 858.

⁹⁵ The meaning of the act requiring executors to pay taxes assessed upon the estate of the deceased "previous to his death," etc., is that assessments, so far completed that the name of the person, named as owner, cannot be changed or altered by the assessment

officers before the death of such person, shall be payable from his estate in due course of administration. (Per Ruger, C. J., in Matter of Babcock, *supra*.)

⁹⁶ Matter of Babcock, *supra*; Matter of Arkenburgh, 13 Misc. 744; 35 N. Y. Supp. 251; Matter of Doheny, 70 App. Div. 370; 75 N. Y. Supp. 24.

⁹⁷ Matter of Philbin, N. Y. Law J., July 9, 1892.

⁹⁸ Matter of Smith, 1 Misc. 269; 22 N. Y. Supp. 1067. In that case, the will also provided that if the widow accepted thereunder, she should pay all taxes on the estate out of the income. Held, the executor was not entitled to credit for taxes paid, in the absence of any proof that the income was insufficient for that purpose, and the payment by him was necessary for the preservation of the estate. See Clarke v. Clarke, 145 N. Y. 476; Matter of Mansfield, 10 Misc. 296.

quently to his decedent's death;⁹⁹ they are chargeable upon the land. There is, therefore, no ratable apportionment, varying according to the period of the year in which the decedent died, of the amount to be paid out of the personalty, and that chargeable on the land.¹ The term "taxes" does not include assessments made by a municipal corporation under authority derived from the Legislature;² and, although such an assessment, which was confirmed at the time of the decease of the testator, is a personal debt, and should be paid out of the personal estate, it is not entitled to any priority before other debts.³

§ 667. Judgments and decrees.—Before the adoption of the Revised Statutes, judgments had a right of priority of payment as among themselves, according to the date, not of their entry, but of the issue of execution upon them. Now, however, they are payable "according to the priority thereof, respectively,"⁴—that is, of their docketing. The fact that the judgment is more than ten years old, and hence has ceased to be a lien on real estate, does not affect its right to priority.⁵ The judgments contemplated are those entered "against the decedent:" a judgment against his representative, though founded on his debt, is not, therefore, in-

⁹⁹ *Willecox v. Smith*, 26 Barb. 316; *Matter of Benedict*, 15 St. Rep. 746; *Matter of Young*, 17 Misc. 680; *sub nom.* *Matter of Cornell*, 41 N. Y. Supp. 539; 15 App. Div. 285. As to the authority of administrators, etc., to deal with real estate, see *ante*, §§ 530, 595.

¹ *Griswold v. Griswold*, 4 Bradf. 216.

² *Matter of Hun*, 144 N. Y. 472; 63 St. Rep. 729.

³ *Seabury v. Bowen*, 3 Bradf. 207.

⁴ Co. Civ. Proc., § 2719, as amended 1893; *Matter of Foster*, 8 Misc. 344; 29 N. Y. Supp. 316; *Trust v. Harned*, 4 Bradf. 213; 4 Abb. Pr. 270. This rule of priority is different in the case of a judgment debtor who acquires title to real estate after the docketing of several judgments against him. In such case, the liens of the several judgments attach together at the same instant, all stand upon the same footing, and the oldest judgment has no priority. (*Goetz v. Mott*, 21 Abb. N. C. 246; 15 Civ. Proc. Rep. 11.) In *Matter of Hazard*, in N. Y. Surr. Ct. (N. Y. Law J., Feb. 23, 1893), on proceedings for the distribution of a wife's estate, the whole of which she had bequeathed to her husband, one

of five judgment creditors of the latter claimed a priority of payment on the ground of the prior date of the docketing of his judgment, although this would exhaust the entire fund in court for distribution. Held, that all judgments docketed prior to the vesting of the estate in the judgment debtor, on the death of his wife, attached simultaneously; that the liens were all of the same rank, no one being superior to the other; and that the money should be distributed *pro rata*. In *Matter of Gates* (44 St. Rep. 104; 18 N. Y. Supp. 873; *affd.*, 21 id. 576), a judgment had been docketed against decedent six years before he died, but no administrator was appointed until ten years had expired from the docket of the judgment, and the administrator was discharged two years thereafter. Held, that under Co. Civ. Proc., § 1380, the lien of the judgment could be enforced within three years and six months of the issue of letters of administration, and that that time did not run from the death of the intestate.

⁵ *Ainslie v. Radcliff*, 7 Paige, 439; *Matter of Townsend*, 83 Hun. 200; 31 N. Y. Supp. 409.

cluded in the class. The statute expressly declares that "the commencement of a suit for the recovery of a debt, or the obtaining a judgment thereon against the executor or administrator, shall not entitle such debt to preference over others of the same class."⁶ A question has arisen, where the estate is insolvent and cannot pay the class of judgments in full, whether the part of the judgment which represents a recovery for costs against the representative, in an action by a creditor to establish the claim, is entitled to be paid in full, though the rest of the judgment is payable only *pro rata*. It has been held, that such costs are entitled to priority, in proceedings for payment out of, or against, particular funds or properties, when equitable principles require that payment of costs should be made separate from the debt.⁷

⁶ Co. Civ. Proc., § 2719, as amended 1893 (formerly 2 R. S. 87, § 28). See *Schmitz v. Langhaar*, 88 N. Y. 503; *Sippel v. Macklin*, 2 Dem. 219; *Matter of Casey*, 6 N. Y. Supp. 608; *Parler v. Gainer*, 17 Wend. 559; *James v. Beesly*, 4 Redf. 236. An award against the estate, under a submission made by the representatives, is not entitled to priority of payment as a judgment; though the award may bind the representative personally, it cannot prejudice the rights of other creditors, having debts of equal degree, to share equally in the distribution of the estate. (*Wood v. Tunnicliff*, 74 N. Y. 38.) A judgment creditor of the decedent cannot obtain a preference by the commencement of an action against the representative, and his fraudulent vendee of the assets, to set aside the fraudulent transfer and have the assets applied to the payment of his judgment. (*Everingham v. Vanderbilt*, 51 How. Pr. 177.) Where a judgment has been recovered against an executor in an equitable action by a creditor whose claim was incurred in the continuance of the business by the executor under the direction of the will, a provision which requires the defendant to pay it out of the funds and property belonging to the estate, and directs him to pay the plaintiff's judgment and to hold the remainder of the estate subject to the order of the court is improper. In such case plaintiff must proceed to collect his debt in the mode prescribed by law, by proceedings in the Surrogate's Court. (*Willis v. Sharp*, 115 N. Y. 396; 26

St. Rep. 125.) *It seems*, that if the creditors of the decedent, at the time of his death, did not consent to the carrying on of the business by the executor, they have the right to insist that the estate, as it existed at his death, shall be used for the payment of their debts, and the expenses of administration, to the exclusion of debts subsequently created by the executor, but if they do consent, different principles must apply, and creditors of the business must share *pro rata* with the other creditors in the whole estate. If the business was carried on without the consent of the creditors, and the estate has been thereby increased, then the original creditors should probably alone share in the estate, as it came to the executor, and the creditors of the business should alone have the increase made by their contributions to the capital of the business. (Ib.)

⁷ So held in *Shields v. Sullivan*, 3 Dem. 296, on the principle of the case of *Columbia Ins. Co. v. Stevens*, 37 N. Y. 536; and in *Matter of Randell*, 8 N. Y. Supp. 652. In the last case, the court (Weiant S.) said: "Where expense is imposed upon a creditor to enforce his claim by resistance thereto made in the interest of the fund or property of those entitled to the same, I do not see why such creditor should not be first reimbursed to the extent of the costs awarded him for such reimbursement. It is but the marshalling and disposing of funds or properties in court upon principles of equity, where no fixed rules of law intervene to the contrary." But compare *Shute*

§ 668. **Judgment entered after a party's death.**— But a final judgment, entered in the names of the original parties, as permitted, in case either party has died, "after an accepted offer to allow judgment to be taken, or after a verdict, report or decision, or an interlocutory judgment, but before final judgment is entered,"⁸ is not such a judgment. Such a judgment "does not become a lien upon the real property or chattels real of the decedent, but it establishes a debt to be paid in the course of the administration;"⁹ and if such a judgment has been duly docketed, it has the same force and effect, as regards priority in payment, as if the decedent had died on the day after its entry.¹⁰

§ 669. **Foreign judgments.**— Judgments rendered in sister States, or foreign countries, as they cannot be docketed here, take rank only as simple contract debts.¹¹ But judgments of the Federal courts, sitting in this State, are doubtless entitled to be included among "judgments docketed."¹²

§ 670. **Rent due on leases.**— Among the fourth class, in the order of payment, are to be included rents due or accruing upon leases held by the decedent at the time of his death. But such rents the Surrogate's Court has authority to order paid, before the other debts of this class, when it satisfactorily appears that such preferred payment will benefit the estate.¹³ Such a direction should be made after a hearing had, upon a petition, and on proof of all the facts and circumstances, by affidavits or oral testimony, disclosing in what way the alleged benefit may accrue. In the

v. Shute (5 Dem. 1), where it was held, that, in case of a deficiency of assets, costs included in the judgment recovered against the representative, upon a demand against the decedent, had no preference. See *Matter of Mahoney*, 37 Misc. 472; 75 N. Y. Supp. 1056. In *Matter of Casey* (6 N. Y. Supp. 608), it was held on appeal from a decree, on an accounting of executors, that costs contained in a judgment against executors for costs should be paid in preference to legacies.

⁸ Co. Civ. Proc., § 763.

⁹ Co. Civ. Proc., § 1210.

¹⁰ *Matter of Clark*, 5 Dem. 377; citing *Nichols v. Chapman*, 9 Wend. 452; *Salter v. Neaville*, 1 Bradf. 488; *Bernes v. Weisser*, 2 Bradf. 212; *Matter of Clark*, 15 Abb. Pr. 227; *Ainslie v. Radcliff*, 7 Paige, 439. It is not necessary to obtain an order to enter

the judgment, *nunc pro tunc*, as of the term prior to decedent's death. (*Matter of Dunn*, 5 Redf. 27.)

¹¹ *Brown v. Public Adm'r*, 2 Bradf. 103; *Hubbell v. Coudrey*, 5 Johns. 132; *Taylor v. Bryden*, 8 id. 173; *Pawling v. Bird*, 13 id. 192.

¹² See *Bernes v. Weisser*, 2 Bradf. 212; *Manhattan Co. v. Everton*, 6 Paige, 457; *Willard on Exrs.* 280; *Dayton on Surr.* 288.

¹³ Co. Civ. Proc., § 2719, as amended 1893 (formerly 2 R. S. 87, § 30). Before the Revised Statutes, rents were preferred next after debts of record, and a practical preference was also given by the landlord's right to distrain for rent. (2 R. S. 500.) The present rule gives, in effect, the same preference, in the cases mentioned in the text. Distress for rent was abolished in 1846. (L. 1846, c. 274.)

absence of proof of actual benefit, the surrogate cannot assume to direct the payment of rent as a preferred claim.¹⁴ Where the surrogate's decree stated that it appeared, to his satisfaction, that a preference allowed by him would benefit the estate, it was held conclusive, upon appeal.¹⁵ The surrogate may not only direct the preference upon an application to him for that purpose, but he may, upon the final accounting of the representative, ratify his preferential payment of rent, upon proof of benefit to the estate.¹⁶

§ 671. **Debts by specialty.**— There is also a class of debts not mentioned in the statute, which are, nevertheless, good as against the executors or administrators, and form a sort of fifth class, *e. g.*, a voluntary bond of the testator, given in his lifetime, payable at, or immediately after, his death. In the absence of fraud, such a bond has been held a valid debt against the estate, and to have a preference over legacies, though it must be postponed to debts contracted for valuable consideration.¹⁷

SUBDIVISION 2.

MARSHALLING ASSETS.

§ 672. **Order of priority.**— Questions frequently arise between heirs or devisees and executors, as to how far the personal property must be exhausted in the payment of debts, before the real estate can be resorted to, and how far executors can be compelled to pay off incumbrances on the land out of the personal property. The rule governing the order of marshalling assets toward payment of debts is, to apply: (1) the personal estate; (2) lands descended; (3) lands devised.¹⁸

§ 673. **Personal assets primarily liable for debts.**— The personal estate of the testator is deemed the natural and primary fund for the payment of debts and legacies, and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention.¹⁹ Thus where the testator specifically

¹⁴ Cooper v. Felter, 6 Lans. 485. Facts must appear, showing explicitly that a benefit will accrue to the estate; a general allegation to this effect will not suffice. (Harris v. Meyer, 3 Redf. 450.)

¹⁵ Hovey v. Smith, 1 Barb. 372. Rent of a pew in church cannot be made a preferred debt, under the statute, unless it be due on a lease for

years, which is assets in the hands of the personal representative. (Johnson v. Corbett, 11 Paige, 265.)

¹⁶ Hovey v. Smith, 1 Barb. 372.

¹⁷ Isenhardt v. Brown, 2 Edw. 341.

¹⁸ Livingston v. Newkirk, 3 Johns. Ch. 312, and cases *infra*.

¹⁹ Hoes v. Van Hoesen, 1 N. Y. 120; affg. 1 Barb. Ch. 379. And see McKay v. Green, 3 Johns. Ch. 56; Hawley v.

bequeathed his chattels to one person and devised his real property to another, without any direction as to which should be appropriated to satisfy an existing judgment against him, it was held that the personal property must be applied first.²⁰ Where the testator charges the payment of his debts upon certain specified real estate, and if that should prove insufficient, then upon his other real estate, as between the legatees and devisees, the personal estate is exonerated from the debts.²¹ But where the heirs and next of kin are the same persons, the payment of debts from the proceeds of realty is not objectionable.²² The common-law rule, that the personal estate of a deceased person will be applied to the payment of his contract debts, to the relief of his real estate, is not of universal application, and will not be enforced where it is in apparent hostility to the plain intent of the deceased, as expressed in his will, and would defeat bequests made therein.²³ In general, personal property, specifically bequeathed, cannot be applied, unless the remainder of the personalty is insufficient;²⁴ but where a plain intention can be gathered from the will, that certain personal property shall be treated as real, it must be regarded as effecting a conversion thereof, and specific legacies must be resorted to, before chattels so converted are applied.²⁵ Real property equitably converted retains its initial character and cannot be resorted to so long as the personalty is sufficient.²⁶

§ 674. Where assets are insufficient.—Where the personal property is not sufficient to pay all the debts, and the real estate must be resorted to, the land which is not devised must, as between

James, 5 Paige, 318, 448. Where land held under an unpaid contract of purchase is devised for life, with remainder in fee, the unpaid purchase money is to be paid out of personal assets. But the tenant for life cannot require the application of the residuary personal estate to improvements of the land, so as to render it productive for his benefit. (Cogswell v. Cogswell, 2 Edw. 231.) See § 738, *post*. Land held under lease from the Seneca Nation of Indians, for the purposes of transfer, descent, and distribution, is real estate, and rents received therefor by the executors are not available for the payment of general legacies. (Matter of McKay, 33 Misc. 520; 68 N. Y. Supp. 925.)

²⁰ Rogers v. Rogers, 3 Wend. 503.

²¹ Youngs v. Youngs, 45 N. Y. 254.

Where it was the intention of the testator to appropriate the proceeds of a house and lot to the payment of legacies and at the time of his death the personalty was insufficient for that purpose.—Held, that other real estate not appropriated to the payment of legacies should be first resorted to for the payment of his debts. (Jouffret v. Jouffret, 20 App. Div. 455; 46 N. Y. Supp. 810.)

²² Matter of Braunsdorf, 13 Misc. 666; 35 N. Y. Supp. 298; 2 App. Div. 73.

²³ Rice v. Harbeson, 63 N. Y. 493.
²⁴ Toch v. Toch, 81 Hun. 410; 30 N. Y. Supp. 1003.

²⁵ Downing v. Marshall, 1 Abb. Ct. App. Dec. 525.

²⁶ Matter of Mansfield, 10 Misc. 296; 31 N. Y. Supp. 684.

heirs and devisees, be first taken;²⁷ although, in a peculiar case, where the personal property in hand was insufficient, the surrogate directed debts to be paid by the executors out of rents of the real estate then in hand, leaving the rights of the parties to be subsequently settled;²⁸ and, in another case, the proceeds of land sold under a power in the will, were applied to the payment of debts, although the power contained directions to invest the proceeds for the benefit of a specific legatee.²⁹

§ 675. **Mortgage debts.**—At common law, a mortgage debt, whether there was a bond or covenant or not, was primarily payable, like other debts, out of the personalty, and the devisee or heir might compel such payment, by the representative, and thus relieve the realty from the burden of the debt, unless, in the event of a will, the testator expressly or impliedly directed the debt to be paid out of the realty. By the provisions of the Revised Statutes (now incorporated into the Real Property Law), a mortgage cannot be construed as implying a covenant to pay the debt; and in the absence of an express covenant in the mortgage, and of any separate bond or other instrument to secure the payment, the remedy of the mortgagee is confined to the mortgaged lands.³⁰ It is also provided that, whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of the testator that the mortgage be otherwise paid.³¹ Where the real and personal property are

²⁷ *Graham v. Dickinson*, 3 Barb. Ch. 169. And see *Livingston v. Livingston*, 3 Johns. Ch. 148.

²⁸ *Skidmore v. Romaine*, 2 Bradf. 122.

²⁹ *Matter of Shannon*, 1 N. Y. Supp. 747. Compare *Matter of McKay*, 24 Misc. 255; 53 N. Y. Supp. 563. Where a will empowers the executors to sell the real estate when in their judgment they deem it for the best interests of the estate, they are entitled to reimburse themselves from the proceeds of such sale for debts paid by them in excess of the personal estate, irrespective of whether the power was given for the purpose of paying debts. (*Matter of Bolton*, 146 N. Y. 257; 66 St. Rep. 630.)

³⁰ 1 R. S. 738, § 139. This statute

was re-enacted in the Real Property Law (L. 1896, c. 547, § 214). See *Home v. Fisher*, 2 Barb. Ch. 559; *Severance v. Griffith*, 2 Lans. 38; *Coleman v. Van Rensselaer*, 44 How. Pr. 368, and cases cited. Where a person took a conveyance of land subject to a mortgage, covenanting to indemnify the grantor against it, and, having paid part of it, died intestate.—Held, the land was the primary fund for the payment of the residue, and the personal estate was to be resorted to only as auxiliary. (*Cumberland v. Codrington*, 3 Johns. Ch. 229.)

³¹ L. 1896, c. 547, § 215 (1 R. S. 749, § 4); *Matter of Kene*, 8 Misc. 102; 29 N. Y. Supp. 1078. For what has been held to be an express direction by a testator, see *Mosely v. Mar-*

thrown into one fund, in which the same parties are interested equally, the executor may, for the benefit of the estate, apply personal property to pay a mortgage on the realty.³²

While, however, the land upon which the mortgage is a lien is the primary fund for the payment of the mortgage debt, it is not the exclusive fund; for if the primary fund is exhausted, then the general assets may be resorted to.³³ It is a general rule that a creditor, who has a security upon a fund which is primarily liable, is bound to exhaust his remedy against it, and can only come in against the personal estate for the deficiency.³⁴ It is

shall, 27 Barb. 45; *House v. House*, 10 Paige, 158; *Mollan v. Griffith*, 3 id. 402; *Halsey v. Reed*, 9 id. 446, 454; *Smith v. Lawrence*, 11 id. 206; *Wright v. Holbrook*, 32 N. Y. 587. A mere direction in the will to pay debts is not enough to relieve the land from the burden of the mortgage. (*Rapalye v. Rapalye*, 27 Barb. 610; *Taylor v. Wendel*, 4 Bradf. 324; *Meyer v. Cahen*, 111 N. Y. 270.) A direction in a will to pay all of testatrix's debts, "whether on bonds and mortgages or otherwise," has been held, in accordance with the apparent intent of the testatrix, to include mortgages on property included in deeds of gift executed by testatrix in her lifetime, as well as a mortgage on property devised. (*Waldron v. Waldron*, 4 Bradf. 114.) It was held, before the Revised Statutes, that a testator might, by dispositions and language tantamount to express directions, charge his personal estate with the payment of an incumbrance subject to which he had purchased lands. The intent gathered from the whole will was sufficient. (*Cumberland v. Codrington*, 3 Johns. Ch. 272.) So a mortgage given to secure an accommodation indorser for future indorsements does not charge the mortgaged lands in exoneration of the personal estate. (*Cochrane v. Hawver*, 54 Hun, 556.) Where there is an express direction in the will that a mortgage be otherwise paid than from the mortgaged lands, so as to take the case out of the statute, such mortgage-debt is as obligatory upon the executor as is the payment and discharge of any other debt of the testator. (*Matter of Hopkins*, 57 Hun, 9.) If the will shows an intent to treat mortgage-debts of the testator as ordinary debts, and the fund designated by him for their payment

fails, they are chargeable upon his entire real estate devised, each portion of which must bear a share proportionate to its value. (*Searles v. Brace*, 19 Abb. N. C. 10; *Wells v. Wells*, 30 id. 225; 24 N. Y. Supp. 874.) See *Mills v. Mills*, 28 Misc. 633; 59 N. Y. Supp. 1048.)

³² *Hepburn v. Hepburn*, 2 Bradf. 74. See *Pease v. Egan*, 131 N. Y. 262.

³³ And under 2 R. S. 191, § 152, the court, having jurisdiction of a foreclosure suit, may decree the payment of any deficiency by the personal representatives of the mortgagor; and the surrogate, in proceedings before him to compel obedience to such a decree by the executor, has no power to pass upon the validity of the judgment, sufficiency of the complaint, or any other question raised in the action. (*Glacius v. Fogel*, 88 N. Y. 434.) In *Williams v. Eaton* (3 Redf. 503), it was held, that where there was reason to anticipate a deficiency upon a foreclosure of the mortgage, the executor should be directed to reserve, from the personal estate, a sufficient sum to afford the mortgagee his proportion of his demand against the estate, *pro rata* with the other creditors, and to that extent, should satisfy the deficiency. Compare *James v. Beesly*, 4 Redf. 236; *Glacius v. Fogel*, id. 516; *Livingston v. Gardner*, id. 516, note.

³⁴ *Halsey v. Reed*, 9 Paige, 446. And the rule is as applicable to the claims of legatees as to the claims of creditors. (*Rice v. Harbeson*, 63 N. Y. 493.) But a vendor's lien for the payment of the purchase money is not a mortgage within the statute, and, except as against creditors having a prior right, an heir or devisee can compel the executors or administrators to pay the unpaid purchase

obviously impossible, within the space at our command, to go further into this subject.³⁵ The application of the real estate to the payment of debts, where there is a deficiency of assets, by proceedings in the Surrogate's Court for that purpose, is fully treated in the next following chapter.

§ 676. Copartnership debts.—The right of a creditor of a firm to share in the estate of a deceased member of the firm in the hands of his administrator, where there is no joint estate and the surviving partner is insolvent, is governed by the rules by which courts of equity are guided in distributing the separate estate of an insolvent, as between his separate creditors and those of a copartnership of which he was a member. While, as a general rule, in such cases, the separate creditors are entitled to be first paid, yet where a creditor, at the time a debt is contracted, for the benefit of the firm, requires therefor, and receives, the joint and several obligation of the co-partners individually, it thereby becomes the several debt of each of them; the holder is entitled to the benefit of the security according to its terms, and has the right to prove it against the separate estate of the decedent, and to share equally with the other separate creditors in the distribution.³⁶

SUBDIVISION 3.

PROCEEDINGS TO COMPEL PAYMENT OF DEBTS.

§ 677. Judgments against representative.—One of the new rules adopted by the Code of Civil Procedure is that actions, etc., commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, and ac-

money, unless it is secured by an executed mortgage on such land. (Lamport v. Beeman, 34 Barb. 239.)

³⁵ As to disposition of surplus money, on a foreclosure of mortgage on land owned by decedent, see Co. Civ. Proc., § 2798, as amended 1893, § 66, *ante*; and as to representative's power or duty to buy in land on a foreclosure; or paying interest to prevent a foreclosure and sale, see §§ 530, 595, 617, *ante*. As to discrimination in the distribution of legal and equitable assets among all the creditors *pro rata*, without preference, see Moses v. Murgatroyd, 1 Johns. Ch. 119; Thompson v. Brown, 4 id. 619. Those who take of the legal assets will receive no part of the equitable

assets, until they have been so applied as to produce equality among all. (Wilder v. Keeler, 3 Paige, 167.) And see Purdy v. Doyle, 1 id. 558. As to what are legal and what equitable assets, see Rogers v. Hosack, 18 Wend. 319; Benson v. Le Roy, 4 Johns. Ch. 651; Thompson v. Brown, 4 id. 619; Pascalis v. Canfield, 1 Edw. 201.

³⁶ Matter of Gray, 111 N. Y. 404. See Matter of Striker, 24 Misc. 422; 53 N. Y. Supp. 732; Potts v. Baldwin, 67 App. Div. 434; 74 N. Y. Supp. 665. As to remedies of firm creditor against the estate of a deceased partner, see Harbeck v. Pupin, 23 Abb. N. C. 190. See *ante*, §§ 533, 612.

tions, etc., commenced against him (except where brought to charge him personally), must be brought by or against him in his representative capacity. And judgments recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.³⁷ We have already stated the principle, that the only effect of a judgment against the personal representative upon a claim against the decedent is to liquidate the debt. The judgment is not evidence of assets,³⁸ but only of the amount due the creditor. It is further provided that the representative shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin, before suit brought against him on a claim, if such claim was not presented to him "within six months from the first publication of his notice to creditors."³⁹

§ 678. **Effect of judgment.**—A judgment against the representative, as such, is not entitled to equality of payment with judgments docketed against the decedent, but is included in the fourth class of ordinary debts. The decedent's real property is in no way bound or affected by a judgment against his personal representatives, and is not liable to be sold under execution issued on such judgment, unless the judgment expressly and in terms is made a lien upon specific real property therein described, or expressly directs its sale.⁴⁰ Hence, an execution cannot issue against the real property of the deceased upon a judgment for deficiency recovered against his representatives. To authorize such a proceeding, the judgment must have been recovered against the decedent in his lifetime.⁴¹

§ 679. **Execution on judgment.**—An execution against property, in the hands of an executor, administrator, or trustee, must, substantially, require the sheriff to satisfy the judgment out of that property.⁴² "An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might

³⁷ Co. Civ. Proc., § 1814. This provision applies only to actions commenced after Sept. 1, 1880. See *ante*, §§ 567, 570.

³⁸ Co. Civ. Proc., § 1824. See § 632, *ante*.

³⁹ Co. Civ. Proc., § 2718, as amended

1893; adopting, in part, 2 R. S. 89, § 39.

⁴⁰ Co. Civ. Proc., § 1823.

⁴¹ *James v. Beesly*, 4 Redf. 236.

⁴² Co. Civ. Proc., § 1371. See *Saperstein v. Ullman*, 168 N. Y. 636 (mem.); affg. 49 App. Div. 446.

have been issued in favor of the original plaintiff, and without a substitution.”⁴³ But it is provided, that “an execution shall not be issued, upon a judgment for a sum of money, *against* an executor or administrator, in his representative capacity, until an order, permitting it to be issued, has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected; and the execution must be indorsed with a direction to collect that sum.”⁴⁴

§ 680. Leave to issue execution.—Under the Revised Statutes, an execution, on a judgment against the *personal representative*, could issue at once (provided his account had been settled) for a just proportion of the assets applicable to the satisfaction of the judgment.⁴⁵ But, under the present statute, no execution can issue on such a judgment for money, without the order of the surrogate from whose court the letters of the representative were issued;⁴⁶ and the order, when granted, will not direct to be collected, by the execution, a greater sum than the plaintiff's just proportion of the residuum of assets, after allowing for the expenses of the administration, and for debts entitled to a priority; and “for claims entitled to priority as against the plaintiff.”⁴⁷ The order must specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum.⁴⁸ One or more orders may be afterward made in like manner, and one or more executions may be afterward issued, whenever it appears that the sum, directed to be collected by the first execution, is less than the plaintiff's just proportion.⁴⁹ The statute applies as well to a judgment obtained against the representative, for a

⁴³ Co. Civ. Proc., § 1829.

⁴⁴ Co. Civ. Proc., § 1825.

⁴⁵ 2 R. S. 88, § 32. See *Olmsted v. Vredenburg*, 10 How. Pr. 215; *People v. Judges of Albany Co.*, 9 Wend. 488; *Butler v. Hempstead*, 18 id. 667; *Dox v. Backenstose*, 12 id. 542.

⁴⁶ *Disosway v. Hayward*, 1 Dem. 175. Under Code Civ. Proc., §§ 2553, 2554, an execution cannot regularly issue to the sheriff of the surrogate's county, upon a surrogate's decree directing the payment of a sum of money, until the decree has been docketed in the office of the county clerk; if not so docketed, it is irregular, and must be set aside on motion. (Co. Civ. Proc., §§ 1365, 1369.)

⁴⁷ Co. Civ. Proc., §§ 1825, 1826. See *Schmitz v. Langhaar*, 88 N. Y.

503. The clause quoted in the text, and the corresponding expression in section 1827, are intended, according to the note of Mr. Commissioner Throop, “to include not only the common cases, where legacies are postponed to debts, and certain debts to others, but also a class of cases where the assets must, according to well-recognized rules, be applied to the payment of debts, to the exclusion of some legacies rather than others. Thus residuary legacies are applied to the payment of debts before general legacies; and general legacies before those given upon a consideration; and all of these, before applying specific and demonstrative legacies.”

⁴⁸ Co. Civ. Proc., § 1825.

⁴⁹ Co. Civ. Proc., § 1826.

liability incurred by him in the administration of the estate, as to a judgment against him for a debt of the decedent.⁵⁰ But where the judgment was not in "an action relating to decedent's estate,"—as where the action was brought by the representative for damages for negligence which caused the death of the decedent,—the surrogate has no authority to permit an execution to issue for the costs of such an action against the representative, as such.⁵¹

§ 681. **Application for leave.**—The application may be made at any time after judgment, and it is for the court to say whether the estate is so far administered as to enable it to ascertain whether there will be applicable assets sufficient to pay all the debts in full, or if not to pay them in full, then what is the judgment creditor's just proportion of the residuum. The former statute required that, in all cases, an accounting should be first had, before leave would be granted to issue an execution; but this rule was held not to contemplate a settled or liquidated account, but only such an accounting of the condition of the assets, as would enable the court to determine whether there was property applicable to the satisfaction of the judgment;⁵² and this is the present rule.⁵³ Where an appeal from the judgment is pending, on which a stay of execution is granted, the surrogate will refuse leave to issue execution on the judgment, until the result of the appeal is announced.⁵⁴ At least six days' notice of the application for the order must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case, notice must be given to such persons, and in such manner, as the surrogate directs, by an order to show cause why the application should not be granted.⁵⁵ The order made upon the application is appealable, and the adjudication in respect to the sufficiency of assets is now reviewable.⁵⁶

⁵⁰ Matter of Thompson, 41 Barb. 237.

⁵¹ Matter of Jansen, 1 Connolly, 362; Matter of McCullough, 18 Misc. 721; 43 N. Y. Supp. 968. See Co. Civ. Proc., § 1814.

⁵² Mitchell v. Mount, 31 N. Y. 356. The application will be denied where the amount of assets does not appear (Matter of Dougherty, 15 St. Rep. 743); or where the assets have been accounted for and distributed. (Matter of Hathaway, 24 N. Y. Supp. 468.)

⁵³ Co. Civ. Proc., § 2723; Hauselt v. Gano, 1 Dem. 36; Matter of Kelsey, 4 L. Bul. 56; Keyser v. Kelly, 4 Redf.

157; Melcher v. Fisk, id. 22; Matter of Lazelle, 16 Misc. 515; 40 N. Y. Supp. 343; Matter of Hesdra, 23 id. 842; Matter of Steinan, 23 App. Div. 550; 48 N. Y. Supp. 886. See *post*, § 688.

⁵⁴ Keyser v. Kelly, 4 Redf. 157.

⁵⁵ Co. Civ. Proc., § 1826.

⁵⁶ Co. Civ. Proc., § 2552; Mitchell v. Mount, 31 N. Y. 356. And see St. John v. Voorhies, 19 Abb. Pr. 53. The former statute provided that the order granting leave to issue an execution was not appealable, except on giving a bond, etc.

§ 682. **Judgments for legacies and distributive shares.**—Where the judgment is for a legacy or distributive share, the surrogate, before granting an order, permitting an execution to be issued, may, “and, in a proper case, must, require the applicant to file, in his office, an undertaking to the defendant, in such a sum, and with such sureties, as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums, for which the defendant is chargeable, for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant’s claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.”⁵⁷

§ 683. **Judgments against the decedent.**—A different rule prevails with regard to the issuing of executions on judgments obtained against the decedent in his lifetime, or after his death, if entered on a verdict rendered before his death.⁵⁸ It is provided, generally,⁵⁹ that no execution to collect a sum of money can be issued against the property of a judgment debtor, who has died since the entry of the judgment, except under an order of the court from which the execution is to be issued, and upon the decree of the Surrogate’s Court which granted the letters upon the judgment debtor’s estate.⁶⁰ “After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money, is rendered, the judgment may be enforced by execution against any property on which it is a lien with like effect as if the judgment debtor was still living.”⁶¹

⁵⁷ Co. Civ. Proc., § 1827.

⁵⁸ The former rule (L. 1830, c. 320, § 23) that, to entitle the judgment creditor to leave to issue an execution, the judgment must have been had “after a trial at law upon the merits,” is abrogated. See, however, *Smith v. Howell* (2 Redf. 328), and *Schmitz v. Langhaar* (88 N. Y. 503), giving a history of the legislation on the subject prior to the Revised Statutes, and holding that the provisions applied only where the executor disputed the debt, and subjected the creditor to litigation.

⁵⁹ Co. Civ. Proc., § 1379.

⁶⁰ Co. Civ. Proc., § 1380. This section entirely remodels the former

statute (L. 1850, c. 295) on this subject, and incorporates the rulings of the court in *Marine Bank v. Van Brunt*, 49 N. Y. 161; approving *Allden v. Clark*, 11 How. Pr. 209, and *Frink v. Morrison*, 13 Abb. Pr. 80, and disapproving *Wilgus v. Bloodgood*, 33 How. Pr. 289, and *Flanagan v. Tinen*, 5 Barb. 587. It was settled, by the Court of Appeals, that the Act of 1850 (*supra*) did not supersede the provisions of the Code, regulating the procedure in the court in which a judgment is recovered, for enforcing the same after the death of the debtor. (*Wallace v. Swinton*, 64 N. Y. 195.)

⁶¹ Co. Civ. Proc., § 1380.

§ 684. **Leave to issue execution.**—"An execution shall not be issued, unless an order, granting leave to issue it, is procured from the court from which the execution is to be issued, and a decree, to the same effect, is procured from a Surrogate's Court of this State, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor." ⁶²

§ 685. **Continuance of lien of judgment.**—Where the lien of the judgment was created as prescribed in section 1251 (by docketing in county clerk's office), "neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent; and for that purpose such a lien, existing at the decedent's death, continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment-roll. But where the decedent died intestate, and letters of administration have not been granted within three years after his death, by the Surrogate's Court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the State at the time of his death, and letters testamentary or of administration have not been granted within the same time by the Surrogate's Court of the county in which the property, on which the judgment is a lien, is situated, such court may grant the decree, where it appears that the decedent did not leave any personal property within the State upon which to administer. In such case, the lien of the judgment existing at the decedent's death continues for three years and six months as aforesaid." ⁶³

§ 686. **Execution without leave.**—The foregoing provisions with respect to the necessity of leave granted, before execution can issue, are, however, expressly declared not to apply "to real estate which shall have been conveyed, or hereafter may be conveyed, by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors, or any of them; and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared

⁶² Co. Civ. Proc., § 1380; Matter of Phelps, 6 Misc. 397; 26 N. Y. Supp. 774. It is immaterial to which court application is first made. (Atlas, etc., Co. v. Smith, 52 App. Div. 109; 64 N. Y. Supp. 1044.)

⁶³ Co. Civ. Proc., § 1380. Proceed-

ings may, nevertheless, be instituted for the sale of the real property to pay debts during the three years, after grant of letters. (Ib.) See Matter of Gates, 44 St. Rep. 104; 22 Civ. Proc. Rep. 241; Atlas, etc., Co. v. Smith.

fraudulent by the judgment or decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be necessary to obtain leave of any court or officer to issue such execution; and the same may be issued at any time to the sheriff of the county where such property is or may be situated.”⁶⁴

§ 687. Leave, how obtained.— It will be seen that a double proceeding is necessary. *First*, the application to the court from which the execution is to be issued should be by motion, on notice “to the person or persons whose interest in the property will be affected by a sale by virtue of the execution, and also to the executor or administrator of the judgment debtor.”⁶⁵ The persons interested in the property are necessarily the widow, the heirs and next of kin, terre-tenants, and devisees, if any. It may frequently embarrass the moving party to obtain the names of these persons and their residences, and, if any of them are nonresidents, to serve them personally with notice of the application. The statute leaves the manner of service of notice of the application to be prescribed by the General Rules, but as these rules fail to prescribe any manner of service, it is for the court to direct how service may be made,—*e. g.*, by publication—in an order to show cause. It is provided, generally, that leave to issue execution shall not be granted except on proof, by affidavit or otherwise, satisfactory to the court, that the judgment remains wholly or partially unsatisfied.⁶⁶ *Second*, the application to the Surrogate’s Court is by regular special proceeding, commenced by petition and citation served in the usual manner.⁶⁷

§ 688. Petition for leave.— The petition should set forth the facts of the administration of the estate of the judgment debtor, or the recovery of the judgment, the granting of leave by the court from which the execution is to be issued, etc., and the names and residences, so far as known, of the persons whose interests in the property will be affected by a sale by virtue of the execution. The

⁶⁴ Co. Civ. Proc., § 1380. The same section declares that a description of the property against which the execution is sought to be enforced, shall have indorsed on it the words—“issued under section thirteen hundred and eighty of the Code of Civil Procedure:” “whereupon said sheriff shall enforce the execution as therein directed against the property so described, and not against any other property, either real or personal; and all provisions of law relating to the sale and conveyance of real estate on execution and redemption thereof shall apply thereto.”

⁶⁵ Co. Civ. Proc., § 1381, subd. 1.

⁶⁶ Co. Civ. Proc., § 1381, subd. 1.

⁶⁷ Co. Civ. Proc., § 1381, subd. 2.

prayer should be for a citation directed to such interested persons, including the executor or administrator, to show cause why leave to issue execution should not be granted. The surrogate may make such a decree in the premises as justice requires. An accounting will not necessarily be had before granting the leave prayed for. If it appears by the petition or affidavits, that the representative has sufficient assets in hand applicable to the payment of the judgment, or a stated proportion of it, and this is not controverted by the representative, this will warrant the granting of the order. But unless the ability of the executor to pay the judgment from the funds of the estate does so appear, the issuing of an execution would be unjustifiable. And if the petition omits to allege the possession, by the executor, of assets applicable to the judgment, and the executor swears that there is nowhere any property of decedent, the proceeding should be dismissed.⁶⁸ The amount of the assets, as near as it can be given, should be stated. It is only in case of a denial of the allegations of the petition, that an order for an accounting, or a reference to take proof, will be granted.⁶⁹ The surrogate has no power to determine, on an application of this kind, whether the judgment creditor is indebted to the estate in an amount which should be offset against the amount of the judgment,⁷⁰ nor whether the judgment was fraudulently obtained or not. The court in which the judgment was obtained is the proper tribunal to determine the validity of its own judgment.⁷¹

§ 689. Compelling payment by surrogate's order.—The authority vested in the surrogate to decree the payment of a debt, or a proportional part thereof, in advance of the final accounting, is to be exercised in conformity with, not in hostility to, the general principles of equity among creditors, and only in cases where the contemplated payment can be made consistently with the rights of all parties interested in the estate.⁷² The nature of the debt, whether equitable or legal, is not material, so long as it is "a claim or demand upon which a judgment for a sum of money, or direct-

⁶⁸ *Hauselt v. Gano*, 1 Dem. 36. See *Matter of Thurber*, 37 Misc. 155; 74 N. Y. Supp. 949; *Matter of Gall*, 40 App. Div. 114; 57 N. Y. Supp. 835.

⁶⁹ *Keyser v. Kelly*, 4 Redf. 157. See *Matter of Congregational, etc., Soc.*, 34 App. Div. 387, 54 N. Y. Supp. 269, and § 681, *ante*.

⁷⁰ *Cleveland v. Whiton*, 31 Barb. 544.

⁷¹ *Freeman v. Nelson*, 4 Redf. 374. See § 692, *post*.

⁷² *Thompson v. Taylor*, 72 N. Y. 32. An executor should not be directed to pay out of the assets the amount of a deficiency judgment recovered against the estate, where another mortgage is about to mature and it is questionable whether the property is sufficient to satisfy such mortgage. (*Matter of Wiener*, 9 App. Div. 621; 40 N. Y. Supp. 1027.)

ing the payment of money, could be recovered in an action,"⁷³ and has been liquidated or is undisputed.⁷⁴ A judgment creditor may take this proceeding instead of applying for leave to issue execution.

§ 690. Application, when and by whom made.—At any time after six months have expired since the grant of letters, a creditor may apply to the surrogate, by petition, for an order directing the representative to pay his claim, or its just proportional part.⁷⁵ The word "creditor" as here used means a person to whom the decedent was indebted in his lifetime, or such person's assignee.⁷⁶ Consequently, a defendant who has recovered a judgment for costs in an action by an administrator is not a "creditor" entitling him to such an order.⁷⁷ A citation must issue requiring the representative to show cause why such an order should not be granted.⁷⁸

§ 691. Dismissal of proceeding on the answer.—The court must, upon the hearing, "make such a decree in the premises as justice requires." But the petition must be dismissed, "where the executor or administrator files a written answer, duly verified,"⁷⁹ setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely, or upon information and belief."⁸⁰

§ 692. Application by a judgment creditor.—The court may inquire into and pass upon alleged payments made to apply upon

⁷³ Co. Civ. Proc., § 2514, subd. 3. See *Babcock v. Lillis*, 4 Bradf. 218; 4 Abb. Pr. 272; *Thompson v. Taylor*, 71 N. Y. 217. But an agreement for the settlement of a disputed claim, which the representative refused to perform, cannot be enforced in such a proceeding. (*Matter of Bronson*, 69 App. Div. 487; 74 N. Y. Supp. 1052.)

⁷⁴ *Matter of Walker*, 70 App. Div. 263; 74 N. Y. Supp. 971; *Matter of Stevenson*, 77 Hun, 203; 28 N. Y. Supp. 362.

⁷⁵ Co. Civ. Proc., § 2722, as amended 1893 (former § 2717).

⁷⁶ *Matter of Moderno*, 63 Hun, 261; 28 Abb. N. C. 57. One who acquired the claim by subrogation merely, from having voluntarily paid decedent's debts, although there was no formal assignment, is a creditor and may institute the proceeding. (Ib.) See *Matter of Solomon*, 4 Redf. 509. Prior to the amendment, in 1900, of Co. Civ. Proc., § 2514, subd. 3, defining the

word "creditor," it was held, that one holding a claim for funeral expenses could not maintain the proceeding, as he was neither a creditor or a person interested in the estate. (*Matter of Flint*, 15 Misc. 598; 38 N. Y. Supp. 188.)

⁷⁷ *Hall v. Dusenbury*, 38 Hun, 125. See *Matter of Jansen*, 1 Connolly, 362; *Matter of McCullough*, 18 Misc. 721.

⁷⁸ Under the former statute (2 R. S. 116, § 18), the court had the power to direct payment of the claim without citing the persons interested in the estate. (*Campbell v. Bruen*, 1 Bradf. 224.) See *St. John v. Voorhies*, 19 Abb. Pr. 53.

⁷⁹ The want of a verification is waived unless objection is made by the claimant. (*Matter of Corbett*, 90 Hun, 182; 35 N. Y. Supp. 945.)

⁸⁰ Co. Civ. Proc., § 2722, as amended 1893 (former § 2718, subd. 1). See *Matter of Stevenson*, 77 Hun, 203; 28 N. Y. Supp. 362.

the judgment, and determine the amount due thereon, and may also determine who is the owner of the judgment and entitled to the money; but he has no jurisdiction to determine whether there has been an accord and satisfaction, or whether the estate is entitled, in equity, to a release or discharge, either in whole or in part, from the judgment.⁸¹ Where, therefore, a judgment against a decedent is disputed or rejected by the representative on its presentation for payment, it is not necessary for the judgment creditor, as it is for creditors whose claims are not in judgment, to sue over again.⁸² The judgment is, *prima facie*, a valid subsisting claim against the estate, and the surrogate cannot try the question of the existence of the judgment, or the assertion, by the representative, of a set-off against it, which would amount to a suit in equity for the set-off.⁸³ By this is not meant that the surrogate may not require competent proof of the fact of the judgment. A transcript of the judgment is no legal evidence of its existence; the only proper proof is the judgment-roll itself, and this must show the jurisdiction of the court which granted it. Unless it contains proof of service of the summons, or of appearance by the defendant, there is no proof of jurisdiction and no proper

⁸¹ *McNulty v. Hurd*, 72 N. Y. 518; *Matter of Miller*, 70 Hun. 61; 23 N. Y. Supp. 1104. An answer to a petition to compel payment of a judgment must, in order to oust the surrogate of jurisdiction, set forth facts constituting a defense to, or avoidance of, the judgment. (*Salomon v. Heichel*, 4 Dem. 176). It seems, that the remedy of the executors or administrators to prevent the enforcement of the judgment, and to obtain relief, where the surrogate has no jurisdiction to grant it, is by resort to the proper judicial tribunals. This may be had either before or after a decree for the payment of the judgment, and a restraining process obtained either to prevent the decree or its enforcement. (*McNulty v. Hurd*, *supra*.) "We are of opinion," said Church, C. J., in that case, "that the surrogate may inquire into, and pass upon, payments made to apply upon such judgments, and determine the amount due thereon. He may also determine who is the owner of the judgment and entitled to the money. This power is necessary to enable the surrogate to make the decree, and is fairly inferable from the language of section sev-

enty-one. Beyond this, the surrogate has no jurisdiction to try and determine questions in respect to the validity of judgment. There may be grounds for setting aside judgments, as if obtained by fraud, or where there has been an accord and satisfaction; and there may be other grounds for relief, such as is a set-off and the like, or the estate of the deceased may be entitled in equity to a release or discharge, either in whole or in part, from the judgment, and, as to all these, I can find no warrant in the statute for the exercise of jurisdiction by the surrogate to adjudicate them. To affirm such a power would open the door to a wide field of jurisdiction in law and equity by Surrogates' Courts, not contemplated by the statute, inconsistent with the limited powers conferred, and, in some cases, subversive of the right of trial by jury."

⁸² *McNulty v. Hurd*, *supra*. See *Forman v. Lawrence*, 6 Sup. Ct. (T. & C.) 640; *Matter of Browne*, 35 Misc. 362.

⁸³ *Per Folger, J., Stilwell v. Carpenter*, 62 N. Y. 639. See the same case on a former appeal, 59 N. Y. 414.

evidence of the existence of the judgment.⁸⁴ The surrogate will not direct payment of a judgment pending an appeal from it by the representatives.⁸⁵

§ 693. **Same; claims not in judgment.**—Where, in such case, the representative sets forth a defense not palpably unfounded, or a counterclaim or an equitable set-off,⁸⁶ the Surrogate's Court has no jurisdiction to determine them;⁸⁷ if the validity, or the amount, of the claim is put in issue by the sworn answer of the representative, the court may look into the matter with a view of ascertaining whether there is a reasonable doubt of the validity of the claim, but no farther. Where the evidence is suspicious, the petition will be dismissed.⁸⁸ Although the representative may have, at one time, admitted the claim, his present contest deprives the court of jurisdiction to determine it.⁸⁹ But where he has allowed as a claim against the estate, the amount of a note made by testator upon which certain payments have been indorsed, such allowance implies that the note has not been paid, and that, by the payments as indorsed thereon, it has been kept in life as a claim against the maker.⁹⁰ If the representative merely disputes the fact of the allowance of the claim, it is not a dispute about its validity and legality which requires a petition for its payment to be dismissed, but the surrogate may decide whether the claim has been rejected or allowed, and if he decides it has been allowed, he may properly direct its payment.⁹¹ The answer ought to be in writing,⁹² and must set forth facts showing that the validity or legality of the

⁸⁴ *Archer v. Furniss*, 4 Redf. 88. 518; *Matter of Lyman*, 33 St. Rep. 531; 11 N. Y. Supp. 530.

⁸⁵ *Flagg v. Ruden*, 1 Bradf. 192; *Campbell v. Bruen*, id. 224.

⁸⁶ *Ruthven v. Patten*, 1 Robt. 416; 2 Abb. Pr. (N. S.) 121; *Jennings v. Phelps*, 1 Bradf. 485; *Mahoney v. Gunter*, 10 Abb. Pr. 431. Compare *Matter of Miles*, 170 N. Y. 74. But the denial of the application is not conclusive against the justness of the claim, and hence does not prevent the creditor from maintaining an action upon it. (*Fitzpatrick v. Brady*, 6 Hill, 581.) See *Butler v. Hempstead*, 18 Wend. 666; *Magee v. Vedder*, 6 Barb. 352.

⁸⁷ *Curtis v. Stilwell*, 32 Barb. 354.

⁸⁸ *Hall v. Dusenbury*, 4 Dem. 181; affd., 38 Hun. 125. See *Ashley v. Lamb*, 17 St. Rep. 889.

⁸⁹ *Tucker v. Tucker*, 4 Keyes, 136; *Cooper v. Felter*, 6 Lans. 485; *Levinness v. Cassebeer*, 3 Redf. 491; *Matter of Leslie*, id. 280; *Bevan v. Cooper*, 72 N. Y. 317; *Shakespeare v. Markham*, id. 400; *Stilwell v. Carpenter*, 59 id. 414; *McNulty v. Hurd*, 72 id.

⁹⁰ *Matter of Kellogg*, 104 N. Y. 648.

⁹¹ *Matter of Miles*, 170 N. Y. 75, thus overruling *Matter of Cowdrey*, 5 Dem. 453.

⁹² *Matter of McKiernan*, 4 Civ. Proc. Rep. 218. But see *Lambert v. Craft*, 98 N. Y. 342.

claim is doubtful and also a denial of its validity or legality; both conditions must concur.⁹³ It is not enough for the answer merely to deny the validity of the claim, without stating affirmatively the facts constituting a defense, or justifying a doubt of its legality. It is enough to warrant a dismissal of the motion that the answer avers that the demand is excessive in amount,—the issue so raised being one which the Surrogate's Court has no authority to determine.⁹⁴

§ 694. **Dismissal for want of assets.**—The court must likewise dismiss the proceeding “where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction.”⁹⁵ The burden is on the petitioner, not only to show the validity of the claim, but also to prove “to the satisfaction of the surrogate” that there is property of the estate applicable to its payment.⁹⁶ A petition which alleged the existence of a fund, but stated that the executor claimed the pendency of a suit respecting it, was held not to contain necessary facts and was dismissed.⁹⁷ Where the estate is insolvent, the court will not decree the payment on even a proportional part of the claim, without a settlement of the representative's account first had.⁹⁸ The surrogate may, on his own motion, order an accounting, but the petition in *this* proceeding cannot embody a prayer for an inter-

⁹³ *Lambert v. Craft*, 98 N. Y. 342; *Matter of Miller*, 70 Hun. 61; 23 N. Y. Supp. 1104. In that case, the petition set forth that the claim had been presented to the executors and had not been rejected or paid, and that the statutory time had elapsed. The executors orally denied the allegations. Proof was given of presentation of the claim to one of the executors, that it had not been rejected, and that the personal estate was sufficient to pay it. The executors did not ask for an accounting, or show the existence of other debts. Held, that the surrogate properly decreed payment. It was also held, that the petition need not set forth the facts which make out the debt. In *Matter of Fargo* (44 St. Rep. 812; 18 N. Y. Supp. 670), the claim was for damages arising from the alleged fraudulent sale of a printing house:

the answer set forth that the claim had been the subject of dispute, that the items thereof had been demanded so that it could be specifically rejected; that the sale had been made five years before the demand, and upon information and belief denied the legality of the claim.—Held, the petition was properly dismissed. See also *Matter of Whitehead*, 38 App. Div. 319; 56 N. Y. Supp. 989; *Matter of Stevenson*, 77 Hun. 203; 28 N. Y. Supp. 362.

⁹⁴ *Koch v. Alker*, 3 Dem. 148.

⁹⁵ Co. Civ. Proc., § 2722, as amended 1893 (former § 2718, subd. 2).

⁹⁶ *Lynch v. Patchen*, 3 Dem. 58. The inventory alone is insufficient. (*Matter of Corbett*, 90 Hun. 182; 35 N. Y. Supp. 945.)

⁹⁷ *Baylis v. Swartwout*, 4 Redf. 395. See *Matter of Bentley*, 16 Abb. Pr. 89.

⁹⁸ *McKeown v. Fagan*, 4 Redf. 320.

mediate accounting; nor will the representative be permitted, on the return of the citation, to file a petition for a settlement of his accounts.⁹⁹ The two proceedings are essentially distinct, and cannot be consolidated.¹ By analogy to the Statute of Limitations, the proceeding should be instituted within the same time in which suits of the same character are required to be commenced in a court of law or of equity.²

§ 695. Effect of decree.—Where the petition is dismissed, on either of the grounds stated, the decree must dismiss it “without prejudice to an action or an accounting, in behalf of the petitioner.”³ A decree, directing payment to a creditor of, or a person interested in, the estate or fund, or an order permitting a judgment creditor to issue an execution against an executor or administrator, is declared to be, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in the representative’s hands to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue.⁴ It has been questioned, however, whether an executor or administrator, acting in good faith, will be protected in paying a debt in full, pursuant to the surrogate’s decree, where it turns out that, by reason of losses or other causes, the remaining assets are insufficient to fully pay the other creditors. It seems that he will be protected.⁵ Such a decree, however, is provisional to this extent, that if it remains unexecuted when the general decree for the distribution of the estate among the creditors is made, it must, in case of insufficiency of assets to pay the debts in full, give way to a paramount authority providing for equality between the creditors; and the creditor obtaining the decree cannot claim a preference under it. It is not necessary in such case to procure the decree to be formally vacated.⁶

§ 696. Docketing and enforcing decree for payment.—Where the court directs the payment of the petitioner’s claim, the party in whose favor the decree is made may file a duly attested transcript in the office of the county clerk, who is thereupon required to enter it in his docket-book of judgments. The transcript should state all the particulars with respect to the decree which are re-

⁹⁹ Baylis v. Swartwout, 4 Redf. 395.

¹ Baylis v. Swartwout, 4 Redf. 395.

² McCartee v. Camel, 1 Barb. Ch.

455; House v. Agate, 3 Redf. 307; Matter of Denny, 28 St. Rep. 42; 8 N. Y. Supp. 229.

³ Co. Civ. Proc., § 2722, as amended 1893.

⁴ Co. Civ. Proc., § 2552. See Matter of Clark, 2 Abb. N. C. 208.

⁵ Thompson v. Taylor, 72 N. Y. 32.

⁶ Thompson v. Taylor, 72 N. Y. 32.

quired to be entered in the clerk's docket-book in the case of judgments of the Supreme Court. The docketing of such a decree has the same force and effect as a judgment of the Supreme Court; it may be assigned or satisfied, and the lien thereof may be suspended or discharged in the same manner as such a judgment.⁷ The decree may be enforced by execution,⁸ or by proceedings as for a contempt;⁹ which are fully described in a subsequent chapter.¹⁰ But the execution creditor cannot institute supplementary proceedings for the sequestration of the property of the estate to the payment of the judgment.¹¹

ARTICLE THIRD.

PAYMENT OF TRANSFER TAX.

§ 697. **History of the statute.**— A new scheme of taxation, known as the collateral inheritance tax, was inaugurated in this State by the act of June 10, 1885, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases,"¹² which was, to some extent, superseded by an amendatory act passed in 1887.¹³ Both these acts, with those amending the latter,¹⁴ were repealed in 1892, and a new act passed, which, while readopting the general scheme of the original statute, and its machinery for the assessment and collection of the tax, did much toward correcting "the singularly involved and obscure phraseology" of the original enactments. As it imposed the tax, within certain limits, upon direct, as well as collateral, inheritances, and other successions, the act was entitled "An act in relation to taxable transfers of property."¹⁵ In 1896, this act was itself repealed, and its provi-

⁷ Co. Civ. Proc., § 2553; revising L. 1837, c. 460, §§ 63, 64; L. 1844, c. 104, § 2.

⁸ Co. Civ. Proc., § 2554. It cannot be enforced by an order to show cause. (Berrian's Estate, 19 Daily Reg. No. 26.)

⁹ Co. Civ. Proc., § 2555.

¹⁰ See c. XXI, *post*.

¹¹ Collins v. Beebe, 54 Hun. 318. That was the case of a judgment recovered against a representative, and an execution issued by permission of the Surrogate's Court.

¹² L. 1885, c. 483. The Act of 1885 has been declared not to be unconstitutional. (Matter of McPherson, 104 N. Y. 306.)

¹³ L. 1887, c. 713.

¹⁴ L. 1888, c. 307, and c. 479; L. 1891, c. 215.

¹⁵ L. 1892, c. 399. The Act of 1885 went into effect on June 30, of that year, and did not apply to property passing under the will of one who died after its passage, but before that date. (Matter of Howe, 112 N. Y. 100; overruling Matter of Chardavoyne, 5 Dem. 466.) Its provisions continued in force until the Act of 1887 went into effect (Warriner v. People, 6 Dem. 211), that is, immediately on the governor's signing it. (Matter of Kemeys, 56 Hun. 117; 9 N. Y. Supp. 182.) The effect of the repealing clause in the Act of 1892, is declared by the statute itself. So far as its provisions are substantially

sions incorporated into the General Tax Law, which, with certain amendments since made, is the only existing statute embracing this subject;¹⁶ and while many of the decisions, to be referred to, were made under the former statute, their applicability to the present act will be easily discerned.

§ 698. Taxable transfers.— With certain exceptions and limitations hereafter mentioned, a tax at the rate of five per cent. upon its clear market value is imposed on any real or personal property, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, not exempt by law from taxation on real or personal property, in the following cases:

“1. When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.

“2. When the transfer is by will or intestate law, of property within the State, and the decedent was a nonresident of the State at the time of his death.

“3. When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this State, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor;¹⁷ or intended

the same as those of laws existing on April 30, 1892, they “shall be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments,” and “references, in laws not repealed, to provisions of law incorporated into this act, and not repealed, shall be construed as applying to the provisions so incorporated.” Such also was the effect of the Act of 1887 upon that of 1885, as well as of the several acts amendatory of that of 1887, except that new or changed provisions were to be understood as having been enacted at the time the later act took effect. (Matter of Miller, 110 N. Y. 223; Matter of Arnett, 49 Hun, 599.) Compare Matter of Kemeys, *supra*. It was further provided by the Act of 1892, that all rights acquired or liabilities incurred under any of the acts thereby repealed, should not be impaired or affected, but that provision was not incorporated into the Act of 1896, and hence is no longer in force. It may be said, however, that proceedings instituted after the

present law went into effect, are regulated by that law, though the law in existence at the decedent's death must govern, as to rights accrued and liabilities incurred. (Matter of Sloane, 154 N. Y. 109; Matter of Sterling, 9 Misc. 224.) The right of the State to the tax accrues at the date of the death of the decedent, and not at that of its actual imposition, and hence is not affected by intervening legislation. (Matter of Prime, 64 Hun, 50; *affd.*, 136 N. Y. 347.) See Moore v. Mausert, 49 *id.* 332; People v. Supervisors, 67 *id.* 109; Matter of Johnson, 47 St. Rep. 391; Matter of Davis, 149 N. Y. 539.

¹⁶ L. 1896, c. 908, § 220 *et seq.*; L. 1897, c. 284; L. 1901, c. 173.

¹⁷ The words “in contemplation of death” refer to a gift *causa mortis*. (Matter of Cornell, 66 App. Div. 162; 73 N. Y. Supp. 32; 170 N. Y. 423.) A gift *causa mortis*, delivered to a person other than the beneficiary, is subject to the tax. (Matter of Crosby, 46 St. Rep. 442.) Such a gift, made while the Act of 1887 was in force, is taxable. (Matter of Edwards, 85 Hun, 436;

to take effect, in possession or enjoyment, at or after such death " (§ 220).

§ 699. "Estate" and "property," defined.—The words "estate" and "property," as used in the statute, mean the same thing, to wit: "the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article, and not as the property or interest therein passing or transferred to the individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees, and shall include all property or interest therein, whether situated within or without this State."¹⁸ The definition includes an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent estate, or a remainder or reversion or other expectancy, real or personal.¹⁹

§ 699a. Retroactive effect of act.—The statute declares that "such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made *before or after* the passage of this act" (§ 220).²⁰ and that "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property, to which such appoint-

32 N. Y. Supp. 901.) For cases of transfers of property held to have been made in contemplation of death, see *Matter of Green*, 153 N. Y. 223; *Matter of Ogsbury*, 7 App. Div. 71; *Matter of Bostwick*, 160 N. Y. 489; *Matter of Cornell*, 170 id. 423; *Matter of Barlow*, 30 Misc. 27; *Matter of Brandreth*, 169 N. Y. 437; *Matter of Sherer*, 36 Misc. 502; *Matter of Miller*, 37 id. 449. *Contra*, *Matter of Mahlstedt*, 67 App. Div. 148; *Matter of Bullard*, 37 Misc. 663; *Matter of Baker*, 38 id. 151; *Matter of Cray*, 30 id. 72; *Matter of Thorne*, 44 App. Div. 8; 162 N. Y. 238; *Matter of Masury*, 28 App. Div. 580; *affd.*, 159 N. Y. 532; *Matter of Spaulding*, 49 App. Div. 54; *affd.*, 163 N. Y. 607; *Matter of Edgerton*, 35 App. Div. 125; *affd.*, 158 N. Y. 671.

¹⁸ L. 1896, c. 908, § 242, as amended by L. 1898, c. 88. Under the Act of 1885, the word "estate" meant the

interest of the beneficiary. (*Matter of Sterling*, 9 Misc. 224.)

¹⁹ L. 1896, c. 908, § 230, as amended by L. 1901, c. 173.

²⁰ This provision was doubtless intended to meet the judicial interpretation given to the former statutes, that estates passing prior to their passage, though subject to a prior estate which did not fall in until after the statute became operative, were not subject to the tax. (*Matter of Cogswell*, 4 Dem. 248; *Matter of Brooks*, 6 id. 165; *Matter of Hendricks*, 1 Connolly, 301.) See *Matter of Travis*, 19 Misc. 393; 44 N. Y. Supp. 349; *Matter of Moore*, 90 Hun. 162; 35 N. Y. Supp. 782; *Tallmadge v. Seaman*, 147 N. Y. 69. In the last case it was said that the clause quoted in the text refers only to gifts *causa mortis*, and not to transfers by will or intestacy.

ment relates, belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property, to which such power related, had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.”²¹

§ 700. Rule of construction.— Where the question is, whether a certain subject of taxation is embraced within the statute, the rule has been stated to be that the statute should be strictly construed in favor of the citizen, since it assumes to impose a special burden upon particular property and persons, and is not a general tax;²² but this rule does not apply to a case where a particular subject is within the scope of the statute, and exemption from taxation is claimed on the ground that the Legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance. In such case, a liberal, rather than a strict, construction should be applied, and if, by a fair and reasonable construction of its provisions, the purpose of the statute can be carried out, that interpretation ought to be given, to effect the legislative intent.²³

§ 701. Subject of the tax.— The thing taxed is the *transfer*, that is, the devolution or succession, of property, and not the property itself;²⁴ it is a tax on the privilege of succeeding to

²¹ L. 1896, c. 908, § 220, as amended by L. 1897, c. 284. Prior to this amendment, where a power of appointment was not exercised, a gift over took effect under the will, and was not taxable. (Matter of Langdon, 153 N. Y. 6.) See § 723, *post*.

²² Matter of Enston, 113 N. Y. 174; Matter of Vassar, 127 id. 1; 37 St. Rep. 239; Matter of Becker, 26 Misc. 633; 57 N. Y. Supp. 940.

²³ Matter of Stewart, 131 N. Y. 274.

²⁴ Matter of McPherson, 104 N. Y. 306. Hence, a legacy payable out of the proceeds of United States government bonds is subject to the tax, because it is the passing of the bonds,

and not the property itself, which is taxable. (Matter of Howard, 5 Dem. 483; Matter of Tuigg, 15 N. Y. Supp. 548; Matter of Sherman, 153 N. Y. 1; Matter of Whiting, 150 id. 27.) Under the original section (L. 1892, c. 399, § 22), declaring that the word “property” applied to that “over which this State has any jurisdiction for the purposes of taxation.” United States bonds, themselves, were not taxable. But by L. 1898, c. 88, the clause quoted was stricken out, so that now it would seem that such bonds are subject to the tax. (Matter of Plummer, 30 Misc. 19; 62 N. Y. Supp. 1024.) Under the former statute

property on the death of the owner. The word "transfer," as used in the statute, is declared "to include the passing of property, or any interest therein in possession or enjoyment, present or future, by inheritance, descent, bequest, grant, deed, bargain, sale or gift in the manner" prescribed in the statute (§ 242). The words *possession* and *enjoyment* mean the same thing. The possession need not be the actual, immediate custody or occupancy of the thing, but may be a constructive possession, that is, a possession which exists in contemplation of law. Hence, if a devisee or heir has a constructive possession, as of an interest in real property in course of partition, or in the moneys in court realized on a partition sale, his interest therein is assessable under the statute.²⁵

§ 702. Taxability as affected by location of property.—Under the former statute, the tax was upon the succession to property "within this State," hence real property situated in another State was not subject to the tax here;²⁶ nor were the proceeds of such property, though equitably converted, and sold under the direction of the will, and brought here for distribution.²⁷ But personal property of a resident is subject to the tax, wherever situated, upon the theory that such property follows the domicile of the owner.²⁸

§ 703. Taxability as affected by residence of testator, intestate, etc.—The statute of 1885 made no discrimination between the property of intestates and the property of testators, as regards the liability of the one or the other to the payment of the tax.²⁹ The question early arose, whether by the statute of 1885, before its amendment, a tax was intended to be imposed upon a succession of

(and the same rule now applies) a bequest to the United States was taxable. (*Matter of Merriam*, 141 N. Y. 479; *Matter of Cullom*, 5 Misc. 173.)

²⁵ *Estate of Welsh*, N. Y. Law J., July 28, 1888; *Matter of Stiger*, 7 Misc. 268; 28 N. Y. Supp. 163. The transfer of stock to a daughter.—Held taxable, though she survived her father only three days, and never received any dividends, and a transfer tax would also be imposed upon succession to her legatees. (*Matter of Borup*, 28 Misc. 474; 59 N. Y. Supp. 1097.) See *Matter of Chabot*, 44 App. Div. 340; 60 N. Y. Supp. 927; *aff'd.*, 167 N. Y. 280. In *Matter of Jones* (28 Misc. 356), the widow of the decedent, having a life estate, died before the appraisal of the transfer tax, which was governed

by L. 1887, c. 713. Held, that it was erroneous to calculate the value of her interest as measured by the term of its actual duration, but the entire property by which that interest was supported should be appraised, and the interest should be valued by the methods employed at the time by the superintendent of insurance. S. P., *Matter of Hall*, 36 Misc. 618.

²⁶ *Lorillard v. People* (Wolfe Estate), 6 Dem. 268; 19 St. Rep. 263; *Matter of Dewey*, N. Y. Law J., Oct. 21, 1889.

²⁷ *Matter of Swift*, 137 N. Y. 77.

²⁸ *Matter of Swift*, *supra*; *Matter of Dingman*, 66 App. Div. 228; 72 N. Y. Supp. 694.

²⁹ *Matter of Howard*, 5 Dem. 483.

personal property in this State under the will of a nonresident testator. After much consideration, by the highest authority, it was held that such was not the intention of the Legislature; that, as to personal property, the act applied only to property within this State belonging to a resident of this State; that personal property belonging to a nonresident, though physically here, could not in law be said to be "within this State," because, by the general rule, such property attends its owner and has its *situs* at his domicile.³⁰

By the amendatory act of 1887, however, the tax was laid upon the passing of property from a resident of this State, *or from a nonresident*, if the property or any part thereof should be within the State; and the intention of this amendment was interpreted to be to impose the tax upon the property of a nonresident *testator or grantor*, actually and physically within this State.³¹ As to the personal property of nonresident *intestates*, it was held that so much of it, at least, as was habitually kept or invested by him here, at the time of his death, was liable to the tax, under the foregoing amendment.³² By the scheme of the Act of 1892, the trans-

³⁰ Matter of Enston, 113 N. Y. 174. "It is true that this is a fiction of law, but it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent. * * * There is nothing in the Act of 1885 from which it can be inferred that the Legislature meant so far to depart from its general system and policy of taxation as to impose here a succession tax upon property thus situated. It was dealing with taxation upon property of persons domiciled here, and not upon property of nonresidents, which had no *situs* in this State." (Ib., per Andrews, J.)

³¹ Matter of Clark, 29 St. Rep. 650; 9 N. Y. Supp. 444; Estate of Vinot, 7 id. 517; 26 St. Rep. 610. Compare Matter of Hall, 29 St. Rep. 367; 8 N. Y. Supp. 556; Matter of James, 144 N. Y. 6; 62 St. Rep. 855. In Matter of Embury (19 App. Div. 214; 45 N. Y. Supp. 881; affd., 154 N. Y. 746) it was said that the jurisdiction of Surrogates' Courts, under the amendment of 1887, was limited, as to nonresidents, to cases in which a nonresident decedent had left real estate within the county, and did not apply to personal property which the

executors of a nonresident decedent have removed from the State. That as to residents the tax was upon the right of succession, but that as to nonresidents there can be no succession tax, the right of a State to impose a tax being based on its dominion over the property situated within its territory. Compare Matter of Pettit, 65 App. Div. 30; Matter of Hubbard, 21 Misc. 566; Matter of Crerar, 31 id. 481.

³² Matter of Romaine, 127 N. Y. 80; 38 St. Rep. 76. In that case, the court said: "Where the property of a nonresident is habitually kept, even for safety, in this State, we think that the statute applies both in letter and spirit. Such property is within this State in every reasonable sense, receives the protection of its laws and has every advantage from government, for the support of which taxes are laid, that it would have if it belonged to a resident. We think that a fair construction of the act permits no distinction as to such property, based simply upon the residence of the deceased owner." See Matter of Embury, *supra*. It had been held, that a taxable intestate succession, under the Act of 1885, was a succession by the intestate laws of

fer of the property of a nonresident "by will or intestate law"—*i. e.*, of this State or the State of his domicile,—or "by deed, grant, bargain, sale or gift made in contemplation of death," etc., is subject to the tax; provided the property is "within this State." The legislative intent seems to be that, for the purpose of taxation, the law of the place where the property actually is shall govern, while for the general purpose of administration and distribution, the law of decedent's domicile will continue to govern.³³ But it does not seem to have been the intention to include property of a nonresident, casually brought into the State for a temporary purpose.³⁴

§ 704. **Transfers under five hundred dollars in value.**—By the former statute, "an estate valued at a less sum than five hundred dollars was exempt from the tax." "An estate valued" was held to mean *not* the estate of the decedent, but the estate or interest of the legatee or other taker; therefore, no tax was imposed upon a particular legacy which did not amount to, or exceed, that sum in value.³⁵

this State. (Matter of Tulane, 51 Hun. 213; 4 N. Y. Supp. 36.) By L. 1891, c. 215, the operation of the Act of 1885 was extended to property of nonresidents, within this State at time of death. It was held, under this amendatory statute, that notes secured by mortgages of land in another State, and owned by a resident of this State, at the time of his death, were subject to the tax, and it was not material that the notes and mortgages were in the hands of the owner's agent in the State where the land was situated. (Matter of Corning, 23 N. Y. Supp. 285.) In Matter of Thomas (3 Misc. 388), the personal estate of testatrix consisted exclusively of her distributive share in the estate of a deceased sister, who resided in the State of Ohio at the time of her death, no part of which came into the hands of the testatrix before her death. Held, that that portion of her estate was not taxable. Also held, that certificates of stock of corporations created under the laws of other States owned by a decedent at the time of his death were not "property within this State," and hence not subject to taxation under the Act of 1885, or amendatory acts. But in Matter of Boudon (N. Y. Law J., Mar. 1, 1892), it was held, under the authority of the Romaine case (*supra*), that such stock was taxa-

ble. Compare Matter of Phipps, 77 Hun. 325; 28 N. Y. Supp. 330; *affd.*, 143 N. Y. 641.

³³ See *Hardenberg v. Manning*, 4 Dem. 437. Thus money of a nonresident deposited here is subject to the tax (Matter of Houdayer, 150 N. Y. 37; Matter of Burr, 16 Misc. 89; Matter of Blackstone, 66 App. Div. 127; 74 N. Y. Supp. 508); also bonds and stock of domestic, and bonds of foreign, corporations. (Matter of Whiting, 150 N. Y. 27; Matter of Morgan, *id.* 35; Matter of Pullman, 46 App. Div. 574.) But bonds of domestic corporations held at the decedent's domicile are not taxable (Matter of Bronson, 150 N. Y. 1), otherwise as to stock of such corporations. (*Ib.*; Matter of Kennedy, 20 Misc. 531; Matter of Newcomb, 71 App. Div. 606.) See, as to life insurance policies, Matter of Abbett, 29 Misc. 567; debts due from nonresident (Matter of Bentley, 31 Misc. 656); interest in firm doing business here (Matter of King, 30 Misc. 575); mortgages on New York real estate. (Matter of Preston, 37 Misc. 236.)

³⁴ Matter of Leopold, 35 Misc. 369; 71 N. Y. Supp. 1032. See Matter of Romaine, 127 N. Y. 80; Matter of Enston, 113 *id.* 182.

³⁵ *McVean v. Shelden*, 48 Hun. 163; Matter of Miller, 5 Dem. 132; Matter of Hopkins, 6 *id.* 1.

On the other hand, an inheritance or a testamentary gift of a value exceeding that sum was taxable to the extent of its whole value, it not being the intention of the Legislature to exempt *all* taxable estates to the extent of the sum named, but merely to limit the estates upon which the tax should be imposed.³⁶ The language of the Act of 1892 differs, in this regard, from the Act of 1885,—the tax being laid “upon the transfer of *any property*” of the value of five hundred dollars or over, to persons not exempt, etc. Moreover, “*the property*” means “the property or interest therein of the testator,” and not “the property or interest therein passing or transferred to individual legatees,” etc. It is not, therefore, the property passing to an individual legatee or distributee which must be less than five hundred dollars, in order to entitle the same to exemption, but the amount of all property passing to legatees or distributees of the unexempted class which must be less than five hundred dollars.³⁷

§ 705. Express exemptions and limitations.—The tax attaches only to transfers of property “of the value of five hundred dollars or more” (§ 220), no matter to what description of person the property passes. Certain classes of persons are expressly named (besides those who are already “exempted, by law, from taxation”), transfers to whom are not taxed, or else the amount of tax is reduced in amount. The statute provides that “when the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother,³⁸ sister, wife or widow of a son or the husband of a daughter,³⁹ or any child or children adopted as such in conformity

³⁶ Matter of Sherwell, 125 N. Y. 376; 35 St. Rep. 403. In that case, the surrogate had held that a legatee was entitled absolutely to an exemption of \$500 from a legacy of a greater sum, the balance only being assessable for taxation. (32 St. Rep. 1020.) In Matter of Peck (2 Connoly, 201; 24 Abb. N. C. 365), Coffin, S., of Westchester, held, that as a legacy is not payable until the expiration of a year, its “fair market or cash value” at testator’s death could not be said to be its face value, but what it will be worth when the legatee is entitled to receive it and may compel its payment or delivery; hence, that a cash legacy of \$500 was to be appraised at that sum less a year’s interest. See also Matter of Underhill, 2 Connoly, 262; 20 N. Y. Supp. 134. But in Matter of

Bird (2 Connoly, 376; 32 St. Rep. 899), Ransom, S., of New York, held otherwise.

³⁷ Matter of Bliss, 6 App. Div. 192; 39 N. Y. Supp. 875; Matter of Flynn, N. Y. Law J., Feb. 25, 1893. It was held, in that case, that as the property passing to those not exempt was over \$1,800 in value, each of four legacies of \$100 to strangers were subject to the tax.

³⁸ In Matter of Farley (15 St. Rep. 727), testatrix bequeathed all her property to her executor, individually, agreeing with him at the time of the execution of the will that the bequest should be in trust for her brother. Held, such trust was within the exemption of the statute.

³⁹ A legacy to a husband of a daughter is not subject to the tax,

with the laws of this State, of the decedent, grantor, donor or vendor, or to any child⁴⁰ to whom any such decedent, grantor, donor or vendor, for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter, or to any lineal descendant⁴¹ of such decedent, grantor, donor or vendor born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property."⁴²

It is important to observe, in this connection, that it is the aggregate amount of personal property of the decedent passing to taxable persons, which determines whether the tax shall be imposed or not. Hence, if *all* the legacies or distributive shares, passing to persons of that class, aggregate ten thousand dollars or more, any one of such legacies or shares, though less than that amount, is subject to the tax.⁴³

A transfer of real property to one of the exempted class is also within the terms of this exemption and limitation, and although a testamentary distribution of real property requires its conversion into personalty, it will not be taxable as personalty.⁴⁴

§ 706. Adopted and quasi-adopted children.— Adopted children were not included in the exempted class by the Act of 1885, but were, by the Act of 1887;⁴⁵ the provisions of which latter act, in

although the daughter died before the testator. (Matter of Woolsey, 19 Abb. N. C. 232; s. c. as Matter of McGarvey, 6 Dem. 145; Matter of Ray, 13 Misc. 480.)

⁴⁰ The word "child" was, by L. 1898, c. 88, inserted in place of the word "person," doubtless to meet the decisions of the courts that the exemption was not limited to illegitimate children. (Matter of Beach, 154 N. Y. 242; overruling Matter of Hunt, 86 Hun, 232; Matter of Nichols, 91 id. 140; Matter of Stilwell, 34 N. Y. Supp. 1123.)

⁴¹ The term "lineal descendants," as used in the statute, includes only the direct descendants of the testator or intestate, and does not include the children of the brothers and sisters of the deceased. (Matter of Miller, 5 Dem. 132; affd., 45 Hun, 244; Matter of Smith, 5 Dem. 90.)

⁴² L. 1896, c. 908, § 221, as amended L. 1898, c. 88; L. 1901, c. 458.

⁴³ Matter of Corbett, 171 N. Y. 516; Matter of Hoffman, 143 id. 327; Matter of Taylor, 6 Misc. 277; Matter of Birdsall, 22 id. 180.

⁴⁴ Matter of Sutton, 3 App. Div. 208; affd., 149 N. Y. 618; Matter of Cobb, 14 Misc. 409. Compare Matter of Wheeler, 1-id. 450; 22 N. Y. Supp. 1075; Matter of Mills, 32 Misc. 493. A leasehold interest is personal property under the exemption clause, although improvements by the lessee are taxable as realty under the Tax Law. (Matter of Althouse, 63 App. Div. 252; affd., 168 N. Y. 670.)

⁴⁵ It was accordingly held, that the interests of adopted children, which became vested after the Act of 1885 took effect, were subject to the tax, notwithstanding the tax was not formally assessed until after the Act

this regard, were readopted by the Acts of 1892, 1896, and (with certain modifications) the Act of 1901. The adoption must have been made "in conformity with the laws of this State." This does not require the proceedings for adoption to have been instituted in, or under the laws of, this State; hence, where the adoption was effected under proceedings in another State, which substantially conform to the requirements of our own statute, in that regard, the person so adopted is within the operation of the exemption.⁴⁶

"*The relation of a parent*," within the meaning of the statute, may arise by circumstances surrounding the commencement and continuance of such relation; it was the intent of the statute to give this class of cases the benefit of its exempting clause. The statute does not suggest the character of proof, nor require the acknowledgment of the parental relation to be in writing or by declarations in public, or to any person or persons; so that, if the evidence conclusively shows that the parties understood that their relations were parental, and that they thus lived together in this belief, discharging their duties and obligations to each other upon the theory that such relations existed, such manner of life is a mutual acknowledgment of the relation which each sustains to the other.⁴⁷ The full term of ten years of such acknowledged relationship must have been fully completed, in order to secure the benefit of the exemption.⁴⁸

of 1887, with its enlarged exemption, went into effect. (Matter of Ryan, 18 St. Rep. 992; 3 N. Y. Supp. 136.) But by the Act of 1889 (c. 479) the Act of 1887 (including, of course, the exemption clause) was made applicable "to all estates of deceased persons where no assessment of the tax has been made to which such estate or estates are liable." The effect of this amendment was to exempt from taxation legacies to adopted children in cases where testator died prior to the passage of the Act of 1887, but no assessment of the tax has been made, and the order thereon entered, prior to June 14, 1889. (Matter of Kemeys, 56 Hun. 117.) See Matter of Thomas, 3 Misc. 388; 24 N. Y. Supp. 713. See § 699a, *ante*.

⁴⁶ Matter of Butler, 58 Hun. 400; 12 N. Y. Supp. 201. A legacy to the child of an adopted daughter is not exempt. (Matter of Bird, 2 Connolly, 376; 32 St. Rep. 899; Matter of Moore, 90 Hun. 162; 35 N. Y. Supp. 782;

Matter of Fisch, 34 Misc. 146; 69 N. Y. Supp. 493.)

⁴⁷ Matter of Spencer, 1 Connolly, 208; 21 St. Rep. 145. In that case, a niece for many years had lived with the testatrix and had been supported by her, in the apparent relation of parent and adopted child, although the parties were never addressed by each other as "mother" and "daughter," but it was apparent that the niece was treated in all respects as if she had been an adopted child; the legacy was held exempt from the tax. See Matter of Sweetland, 47 St. Rep. 287; 20 N. Y. Supp. 310; Matter of Birdsall, 22 Misc. 180; 49 N. Y. Supp. 450; Matter of Capron, 30 St. Rep. 948; 10 N. Y. Supp. 23; Matter of Wheeler, 1 Misc. 450.

⁴⁸ Where the ten years' provision had not been complied with, as the adopted child died at the age of 9 years, after living with the testator about seven, the legacy is not exempt. (Matter of Gardner, N. Y. Law J., March 4, 1889.)

§ 707. Bishops and religious corporations.—"Any property heretofore or hereafter devised or bequeathed to any person who is a bishop⁴⁹ or to any religious corporation, including corporations organized exclusively for bible or tract purposes," is declared to be exempted from, and not subject to, the provisions of the act.⁵⁰ Religious corporations were included in the list of corporations declared to be exempt from the operation of the collateral inheritance tax, by a general statute, passed in 1890; but before that act, only the building used for public worship was exempt from public tax; hence a legacy to a church organization was held not exempt from the legacy tax.⁵¹ And so, a bequest of money to a church corporation toward the building of a new church, or the renovation of its present one, was held to be subject to the tax.⁵²

§ 708. Charitable, educational, and literary institutions.—The statute also exempts from taxation personal property, other than money or securities, bequeathed to a corporation or association organized exclusively for the moral or mental improvement of men or women or for charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, cemetery or historical purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member, or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper bene-

⁴⁹ Including an archbishop or cardinal archbishop (*Matter of Kelly*, 29 Misc. 169), though residing without the State. (*Matter of Palmer*, 33 App. Div. 307; *affd.*, 158 N. Y. 669.) The Young Men's Christian Association is not a religious corporation. (*Matter of Watson*, 171 N. Y. 256; *Matter of Fay*, 37 Misc. 532.)

⁵⁰ L. 1896, c. 908, § 221, as amended L. 1901, c. 458.

⁵¹ *Matter of Kennedy*, N. Y. Law J., April 25, 1890.

⁵² *Matter of Van Kleeck*, 121 N. Y. 701; 31 St. Rep. 896. L. 1890, c. 398, exempting legacies to religious corporations from taxation, is prospective in its operation, and does not relieve from payment of a tax which became due and payable before its

passage. (*Ib.*) In *Matter of Murphy* (N. Y. Law J., June 22, 1893), it appeared by the will, in connection with the proof furnished by the executors as to the understanding between the executors and the testator, which was the consideration influencing deceased to make the bequest in the absolute form in which it appears, a valid parol trust was created, enforceable in equity in favor of the various religious corporations which were to share in the proportions specified. Held, that these corporations were exempt under the Act of 1892, citing *Lynch v. Loretta*, 4 Dem. 318; *Willets v. Willets*, 35 Hun. 405; *Matter of O'Hara*, 95 N. Y. 413; *Matter of Farley*, 15 St. Rep. 727; *Matter of Havens*, 17 id. 837.

ficiaries of its strictly charitable purposes; or, if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one or more of such purposes.⁵³ This exemption only applies to the property of domestic, not to that of foreign, corporations.⁵⁴

The charter, or general statute, under which an exemption from taxation is claimed, must be a charter granted by, or a law in operation in, this State. It is no ground for exempting a foreign corporation that it is exempt from taxation by the laws of the State of its origin.⁵⁵

§ 709. Property "exempt by law."—The Acts of 1885 and 1887 exempted from their operation "the societies, corporations and institutions now exempted by law from taxation;" the Act of 1896 lays the tax on all transfers "to persons or corporations not exempt by law from taxation on real or personal property" (§ 220). "Exempt by law" means exempt by some general statute applicable to specified classes of persons or corporations whose property is declared to be exempt from taxation, or by some special statute which exempts a particular person or corporation therein mentioned. Such a general statute is the Tax Law of 1896⁵⁶ which

⁵³ L. 1896, c. 908, § 221, as amended L. 1901, c. 458. The corporation need not actually be in existence at the death of the testator. Thus, where testator gave his residuary estate to trustees for the purpose of founding, erecting, and maintaining a home for the aged; such estate to be held by the trustees until the termination of two lives in being, when they were to execute the trust. Held, that such residuary estate actually in the hands of the trustees was, under L. 1893, c. 701, regulating gifts for charitable purposes, to be considered as if in the possession of a corporation already formed under the will, or in the control of the Supreme Court, for the purpose of carrying out testator's charitable scheme, and, therefore, exempt at the time of testator's death. (*Matter of Graves*, 171 N. Y. 40.) Compare *Matter of Chesebrough*, 34 Misc. 365.

⁵⁴ *Matter of Smith*, 77 Hun. 134; *Matter of Taylor*, 80 id. 589; *Matter of Balleis*, 144 N. Y. 132; *Matter of Fayerweather*, 62 St. Rep. 74; *Matter*

of Wolfe, 23 Misc. 439; *Matter of Prime*, 136 N. Y. 347. It was further held, in that case, that the provisions of L. 1887, c. 376, enabling a designated foreign corporation to take and hold property in this State, did not entitle it to such exemption.

⁵⁵ *Catlin v. Trinity College*, 49 Hun. 278; 22 Abb. N. C. 28; *affd.*, 113 N. Y. 133. See *Catlin v. St. Paul's M. E. Church*, 17 St. Rep. 707; *Matter of McCoskey*, *id.* 829; 6 Dem. 438; *Matter of Tuigg*, 15 N. Y. Supp. 548.

⁵⁶ L. 1896, c. 908, § 4, subd. 7, repealing 1 R. S. 388, § 4; L. 1866, c. 136; L. 1883, c. 397; L. 1884, c. 537; L. 1892, c. 713. The exemption in the Act of 1887, of bequests to "the societies, corporations, and institutions now exempted by law from taxation" did not apply to bequests to municipal corporations. (*Matter of Hamilton*, 148 N. Y. 310.) But a bequest to a city of a sum of money to be used for the construction of a library building to be open to the public, is exempt from the transfer tax. (*Matter of Thrall*, 157 N. Y. 46.) The pro-

exempted certain property from taxation. Previous to 1900, that statute was applicable to cases of taxable transfers;⁵⁷ but in that year an act was passed by which it was provided that the exemptions enumerated in the Tax Law should not apply.⁵⁸ That statute, however, is not retroactive,⁵⁹ so that transfers of property to those persons and corporations formerly exempt, and which vested prior to the Act of 1900, are not subject to the tax;⁶⁰ and, *per contra*, transfers which took effect after the act are not exempt.⁶¹ Another statute of general application exempts the cemetery lands and property of duly organized cemetery associations from public tax so long as the same shall be dedicated to the purposes of a cemetery.⁶²

§ 710. Application of the statute.— The exemptions granted to almshouses and the like, and to the personal property of incorporated companies not liable to taxation upon capital, are those which have been most frequently claimed by corporations sought to be charged either with the collateral inheritance tax, under the Acts of 1885 and 1887, or with the transfer tax, under the Acts of 1892 and 1896. To entitle a corporation to immunity from the tax under either of these statutes, if exempt at all, it is not necessary that its own charter or act of incorporation should expressly exempt it: it is enough if it belongs to the class of institutions declared exempt by the general statute.⁶³ It ought to be

vision of the Revised Statutes exempting buildings erected for the use of a college or other seminary of learning, churches, schoolhouses, courthouses, jails, etc., was not applicable in the city of New York, "unless the same shall be exclusively used for such purposes and exclusively the property of a religious society." (L. 1882, c. 410, § 827.) See *Young Men's Christian Assn. v. Mayor, etc.*, of New York, 113 N. Y. 189. As to schoolhouses, see *Church of St. Monica v. Mayor, etc.*, 119 id. 91. For institutions in New York city exempt from taxation, see L. 1882, c. 410, §§ 824, 827. As to the exemption of real and personal property of public libraries under the Revised Statutes, see *Matter of Lenox*, 31 St. Rep. 959; 9 N. Y. Supp. 895; *American Geographical Society v. Commissioners, etc.*, 11 Hun. 505. Under the original statute, churches and colleges were not included within the term "incorporated companies." (*Catlin v. Trinity College*, 113 N. Y. 133; *Young Men's Christian Assn. v. Mayor,*

etc., of New York, *supra*; *Matter of Vanderbilt*, 10 N. Y. Supp. 239.)

⁵⁷ *Matter of Kimberly*, 27 App. Div. 470; 50 N. Y. Supp. 586.

⁵⁸ L. 1900, c. 382.

⁵⁹ *Matter of Graves*, 171 N. Y. 40; *Matter of Vanderbilt*, 68 App. Div. 27; 74 N. Y. Supp. 450.

⁶⁰ *Matter of Vanderbilt, supra*; *Matter of Graves, supra*.

⁶¹ *Matter of Huntington*, 168 N. Y. 399; *Matter of Howell*, 34 Misc. 40; 69 N. Y. Supp. 505; *Matter of Crouse*, 34 Misc. 670; 70 N. Y. Supp. 731; *Matter of Watson*, 171 N. Y. 256.

⁶² L. 1847, c. 133, § 10, as amended L. 1877, c. 31. Hence a legacy to such a cemetery association was held exempt from the collateral inheritance tax of 1887. (*Matter of Dewey*, N. Y. Law J., Oct. 21, 1889.)

⁶³ *Matter of Miller*, 5 Dem. 132; *Matter of Hunter*, 22 Abb. N. C. 24; *Matter of Kavanagh*, 5 N. Y. Supp. 676; *Matter of Curtis*, 1 Connolly, 471; 7 N. Y. Supp. 207. See *Colored Orphans v. Mayor, etc.*, 104 N. Y. 581;

noted that the exemption clause of the Act of 1892 differed from that of the former acts in this, that by the latter act, a person or corporation claiming to be "exempt by law" must have been exempt from taxation "on *both* real and personal property." It was held, under the Act of 1887, that it was not necessary that the corporation should enjoy complete immunity from taxation; hence, a corporation whose charter exempted it from taxation, on its personal property only, was exempt from the collateral inheritance tax,⁶⁴ and this distinction is recognized in the present statute.

§ 711. **The almshouse exemption.**—A great variety of institutions have claimed and been allowed exemption, as coming within the meaning of an almshouse, as that word was used in the original statute,—such as institutions for the blind,⁶⁵ homes for the aged and indigent,⁶⁶ for consumptives,⁶⁷ and incurables,⁶⁸ and hospitals,⁶⁹ orphan asylums, children's aid societies,⁷⁰ etc. In

Matter of Forrester, 35 St. Rep. 776; 12 N. Y. Supp. 774. Hence, a legacy to a society which conducts an institution, which is exempt as being a house of industry, is exempt from the inheritance tax, although there is no special exemption from taxation in its charter. (Matter of Herr, 55 Hun, 167; 7 N. Y. Supp. 852.) But a corporation which does not fall within any of the general clauses of exemption specified in the general statutes, and which is not exempt by the act under which it was created, is liable to the collateral inheritance tax under the Act of 1885. (Matter of Board of Foreign Missions, 58 Hun, 116; 11 N. Y. Supp. 310.) As, by L. 1884, c. 65, the trustees of Columbia College were "authorized and empowered to take by purchase, gift, grant, devise, or any other manner, and to hold any real estate which, when acquired, shall be used for, or the income thereof shall be applied to, the proper conduct and support of the several departments of education heretofore established, or hereafter to be established, by such trustees."—Held, that a bequest to that institution was not subject to the tax. (Matter of Da Costa, N. Y. Law J., March 12, 1891.)

⁶⁴ Matter of Vassar, 127 N. Y. 1; 37 St. Rep. 239. In Matter of Forrester (35 St. Rep. 776; 12 N. Y. Supp. 774), decided in 1890, an amendment to the charter of a church home, a pure charity, exempted it from taxation on its real estate. Held, that as

this excluded the personal property from exemption, a bequest to it was not exempt from the collateral inheritance tax under the Act of 1887. "If the case stood upon the Revised Statutes alone, there would be little difficulty in sustaining the appellant's position [of exemption]. But under its act of incorporation, the appellant is only exempted from taxation on its real estate. We think that this special statute, prescribing, as it did, a rule for this particular corporation, takes the case out of the operation of the general exemption contained in the Revised Statutes. * * * Considering the existence of the general law, which was before the Legislature when the Act of 1887 was passed, the insertion, in the latter act, of the exemption of real estate, was idle unless intended as a special rule applicable in future to this corporation" (per Barrett, J.). See *Excelsior Petroleum Co. v. Lacey*, 63 N. Y. 426.

⁶⁵ Matter of Underhill, 2 Connoly, 262; 20 N. Y. Supp. 134.

⁶⁶ Matter of Lenox, 31 St. Rep. 959; 9 N. Y. Supp. 895; Matter of Keech, 32 St. Rep. 227; Matter of Vassar, 127 N. Y. 1.

⁶⁷ Matter of Herr, 32 St. Rep. 724; 10 N. Y. Supp. 680.

⁶⁸ Matter of Neale, 32 St. Rep. 910; 10 N. Y. Supp. 713.

⁶⁹ Matter of Vassar, *supra*; Matter of Chittenden, N. Y. Law J., June 5, 1890 [*de Brooklyn Eye and Ear Hospital*].

⁷⁰ Matter of Chittenden, *supra* [*de*

every case in which the exemption was granted to an institution of this character, it was placed, by the lower courts, on the distinct ground that the institution in question did not, under any circumstances, exact or receive any fee or gratuity, from patients, inmates, or other recipients of its charity; and wherever the exemption was denied, it was on the ground that the institution required pay for the benefits conferred. This question came before the Court of Appeals in the case of a home for aged and infirm men, which was founded, incorporated, and maintained by charity, and possessed no element of private or corporate gain, and whatever income it had was devoted exclusively to that charity. Its by-laws contained a provision requiring those becoming inmates, or some one in their behalf, to pay a designated sum upon their admission, and requiring them, if they had any property, to transfer the same by suitable methods to the home. It was held that, being chartered for purely charitable purposes, and supported and maintained by charitable contributions, the institution was none the less an almshouse, within the meaning of the statute, because of the foregoing provision of its by-laws.⁷¹ The present statute conforms to that view.

§ 712. "Beneficial interest" of legatee.—A bequest in which the legatee has no beneficial interest, such as a bequest, in trust or otherwise, to pay testator's debts or funeral expenses, or to apply the income of a certain sum to the maintenance of a burial plot, is not taxable as being "to or for the use" of any one, within the meaning of the former statute; nor, it is thought, is it "any interest" in the property transferred, within the meaning of the statute.⁷² A bequest of a specified sum to the executor in trust,

Children's Aid Soc. of Brooklyn and Orphan Asylum of Brooklyn]; *Matter of Quin*, N. Y. Law J., July 24, 1889. A "mutual benefit association," whose constitution provided for the admission of members under a certain age, what assessments should be paid to entitle to membership, and for what cause membership should be forfeited, the object of the association being to give aid to the sick and disabled, and provisions for the families of the deceased members, is not one of the societies or institutions contemplated by the statute. (*Matter of Jones*, 1 Connoly, 125; 22 Abb. N. C. 50.) See *Matter of Hunter*, 11 St. Rep. 704; s. c., *sub nom.* *Church Charity v. People*, 6 Dem. 154.

⁷¹ *Matter of Vassar*, *supra*; *overrul-*

ing *Matter of Keech*, *supra*; *Matter of Lenox*, *supra*; and *Matter of Vanderbilt*, 10 N. Y. Supp. 239. See *People v. Purdy*, 58 Hun. 386; 34 St. Rep. 893; *affd.*, 126 N. Y. 679.

⁷² Hence, a bequest of the income of a certain sum to be applied to the maintenance of a burial plot is exempt. (*Estate of Vinot*, 7 N. Y. Supp. 517; 26 St. Rep. 610.) But where, by the terms of the will, the executor takes one-third of the estate absolutely, he is not relieved from the inheritance tax by the fact that, in an action to construe the will, he is held to take his legacy impressed with a trust in favor of another, as a result of extrinsic evidence therein introduced. (*Matter of Edson*, 38 App. Div. 19; *affd.*, 159 N. Y. 568.)

"to expend the same for masses for the repose of the soul" of testator, naming the person who was desired should celebrate the masses, being a valid legacy, and being given in a clause of the will separate from that in which the funeral expenses were provided for, was held to be subject to the tax.⁷³ It has been held under the former statute that a legacy to a creditor of so much as he may prove due him is not subject to the tax; for although in form a legacy, it is nothing more than a direction to pay just debts,⁷⁴ and that a legacy for services either already performed,⁷⁵ or to be performed, after testator's death, confers no beneficial interest and is not taxable. But under the present statute, at least, such a bequest which is accepted by the legatee is subject to the tax.⁷⁶ If the beneficiary desires to escape payment of the penalty, he must establish his debt and let the legacy fall into the residuary estate.⁷⁷ The proceeds of a policy of insurance on the life of a decedent, made payable to him or to his personal representatives, are subject to the tax.⁷⁸ But it may well be doubted if the proceeds of a policy, collected by the beneficiary therein named, are subject to the tax, as being any part of the estate of the person whose life was insured.⁷⁹

§ 713. Requests to executors, etc.—In harmony with the foregoing principle, the statute exempts a devise and bequest to an executor or trustee in lieu of, or to an amount not exceeding, his commissions; otherwise, to the extent that such a bequest exceeds the amount of the statutory commissions; *i. e.*, "the excess in value of the property so bequeathed or devised, above the amount of

⁷³ *Matter of Black*, 1 Connolly, 477; 24 St. Rep. 341.

⁷⁴ *Matter of Rogers*, 30 St. Rep. 943; 10 N. Y. Supp. 22; *Matter of Underhill*, 2 Connolly, 262.

⁷⁵ *Matter of Reilly*, N. Y. Surr. Ct. Decis. 1890, p. 416; *Matter of Richardson*, N. Y. Law J., March 9, 1893. See *Matter of Hulse*, 39 St. Rep. 402; *Matter of Meyer*, N. Y. Law J., March 26, 1891.

⁷⁶ *Matter of Gould*, 156 N. Y. 423. It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary, the transfer is made by will and the statute imposes a tax. (*Ib.*) That case should be applied cautiously, and, in

our opinion, should not be extended to a general direction to pay debts, though out of a specific fund.

⁷⁷ *Matter of Doty*, 7 Misc. 193; 27 N. Y. Supp. 653.

⁷⁸ *Matter of Knoedler*, 68 Hun, 150; affd., 140 N. Y. 377.

⁷⁹ See § 536, *ante*. The fact that the will mentions moneys as deposited in trust for certain beneficiaries, does not make them part of the estate to be administered. (*Matter of Walker*, 45 St. Rep. 21; 17 N. Y. Supp. 666.) The amount received from the gratuity fund of the produce exchange is not assets of the estate, since it belongs to the beneficiaries specified in the by-laws of the exchange, and is properly excluded by the appraisers. (*Matter of Fay*, 25 Misc. 468; 55 N. Y. Supp. 749.)

commissions or allowances prescribed by law in similar cases," is taxable, under the statute.⁸⁰ Where a bequest is made to persons named as executors, but the will directs that they shall receive no compensation, the statutory exemption does not apply.⁸¹ The amount of the executor's "commissions or allowances," being fixed by law, there is no occasion for the surrogate to fix them, or to determine any "reasonable compensation" to be made to the executor, as he was required to do under the former act.⁸²

§ 714. Representative and beneficiaries personally liable for tax.—

So far as the act imposes a tax *in personam*, it was, under the former statutes, imposed on the executor, administrator, or trustee, and not on the heir, legatee, or *cestui que trust*. But, under the Transfer Tax Act, the tax is declared to be a lien upon the property transferred, until paid,⁸³ and the person to whom the property is transferred and the executor, administrator, or trustee of the estate are personally liable for it until its payment.⁸⁴ The representative is not "entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this act unless he shall produce a receipt so sealed and countersigned [by the comptroller], or a certified copy thereof, or unless a bond," in a case of preferred payment (§ 222). It is obviously the interest of the representative to have the extent of his personal liability determined by the surrogate at the earliest date possible, and to this end he may, in case of doubt, apply at any time after grant of his letters for the appointment of an appraiser. The surrogate has no jurisdiction to entertain another and different proceeding instituted by the representative for the determination of the question whether the estate or any interest in it is subject

⁸⁰ L. 1896, c. 908, § 227; Matter of Gihon, 169 N. Y. 443.

⁸¹ Matter of Vanderbilt, 68 App. Div. 27; 74 N. Y. Supp. 450.

⁸² By L. 1887, c. 713, § 3, it was provided that any bequest or devise, over and above what would be a reasonable compensation, left to an executor in lieu of his commissions or allowances, was taxable, and such reasonable compensation was to be determined by the surrogate. As it would be impossible to determine the reasonable compensation, until the services had been rendered, the surrogate, in Matter of Havens (N. Y. Law J., Aug. 1, 1890), postponed considering the question until an accounting was had. In Matter of Underhill

(2 Connoly, 262; 20 N. Y. Supp. 134), it was held, that a bequest to an executor of a certain sum "over and above his legal commissions and expenses," was not within the purview of this provision of the Act of 1887. See Matter of Sidell (N. Y. Law J., March 10, 1893), where the entire residuary estate was given "as extra compensation in addition to commissions, and in satisfaction of services rendered during my lifetime."

⁸³ See Kitching v. Shear, 26 Misc. 436.

⁸⁴ The executor is not excused from payment of the tax because the whole estate has been distributed. (Matter of Hackett, 14 Misc. 282.)

to the operation of the statute.⁸⁵ The application may be made with the sole view of procuring an adjudication as to the liability of the estate, or any part of it to taxation under the statute, upon a petition setting forth the facts on which a claim to exemption or otherwise is based. The court will, if thought necessary or desirable, appoint an appraiser to notify the persons interested, and to take such further or additional evidence as may be offered and report to the court.⁸⁶ It is usual for the court to require notice of such an application by the representative to be given to the county treasurer or comptroller, though the giving of such notice is not essential to the right of the court to pass upon the questions presented.⁸⁷ A report of an appraiser, finding that certain legacies are the only ones taxable, and confirmed by the surrogate, will protect the executor from a claim for the amount of the taxes upon other legacies not included in the assessment.⁸⁸ As the surrogate is at once invested with the office and functions of an assessor for the State, with authority to determine the question whether the property of the decedent was subject to taxation under the act, his determination thereon is final and conclusive in any subsequent proceedings,⁸⁹ except upon an application for a reappraisal, hereafter referred to.

§ 715. Collection of tax by representative.—The representative or trustee is furnished with the means of collecting the tax out of the property, and thus escaping personal liability. He is de-

⁸⁵ *Matter of Farley*, 15 St. Rep. 727.

⁸⁶ *Matter of Cohn*, N. Y. Law J., April 13, 1893.

⁸⁷ *Matter of Wolfe*, 137 N. Y. 205. "Where it is sought to procure an adjudication that property passing by the will of a decedent is not liable to the transfer tax, a proceeding must be instituted by petition and the persons interested must be made parties." So far as the application relates to the return of the fund deposited upon the purchase of the property, the surrogate is without jurisdiction." (*Matter of Aherns*, N. Y. Law J., Nov. 29, 1892.)

⁸⁸ *Matter of Vanderbilt*, 10 N. Y. Supp. 239.

⁸⁹ *Matter of Wolfe*, 137 N. Y. 205. Held, also, in that case, that in order to give the surrogate jurisdiction, it is not essential that the proceedings should be initiated by the district attorney, at the instance of the treasurer or comptroller for the enforcement and collection of the tax as authorized

by the act; nor is it necessary that the treasurer or comptroller should have notice. Where, therefore, in proceedings instituted by the district attorney it appeared that, upon application of the executors, appraisers had been appointed by the surrogate, and upon the coming in and confirmation of their report, the surrogate made a decree adjudging that certain legacies were exempt from taxation under the act.—Held, that, as to said legacies, the former adjudication was a bar. See *Matter of Smith*, 23 N. Y. Supp. 762; *Matter of Schermerhorn*, 38 App. Div. 350; *Matter of Seaver*, 63 id. 283. As to the surrogate's power to modify or vacate an order fixing the tax, see *Matter of Fulton*, 30 Misc. 70; 62 N. Y. Supp. 995; *Morgan v. Cowie*, 49 App. Div. 612; 63 N. Y. Supp. 608; *Matter of Earle*, 71 id. 1038. Compare *Matter of Morgan*, 36 Misc. 753; *Matter of Crerar*, 56 App. Div. 479; *Matter of Von Post*, 35 Misc. 367.

clared to "have full power to sell so much of the property of the decedent as will enable him to pay such tax, in the same manner as he might be entitled by law to do for the payment" of decedent's debts. Where he has in charge, or in trust, any taxable legacy or property for distribution, he "shall deduct the tax therefrom," and pay it over to the county treasurer or comptroller within thirty days. If the legacy or property is not in money, he is required to collect the tax upon the appraised value thereof from the legatee or distributee; and he shall withhold delivery of any specific taxable legacy or property, until he has collected the tax thereon. In the case of a legacy chargeable on, or payable out of, real property, the tax remains a lien on the property, and is payable by the heir or devisee to the representative or trustee; failing to do which, the representative or trustee may enforce it by the sale of the property, or the district attorney may take the proceeding for its collection, hereafter mentioned. Where a money legacy is given for a limited period, the representative shall retain the tax upon the whole amount, but where the legacy is not in money, he must apply to the surrogate for an *apportionment*, if the case require it, of the sum to be paid into his hands by the legatees (§ 224). Provision is also made by the statute for a composition of the tax, between the representative and the county treasurer or comptroller, in certain cases where the tax upon an expectant estate is not presently payable, or where successive beneficiaries are not liable at the same rate, or some of them exempt. But where successive trust estates are taxable at the same rate, the representative may pay the whole tax out of the principal of the fund.⁹⁰

§ 716. Collection of tax by district attorney.—On the refusal or neglect of the persons liable for the tax to pay the same, it is made the duty of the county treasurer or comptroller to give the district attorney written notice thereof; and if the latter have probable cause to believe the tax is due and unpaid, he shall apply to the court for a citation to show cause why the tax should not be paid.⁹¹ The citation is addressed to the persons liable to pay the tax, and must be made returnable not more than three months

⁹⁰ L. 1896, c. 908, § 230, as amended L. 1897, c. 284.

⁹¹ The former statute was silent as to the time when the application was to be made; and the surrogate of New York county decided that he would not proceed on his own motion to assess the tax until the expiration of eighteen

months after the decedent's death. (Matter of Astor, 6 Dem. 402; Frazer v. People, id. 174.) The Statute of Limitations is not available as a defense in proceedings to collect the tax. (Matter of Crerar, 31 Misc. 481; 65 N. Y. Supp. 573.)

after its date. The service of the citation, the time, manner and proof thereof, and the hearing and determination thereon, and the enforcement of the determination or order made must conform to the course of procedure prescribed by the Code for Surrogates' Courts; where a controversy arises or may arise as to the relationship of the beneficiaries to the decedent, the comptroller may, with the approval of the attorney-general, and a justice of the Supreme Court of the judicial district in which the decedent resided, compromise and settle the amount of any tax. (§ 235.)

§ 717. Duty of certain corporations as to tax.— On the transfer, by a foreign executor, administrator, or trustee, of any stock or obligations in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer or the comptroller. "No safe-deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or under control securities, deposits or other assets of a decedent," including stock of, or interest in such companies, "shall deliver or transfer the same to the executors, administrators, or legal representatives of said decedent, or upon their order or request, unless notice of the time and place of such intended transfer be served upon the State comptroller at least ten days prior to the said transfer." Nor shall any such corporation or person deliver or transfer any securities, deposits, or other assets of the estate of a nonresident decedent, without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed thereon, unless the comptroller consents thereto in writing. The treasurer or comptroller, personally or by representative, may examine said securities or assets at the time of such delivery or transfer. "Failure to serve such notice or to allow such examination, or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe-deposit company, trust company, corporation, bank, or other institution, person or persons liable to the payment of three times the amount of the tax and penalty due upon said securities, deposits, or other assets." ⁹²

§ 718. Proceedings to assess the tax.— The surrogate who has jurisdiction to grant letters on the estate of the decedent, or to appoint a trustee of such estate, is invested with the office and function of an assessor of the State, upon whom is conferred

⁹² L. 1896, c. 908, § 228, as amended L. 1901, c. 173.

"jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done" by him in other matters or proceedings of which he has jurisdiction.⁹³ As in other proceedings, in case two or more Surrogates' Courts have concurrent jurisdiction, the one first acquiring it may retain it to the exclusion of all others (§ 229).⁹⁴ He has power to decide every question that may arise in a proceeding under the act, which may be necessary to fully discharge the duties imposed upon him. He may, therefore, decide the question whether any of decedent's property passed under the will, or under the laws of intestacy, and may determine the validity, or otherwise, of testamentary dispositions, and if void, may declare the succession, under the Statutes of Decedent and of Distribution.⁹⁵

In the matter of the appraisal of the property, to the end that the tax may be assessed, the surrogate's jurisdiction may be invoked by any interested party, including the State comptroller, or upon his own motion,⁹⁶ and he may "determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser" (§ 232).⁹⁷ In the case of non-residents' estates, upon which either ancillary letters testamentary

⁹³ The provisions of the Taxable Transfer Act prescribing what property is subject to taxation and authorizing the Surrogate's Court, which has jurisdiction to grant letters upon the estate, to hear all proceedings under the provisions of the act, and those of the Code prescribing the right to grant letters, should have the same construction, and where it appears that shares, of a nonresident testator, in a corporation of this State are taxable under the act, because situated here, such shares will also be deemed property which would authorize the Surrogate's Court of the county where the principal office is located, to issue letters and such court, therefore, has jurisdiction of proceedings to assess the tax. (Matter of Fitch, 160 N. Y. 87.)

⁹⁴ Matter of Hathaway, 27 Misc. 474; 59 N. Y. Supp. 166.

⁹⁵ Matter of Ullman, 137 N. Y. 404. In that case, decedent's will attempted to create trusts for the disposition of his residuary estate, which unduly suspended the power of alienation. Held, that the surrogate had jurisdiction to determine that the residuary estate did not pass to the legatees

or devisees, but to the heirs and next of kin; and that a decree assessing the heirs for that portion of the estate which passed to them was valid. To the same effect, Matter of Peters, 69 App. Div. 465; 74 N. Y. Supp. 1028.

⁹⁶ L. 1896, c. 908, § 230, as amended by L. 1902, c. 496. See Matter of O'Donohue, 44 App. Div. 186; 60 N. Y. Supp. 690.

⁹⁷ Under the former statutes, which contained no such provision, it was held, nevertheless, that no formal appraisal was necessary where the legacy or distributive share was a fixed, known sum, on which the amount of tax payable was readily calculated. (Matter of Astor, 6 Dem. 402.) See Matter of Jones, 19 Abb. N. C. 221. But where a surrogate has appointed an appraiser and made application to the superintendent of the insurance department to determine the value of a vested remainder, the determination of the latter is binding upon him and he cannot thereafter, without reversing the entire proceeding, make an appraisal himself. (Matter of Davis, 91 Hun. 53; affd., 149 N. Y. 539.)

or ancillary letters of administration are applied for, the surrogate is required to determine the amount of the tax which may be or become due, and in his decree awarding such ancillary letters, he may make provision for the payment or securing the tax. To this end, every petition for ancillary letters must set forth the name of the county treasurer or comptroller, and also "a true and correct statement of all the decedent's property in this State, and the value thereof;" on which a citation must issue to the treasurer or comptroller, and upon its return the amount of the tax will be determined as above (§ 229).

§ 719. Appointment of appraiser.—Formerly the surrogate was not restricted in the selection of an appraiser; all that was required was that his appointee should be "a suitable person" to ascertain the value of the estate. In 1900,⁹⁸ however, the nomination of appraisers was vested in the State comptroller with respect to certain specified counties of the State, and in other counties the duties of appraiser were imposed upon the county treasurer. Since that time the surrogate has had no power to appoint an appraiser, but should direct one of the official appraisers, or the county treasurer, as the case may be, to proceed with the appraisal.⁹⁹ Under the former statute the appointment could be made at any time when the surrogate was able to determine the amount of the estate, without waiting for the ascertainment of debts,¹ and doubtless that proposition is still true.

§ 720. Proceedings by appraiser.—On notice first given by mail to all persons known to have a claim or interest in the property to be appraised, including the State comptroller, and such other persons as the surrogate may by order direct, of the time and place when he will appraise the property,² the appraiser will "fix the fair market value, at the time of the transfer," *i. e.*, at the time of decedent's death, except as mentioned below. He is authorized to issue subpœnas to witnesses, compel their attendance, and

⁹⁸ L. 1900, c. 658.

⁹⁹ Matter of Sonheim, 32 Misc. 296.

¹ Matter of Westurn, 152 N. Y. 93.

² In Matter of Miller (110 N. Y. 216), which was a proceeding to vacate the order of the surrogate, affirming the appraisement of the estate, and assessing the amount of the tax, it was objected that it was made without notice to the legatee. It appeared that the appraisers were duly appointed, and gave notice, as re-

quired by law, of the time and place when the appraisal would be made, and that upon the coming in of the appraiser's report, the order in question was made. Held, that in the absence of any allegation or proof to the contrary, it was to be presumed that, immediately after making the order, the surrogate gave the notice prescribed by the act, and that no prior notice was required.

take their testimony under oath concerning the property and its value,³ and is required to report the same and the value of the property to the surrogate, and also such other pertinent facts as the surrogate, by order, may require (§ 231).⁴ The appraiser is required "to fix the fair market value of property of persons whose estates shall be subject to the payment of the tax (§ 230). The lien of the tax, which attaches at the time of decedent's death, is subject to the superior lien of the decedent's debts, and also to the charges for administrative expenses. In fixing "the fair market value" of land which is subject to the lien of decedent's mortgage debt, it would seem reasonable to appraise the value of the equity of redemption only, and this whether the succession is by devise or by descent.⁵ But, however that may be, it is clear that mortgage debts are not to be deducted in fixing the value of the personalty, even though directed to be paid by the executor.⁶ If the land is not worth more than the debt, there is no basis for fixing any value to it. The fact that, under the statute, the heir or devisee, and not the general estate, is charged with the burden of the mortgage, does not alter the principle that the value of the property over and above the incumbrance is the only basis for assessing the tax.⁷ Provision is made for the case of debts proved against the estate, after the payment of any legacy or distributive share from which the tax has been deducted, or upon which the legatee or distributee has paid the tax, and has been called on to contribute to the payment of the debts. In such

³ The surrogate may issue a commission to take testimony of nonresident witnesses, for use on the appraisal (*Matter of Wallace*, 71 App. Div. 284), and the appraiser may hear evidence as to such debts as could be enforced against the estate. (*Matter of Wormser*, 36 Misc. 434; 73 N. Y. Supp. 748.)

⁴ Witnesses' fees are to be paid by the treasurer or comptroller; likewise the appraiser's compensation (unless his salary is fixed), and his actual and necessary traveling expenses.

⁵ See *Matter of Kene*, 8 Misc. 102.

⁶ *Matter of Livingston*, 1 App. Div. 568; *Matter of Opperman*, 25 App. Div. 94; 48 N. Y. Supp. 993; *Matter of Sutton*, 3 App. Div. 208; *affd.*, 149 N. Y. 618; *Matter of De Graaf*, 24 Misc. 147; *Matter of Berry*, 23 *id.* 230.

⁷ In *Matter of Colhoun* (N. Y. Law J., May 24, 1892), the only property owned by the testator at the time of

his death was a house and lot in New Jersey, which, of course, was not taxable. This house was worth \$9,000, and was subject to a mortgage of \$7,000. The decedent was entitled to a one-half interest therein. The executors claimed that, being responsible for the amount of the mortgage as a debt of the testator, there should be a deduction from the amount of the estate by one-half of this debt, and that there was no provision of statute in New Jersey similar to that in this State which charges the heir or devisee with the burden of the mortgage. The appraiser refused to make the deduction. The surrogate confirmed the report, apparently on the ground that there was no proof of the law of New Jersey, and even if the law was as claimed, he would require proof that the property would not be sufficient to pay the mortgage debt.

case, an equitable proportion of the tax must be repaid him.⁸ If the property has no salable value, nor any actual or potential annual value at the time of the transfer, it would seem to be incapable of being appraised.⁹ Another principle of appraisal is, that the act only applies to the property of which the decedent died seized and possessed, and not to the interest or increase between that time and the accounting of the executors.¹⁰ In appraising legacies for taxation, the appraiser should report their value, irrespective of any direction in the will as to payment of the tax; and the fact that the will charges the payment of all the taxes upon the residuary estate does not authorize the deduction of that amount in appraising the residuary legacy.¹¹ But in general it may be said that deductions should be made for debts,¹² commissions of the executors¹³ and the probable expenses of administration, but not for the amount of the Federal inheritance tax.¹⁴ The deductions should be made from the whole estate, including exempt property, so that every species of property shall bear its just burden.¹⁵ It was held, under the former statute, not to be the duty of the appraiser to appraise the whole estate of the decedent, but only the estates of those persons whose estates are inherited, or are created by will, and which are subject to the tax.¹⁶

⁸ See § 732, *post*.

⁹ Thus a worthless account (*Matter of Manning*, 169 N. Y. 449), or notes which the maker testifies have been paid (*Matter of Westurn*, 152 N. Y. 93), should not be included. But a judgment against a legatee or next of kin should be appraised, as payment may be enforced by deduction from his legacy or distributive share. (*Matter of Smith*, 14 Misc. 169.) Notes directed to be canceled should be appraised at their actual, not face, value. (*Morgan v. Warner*, 45 App. Div. 424; *affd.*, 162 N. Y. 612.) As to the method of valuing marketable and industrial stocks, see *Matter of Cray*, 31 Misc. 72; *Matter of Smith*, 71 App. Div. 602. The value of the good-will of a joint-stock association, in which decedent was interested, should be included. (*Matter of Jones*, 69 App. Div. 237.)

¹⁰ *Matter of Vassar*, 127 N. Y. 1; 37 St. Rep. 239. See *Matter of Sloane*, 154 N. Y. 109.

¹¹ *Matter of Swift*, 137 N. Y. 77. Where the will leaves to the executor, certain articles to be specified in a subsequent memorandum, in trust for such persons as shall be therein speci-

fied, and some of such persons are exempt from legacy tax, it is error to assess the tax upon the whole gift, but it should be limited to the beneficial interests which are not exempt. (s. c. below, 2 Connolly, 644.) Taxes assessed against the deceased in his lifetime, though not levied until after his death, when they were paid by the executor, should be deducted. (*Matter of Brundage*, 31 App. Div. 348; 52 N. Y. Supp. 362.)

¹² *Matter of Westurn*, 152 N. Y. 93; *Matter of Millward*, 6 Misc. 425. See *Matter of Gould*, 156 N. Y. 423. Compare *Matter of Ludlow*, 4 Misc. 594.

¹³ *Matter of Westurn*, 152 N. Y. 93; *Matter of Gihon*, 169 id. 443 (commissions of temporary administrator); *Matter of Millward*, *supra*.

¹⁴ *Matter of Gihon*, *supra*; *Matter of Curtis*, 31 Misc. 83; 64 N. Y. Supp. 574.

¹⁵ *Matter of Purdy*, 24 Misc. 301.

¹⁶ *Matter of Robertson*, 5 Dem. 92. But the appraiser should report all property as to which he is in doubt, as subject to the tax. (*Matter of Hendricks*, 1 Connolly, 301; 18 St. Rep. 989.) See *Matter of Swift*, *supra*.

But it is quite clear that in the case, for example, of an intestate succession, it may be necessary to appraise the whole estate, in order to determine whether the value of the several distributive shares will exceed the amount on which the tax is limited to one per cent. The appraiser must necessarily examine the will, and it is his duty to call the court's attention to any facts that appear to him as constituting sufficient reasons for reporting the legacies subject to the tax. Where other interests accrue, after his appointment, but before his report is filed, he has power to appraise and report such interests.¹⁷ In case any property is discovered to have been omitted by mistake, fraud, or concealment, from the first appraisal, the court may send it back to him for correction.¹⁸

§ 721. Valuing estates which are subject to defeat.—The statute contains a provision under which, whenever an estate for life or years can be divested by the act or omission of the legatee or devisee, it shall be taxed, as if there were no possibility of such limitation.¹⁹ In estimating the value of any present estate, no allowance shall be made for any contingent incumbrance thereon, or for any contingency, upon the happening of which the estate or interest therein might be abridged, defeated, or diminished; provided, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat, or diminution thereof, a return shall be made to the person entitled thereto, of a proportionate amount of such tax in respect of the amount or value of the incumbrance when taking effect, etc.²⁰ It is also provided, by the same amendment, that where a transfer of property is made subject to a life estate, the increase of benefit accruing to the remainderman upon the termination of the precedent estate, shall be deemed a transfer of property under the act, as though such increase had been acquired

¹⁷ Matter of Stewart, 30 St. Rep. 738.

¹⁸ Matter of McPherson, 104 N. Y. 306; Matter of Lansing, 31 Misc. 148; 64 N. Y. Supp. 1125; Matter of Kelly, 29 Misc. 169.

¹⁹ But this does not apply to estates which had terminated before the act took effect, nor to a remainder which is subject to a life estate, which may be so terminated. (Matter of Sloane, 154 N. Y. 109.) See Matter of Plum, 37 Misc. 466; 75 N. Y. Supp. 940.

²⁰ In Matter of Stanford (N. Y. Law J., May 6, 1893), the surrogate said: "It has been the rule of decision heretofore, to tax vested though defeasible

interests, and in reporting the interest passing to Susan A. Heaton the appraiser acted properly. Should the events happen upon which her estate or interest was limited, before the exhaustion of the trust funds, relief may be accorded to her as provided in the act. The appraiser was also right in reporting for taxation so much of the residuary estate as was ascertainable at the time of the appraisement. Should that fund be temporarily increased by the receipt of additional assets, or by other defeasible interests falling into and becoming a part of the same, another appraisement may be had."

from the person from whom the interest is derived (§ 230). Where property is transferred in trust, or otherwise, and the interests of the transferees are dependent upon contingencies whereby they may be defeated, extended, or abridged, a tax shall be imposed "at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article." Such tax shall be due and payable forthwith out of the property transferred; provided that, on the happening of any contingency whereby the property is transferred to persons either exempt or taxable at a less rate, such persons shall be entitled to a rebate specified in the statute.²¹

§ 722. Valuing future and contingent estates.—The difficulty of valuing a contingent interest before the contingency happens, and the impossibility of determining before that time (in many cases) the person to whom the eventual estate would pass, led to a doubt, under the former statute, whether the Legislature intended to tax such contingent interests at all, at least before the happening of the contingency.²² The present law provides, however, that, "whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately after such transfer, or as soon thereafter as practicable." It is expressly provided, however, that contingent or defeasible expectant estates, of which the value has not been fixed, shall be appraised "when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof," without reference to the valuation, theretofore made, of the particular estate.²³ The value of every future or limited estate, income, interest, or annuity, dependent

²¹ L. 1896, c. 908, § 230, as amended L. 1899, c. 76. Under this statute the tax on a contingent remainder is not payable until the estate vests in possession, as otherwise the effect would be to tax the property and not the succession. (Matter of Vanderbilt, 68 App. Div. 27; 74 N. Y. Supp. 450.) The Act of 1899, in its original form, attempted to tax remainders which had vested prior to June 30, 1885, and, in this respect, was unconstitutional. (Matter of Pell, 171 N. Y. 48.)

²² See Matter of Wheeler, 1 Misc. 450; 22 N. Y. Supp. 1075.

²³ See Matter of Plum, 37 Misc. 466; 75 N. Y. Supp. 940. Where the person entitled to the remainder cannot be known until the death of the

life tenant, the tax does not accrue until that event. (Matter of Davis, 149 N. Y. 539; Matter of Roosevelt, 143 id. 120; Matter of Curtis, 142 id. 219; Matter of Hoffman, 143 id. 327; Matter of Howell, 34 Misc. 432; Matter of Eldridge, 29 id. 734; Matter of Irwin, 36 id. 277.) See Matter of Sloane, 154 N. Y. 109. In that case the remainder could not be determined until the death or remarriage of the life tenant. The provisions of the act do not apply to a case where the transfer was made prior to the passage of the act, though the contingency upon which the estate actually vested in possession took place after the act took effect. (Tallmadge v. Seaman, 9 Misc. 303; 30 N. Y. Supp. 304.)

upon any life or lives in being, shall be determined by the rule, method, and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities, for the determination of liabilities of life insurance companies; except that the rate of interest for making such computation shall be five per centum per annum.²⁴ The statute further provides that "the superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estate, income or interest therein, limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct" (§ 232).²⁵

This clearly brings *contingent remainders* within the operation of the law, and supersedes some rulings to the effect that the former statute applied only to vested, and not to contingent, remainders.²⁶ But where, under the will, the whole estate may be absorbed by the life tenant, or first taker;²⁷ or where the ultimate estate is dependent upon the contingency of the exercise, by the first taker, of a right to dispose of the property by will, there would seem to be no basis for the imposition of the tax, it being a question whether any property at all will pass.²⁸

²⁴ L. 1896, c. 908, § 230, as amended L. 1902, c. 496. "All estates upon remainder or reversion, which vested prior to May 1, 1892, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein, until after the passage of this act, shall be appraised and taxed as soon as the person or corporation, beneficially interested therein, shall be entitled to the actual possession or enjoyment thereof." (Ib.) By an amendment made in 1901 (c. 173), adding a new section to the act (§ 130a), power was given to the county treasurer of any county in which the office of appraiser is not salaried, with the written consent of the State comptroller, and in other counties, the State comptroller, with the written consent of the attorney-general, to compromise with the trustees of any estate, the amount of the tax upon any expectant estate, which, under the Collateral Inheritance, or Transfer Tax, Act, were not then ascertainable, and to grant discharges thereof; provided, that no such com-

promise should be conclusive against the *cestui que trust* without the latter's consent.

²⁵ Under the Act of 1885, the surrogate was governed by the Northampton table of mortality, under the general rules of practice. (Matter of Robertson, 5 Dem. 92.)

²⁶ See Matter of Lefever, 5 Dem. 184; Matter of Clark, 1 Connolly, 431; 22 St. Rep. 354; Matter of Hopkins, 6 Dem. 1. The collateral inheritance tax imposed by L. 1885, c. 483, was upon every interest, immediate or future, derived under a testator or intestate, not embraced in the clause of exemption in the act. (Matter of Stewart, 131 N. Y. 274; 43 St. Rep. 171.)

²⁷ Matter of Babcock, 37 Misc. 445; 75 N. Y. Supp. 926. See Estate of Fleming, N. Y. Law J., Oct. 15, 1889; Matter of Wallace, 18 St. Rep. 387; Matter of Mathews, N. Y. Law J., July 27, 1889.

²⁸ Matter of Cager, 111 N. Y. 343; 19 St. Rep. 497; Matter of Field, 36 Misc. 279.

In the case of a *vested remainder*, no difficulty arises. Thus, in the case of a bequest to the wife for life, with remainder absolutely to a son and his heirs, etc., the remainder vested on the death of the testator, and passed to the son's heirs on his death before the life tenant. It is, therefore, subject to the tax,²⁹ at the value of the whole, less the life estate.³⁰ In the case of a devise, to a brother and his wife, of an estate for life as tenants in the entirety in certain real property, the beneficiary being known, the property definite, and the event certain to occur, the wife has an interest which is capable of assignment, and of which the present value can be fixed, and, therefore, the wife's interest is subject to the tax.³¹ So, too, remainders absolutely vested in the decedent at the time of death, one under a will and the other under a power of appointment, are both presently assessable against the legatee of such decedent.³²

Where a tax is assessed on a life estate, and also on the remainder, the former is to be taken out of the income, and the latter is to be deducted from the principal. The fact that the latter will thus be reduced is no objection, since such reduction is lawfully made.³³

§ 723. **Transfers under power of appointment.**—The statutory provisions relating to this subject have already been referred to,³⁴ but a few observations in connection with the appraisal of such transfers may not be out of place. It has been held, that where a power of appointment, given by a will which took effect prior to

²⁹ Matter of Van Rensselaer, N. Y. Law J., May 25, 1889; Matter of Vinot, 7 N. Y. Supp. 517; 26 St. Rep. 610. See Matter of Johnson, 6 Dem. 146; Matter of Runcie, 36 Misc. 607; Matter of Dows, 167 N. Y. 227; Matter of Sherman, 30 Misc. 547.

³⁰ Matter of Lange, 55 N. Y. Supp. 750; Matter of Hall, 36 Misc. 618. See Matter of Hoyt, 37 id. 720; Matter of Sloane, 154 N. Y. 109.

³¹ Matter of Higgins, N. Y. Law J., Dec. 7, 1889.

³² Matter of Zefita, 167 N. Y. 280.

³³ Matter of Johnson, 6 Dem. 146; 20 St. Rep. 134. See Matter of McMahon, 28 Misc. 697; 60 N. Y. Supp. 64. Where the interest of the life beneficiary is not taxable, the amount of the remainderman's tax is, nevertheless, lawfully payable out of the principal. (Ib.) See Matter of Leavitt, 22 St. Rep. 81; Matter of Leffever, 5 Dem. 184; Matter of Hopkins,

6 id. 1. In Matter of Cockey (N. Y. Law J., March 21, 1893), the surrogate of New York county said, in reference to Matter of Johnson (*supra*), holding that the tax upon the remainder was payable out of the principal fund, and that the fact that such payment would affect the income did not alter this result, that he must dissent from the decision. "In my opinion, the tax should be borne by the beneficiaries in remainder, and the order should run against those who have been served; that the executrix has power under section 7 to sell that interest in remainder for the purpose of paying the tax, and that it is the 'property' referred to in that section."

³⁴ See § 699a, *ante*. As to taxing such transfers before the amendment of 1897, see Matter of Stewart, 2 Connolly, 281; *affd.*, 131 N. Y. 274; Matter of Hyde, N. Y. Law J., April 27, 1892.

the original Inheritance Tax Law, was exercised before the amendment of 1897 (chap. 284), legacies given by the donee of the power should not be taxed,³⁵ but a transfer, under an appointment, made after the amendment, is taxable, irrespective of the time when the grant of the power took effect.³⁶ The appraisal is to be made as of the time the power was exercised,³⁷ hence property which, at that time, was in the form of personalty should be so treated, although consisting of real estate at the death of the original testator.³⁸ Upon the question of exemption, it is also to be noted that transfers under a power of appointment are regarded as passing under the will or grant, by which the power is exercised and not from the instrument creating the power; so that, transfers by the donee to his lineal descendants, or to the other persons specified in section 221 of the act, are exempt, although such persons may be collateral heirs of the donor.³⁹

§ 724. Notice of appraisal.—We do not understand it to be required that a notice of a voluntary application for the appointment of an appraiser should be given to the parties interested in the estate, including the county treasurer or comptroller, as the application will be granted as of course, though the surrogate may, and usually does, direct such notice to be given.⁴⁰ The important thing is, that notice of the appraisal shall be given to those interested, whose names must be designated in the order appointing the appraiser. It must not be forgotten that this is a judicial proceeding to fix the liability of a taxpayer, and he must have due notice of the proceeding against him, and must be given a hearing, or an opportunity to be heard, in reference to the value of his property and the amount of the tax which is to be imposed. Unless he has these, his constitutional right to due process of law has been invaded, and the tax imposed is invalid as having been imposed without jurisdiction.⁴¹ The notice may be served personally or by mail, but as the statute does not prescribe the length of notice to be given, it is the duty of the surrogate to fix a reasonable time according to the circumstances of each case.

³⁵ Matter of Harbeck, 161 N. Y. 211.

³⁶ Matter of Vanderbilt, 50 App. Div. 246; *affd.*, 163 N. Y. 597; Matter of Potter, 51 App. Div. 212.

³⁷ Matter of Tucker, 27 Misc. 616; 59 N. Y. Supp. 699.

³⁸ Matter of Dows, 167 N. Y. 227.

³⁹ Matter of Walworth, 66 App. Div. 171; 72 N. Y. Supp. 984; Matter of

Rogers, 71 App. Div. 462; Matter of Seaver, 63 *id.* 283; 71 N. Y. Supp. 544.

⁴⁰ See Matter of Wolfe, 137 N. Y. 205. The practice is to require notice of the proceeding to be given to the county treasurer or comptroller.

⁴¹ See Matter of Daly, 34 Misc. 148; Matter of Bolton, 35 *id.* 688.

§ 725. **Appraiser's report.**—The appraiser should note in his report to the surrogate the appearances, on the appraisal, of any interested parties; and also their objections, if any, to his appraisal. It is usual to file such objections in writing with the appraiser, and for him to annex them to his report. This will give the party filing objections the right to notice of the hearing before the surrogate, on the coming in of the report; though we do not understand that the filing of formal written objections to the appraisal and report is necessary to entitle a party to be heard in opposition before the surrogate. To make a record for appeal to the Supreme Court, it is better practice for the appraiser to make findings, as in an ordinary reference.⁴² The report must be made in duplicate, one of which should be filed with the surrogate and the other with the State comptroller (§ 232).

§ 726. **Proceedings on appraiser's report.**—“From such report and other proof relating to any such estate before the surrogate,” he shall “forthwith,⁴³ as of course, determine the cash value of all estates, and the amount of the tax to which the same is liable” (§ 232).⁴⁴

§ 727. **Review of appraisement.**—The State comptroller, or any person dissatisfied⁴⁵ with the appraisement or assessment and determination of the tax, “may appeal therefrom to the surrogate within sixty days from the fixing, assessing, and determination of the tax by the surrogate as herein provided, upon filing in the office of the

⁴² See *Matter of Bolton*, *supra*.

⁴³ The great age of a life tenant whose share is subject to the collateral inheritance tax is no reason for postponing the confirmation of the report of the appraiser. (*Estate of Wilkes*, N. Y. Law J., Oct. 31, 1889.)

⁴⁴ The following rules prevail in New York county: (1) Upon the filing of the appraiser's report the surrogate will immediately enter the order determining the value of the property and the amount of the tax. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report. (2) A party having objections to the report, or the order entered thereupon, may, within sixty days, file a notice of appeal. This notice to be served upon all parties appearing before the appraiser, and proof of such service to be filed with the clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the

calendar for the next regular motion day. This notice must specify the grounds of objection. (3) A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice, if it appears that their rights are involved and they are not otherwise adequately represented. The last rule is now made statutory. (§ 232.) Where the estate of an infant is not taxable, no allowance can be made to his special guardian. (*Matter of Post*, 5 App. Div. 113.)

⁴⁵ The executor may appeal from an order fixing the tax (*Matter of Cornell*, 66 App. Div. 162; 170 N. Y. 423), and as the comptroller of the city of New York has authority to institute the proceedings to enforce the tax, he, too, may appeal, although his powers in respect thereto have devolved upon the State comptroller. (*Matter of Blackstone*, 69 App. Div. 127.)

surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken.⁴⁶ The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all parties known to be interested therein, including the State comptroller" (§ 232). The appeal is not limited to questions of law, but may be taken to the surrogate upon both the law and the facts, and he has ample power to correct any error brought to his attention. For the purpose of making such correction, the surrogate is not bound by the estimate of the appraiser or by the facts which appeared before him, but he may hear such new evidence and allegations as may be properly presented to him.⁴⁷ An appeal to the Supreme Court is taken from the surrogate's determination of the appeal to him, not from his order made on the return of the appraiser's report.

In addition to the remedy by appeal, the statute also provides that if such comptroller⁴⁸ believes that the appraisal or determination was made fraudulently, collusively, or erroneously, he may, within two years after the entry of the order, apply to a justice of the Supreme Court of the judicial district in which the former owner resided, for a reappraisal.⁴⁹ Such justice may appoint an appraiser for that purpose, who shall possess all the powers, be subject to the same duties, and receive the same compensation, as is provided with respect to an appraiser appointed by the surrogate. His report shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be had before such justice, as is provided to be taken before the surrogate. The assessment of the justice supersedes that of the surrogate and must be filed with the State comptroller, a certified copy being transmitted to the surrogate.⁵⁰

§ 728. When and to whom tax payable.—The tax is to be paid to the treasurer, in a county in which the office of appraiser is not

⁴⁶ *Matter of Davis*, 149 N. Y. 539; *Matter of Wormser*, 51 App. Div. 441.

⁴⁷ See *Matter of McPherson*, 104 N. Y. 306; *Matter of Westurn*, 152 id. 93; *Matter of Thompson*, 57 App. Div. 317.

⁴⁸ This remedy is available only to the State comptroller (*Matter of Smith*, 40 App. Div. 480), but is not exclusive, as he may appeal to the Supreme Court under Co. Civ. Proc., § 2570. (*Morgan v. Warner*, 45 App. Div. 424; *affd.*, 162 N. Y. 612.)

⁴⁹ The application should be based on errors of fact only, as those of law can be reviewed by appeal. (*Matter of Niven*, 29 Misc. 550; 61 N. Y. Supp. 956.) But a reappraisal should not be ordered simply because property, since the appraisal, has sold for a larger sum. (*Matter of Bruce*, 59 N. Y. Supp. 1083; *Matter of Rice*, 56 App. Div. 253.) See *Matter of Johnson*, 37 Misc. 542; 75 N. Y. Supp. 1046.

⁵⁰ L. 1896, c. 508, § 232, as amended L. 1897, c. 284.

salaries, and in other counties, to the State comptroller; and the treasurer or comptroller is required to give, and every executor, administrator, or trustee is required to take, "duplicate receipts from him of such payment." If such receipts were received from a county treasurer, the executor shall send one of them to the State comptroller, and if received from the State comptroller, to the State treasurer. The State comptroller or the State treasurer, as the case may be, receiving such receipt shall charge the officer receiving the tax with the amount thereof, and seal said receipt with the seal of his office and countersign the same and return it to the executor, administrator, or trustee, whereupon it shall be a proper voucher in the settlement of his accounts."⁵¹

The time of the transfer is fixed as the time when the tax shall be due and payable, *i. e.*, the day of the death of the testator, intestate, grantor, etc., as the case may be. An exception, however, is made in the case of a "transfer of any estate, property, or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer." As to the tax on such an estate, it "shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof" (§ 222).

§ 729. Discount for prompt payment; penalty for nonpayment.—

"If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon

⁵¹ By section 236 of Act of 1896, "any person shall, upon the payment of the sum of fifty cents, be entitled to a receipt from the county treasurer of any county or the State comptroller, or, at his option, to a copy of a receipt, that may have been given by such treasurer or State comptroller for the payment of any tax under this article, under the official seal of such treasurer or comptroller, which receipt shall designate upon what real property, if any, of which any decedent may have died seized, such tax shall have been paid, by whom paid, and whether in full of such tax. Such receipt may be recorded in the clerk's office of the county in which such property is situated, in a book to be kept by him for that purpose, which shall be labeled

'transfer tax.'" Under a similar provision of the original act, it was held, that where the tax was paid in New York county on decedent's real estate situate in that county and another county, it having been appraised in bulk, the receipt of the comptroller in the former county, filed in the latter county, is conclusive evidence that the tax on the real estate situated in the latter county has been paid. (*Matter of Keenan*, 1 Connolly 226.) The comptroller, by accepting the tax imposed upon a life estate, is not estopped from contesting the part of the order declaring that the "remainder estate is at present undeterminable, and not now subject to tax." (*Matter of Bogert*, 25 Misc. 466; 55 N. Y. Supp. 751.)

at the rate of ten per centum per annum from the time the tax accrued,⁵² unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases, when a bond shall be given (as below), interest shall be charged at the rate of six per cent. from the accrual of the tax until the date of payment thereof" (§ 223). As a tax does not carry interest by implication of law, as in the case of a debt, all systems of taxation, where default is made in the payment of the tax, add interest by way of a *penalty*. What is called "interest" in the statute is no part of the tax, but only a penalty, to be exacted or not, according to whether the tax has been paid in time or otherwise.⁵³

§ 730. **Remission of penalty.**—The reduction of the penalty of ten per cent. to six per cent. in a case where the tax cannot be determined and paid within eighteen months after decedent's death, as above, amounts to this: that whether the delay to pay the tax is unavoidable or not, interest by way of a penalty is imposed from the expiration of that period; if the delay is unnecessary and avoidable, then an additional four per cent. is added, making ten per cent. as the maximum penalty.⁵⁴ The law does not provide for a remission of all interest.⁵⁵ The application for a remission of the extreme penalty may be made on motion and affidavits (and notice to the county treasurer, or to the comptroller, as the case may be), setting forth the ground or occasion for the delay beyond the eighteen months, in paying the tax. "Claims made upon the estate, necessary litigation, or other unavoidable cause of delay," are the grounds mentioned in the statute. The suspension of the executor's action, after he is served with a citation to revoke a probate, under Code Civ. Proc., § 2650, is not an "unavoidable delay," so as to relieve him of the liability to pay interest prior to the decree.⁵⁶ Ignorance of the law is no excuse, nor the fact that the payment of the penalty will be a hardship to the legatees.⁵⁷ The Act of 1887

⁵² Interest is chargeable against the estate of a remainderman under a will made prior to 1892, only from the death of the life tenant. (Matter of Davis, 91 Hun. 53; *affd.*, 149 N. Y. 539.)

⁵³ People v. Prout, 53 Hun. 541; 25 St. Rep. 33; *affd.*, 117 N. Y. 650.

⁵⁴ People v. Prout, *supra*, which gives in effect this construction to sections 4, 5, of the Act of 1885.

⁵⁵ Matter of Brown, N. Y. Law J., Feb. 8, 1893 (*de Act* of 1892).

⁵⁶ Matter of Stewart, 131 N. Y. 274.

⁵⁷ Matter of Platt, 8 Misc. 144.

provided that the penalty should not be imposed where, by reason of claims upon the estate, litigation or other unavoidable cause of delay, "the estate of any decedent, or a part thereof, could not be settled at the end of eighteen months from the death of the decedent," which was a re-enactment of the Act of 1885, except that the period of settlement was therein fixed at one year instead of eighteen months. Under the Act of 1892 the penalty is not charged where claims, litigation, or other unavoidable cause of delay prevents "the determination and payment of the tax."⁵⁸ It also changes the terms upon which the remission is granted. In the prior acts, the six per cent. interest ran from the expiration of eighteen months from accrual to the date when the cause of delay was removed;⁵⁹ while in the Act of 1892, in cases where the penalty is not imposed, interest at the rate of six per cent. is charged from the date of accrual (the date of death) until the cause of delay is removed. Under whatever act an application of this character may be made, it is of the utmost importance that the date when the cause of delay was removed, should be fixed.⁶⁰

§ 731. Giving bond on deferring payment.—Where the transfer is limited, conditioned, dependent, or determinable on the happening of any contingency or future event, the beneficiary or the representative or trustee thereof may elect within eighteen months from the date of the transfer (decedent's death) not to pay the tax "until the person or persons beneficially interested therein shall come into the actual possession or enjoyment thereof." If the transfer be of personal property, the representative or trustee is required to give a bond to the State in a penalty of three times the amount of any such tax, with such sureties as the surrogate of the proper county may approve, conditioned for the payment of such tax and interest thereon, at such time or period as the

⁵⁸ See *Matter of Wormser*, 51 App. Div. 441; *Matter of Bolton*, 35 Misc. 688.

⁵⁹ *Matter of Moore*, 90 Hun. 162. The statute in force at decedent's death governs, even though the period of exemption from interest did not expire until after the later act took effect. (*Matter of Fayerweather*, 143 N. Y. 114; *Matter of Milne*, 76 Hun. 328.)

⁶⁰ *Matter of Colhoun*, N. Y. Law J., June 15, 1893. In that case, the surrogate said: "The petitioner herein bases his application upon the circumstance that there was no asset out of which the tax could be paid beside the

seat in the Stock Exchange; yet the date when this asset was realized upon is not given. It could have been sold at an earlier date, though possibly at a sum less than that actually realized. The tax was actually fixed and determined about a year after its accrual, and it is very clear could then have been paid. The representatives of an estate cannot wait for higher prices on assets at the expense of the State." See *Matter of Acker*, N. Y. Law J., May 9, 1893; *Matter of Somerville*, id., Jan. 21, 1893; *Matter of Purroy*, id., May 6, 1892; *Matter of Johnson*, id., Apr. 8, 1893.

person or persons beneficially interested therein may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the surrogate. Such bond must be executed and filed, and a full return of such property, upon oath, made to the surrogate, within one year from the date of transfer thereof as herein provided, and such bond must be renewed every five years " (§ 226).

§ 732. Refund of tax.—The statute provides for the refunding of any tax "erroneously paid," and for the refunding of "an equitable portion" of it in a case where a legatee or distributee, after having received his legacy or distributive share, less the tax, has been required to refund to the representative an amount necessary to satisfy debts of the decedent subsequently proved against the estate. In such a case, the legatee or distributee is entitled to a refund of an equitable portion of the tax, either by the representative, unless he has paid it over to the county treasurer or State comptroller, and if so, by the latter officers. Provision is also made for the refunding of any tax, in part or whole, where the order fixing the same has been modified or reversed within two years⁶¹ from the entry of such order, but an application for a refund must be made within one year from such reversal or modification. On the other hand, if deductions for debts were allowed on the appraisal, which are afterward proved to have been erroneously made, the surrogate may assess the tax upon the amount wrongfully or erroneously deducted.⁶² The remedy furnished by the statute is exclusive; hence, the Supreme Court has no power, on reversing a surrogate's assessment of the tax, to direct the county treasurer or the comptroller, as the case may be, to refund the tax paid under the surrogate's order.⁶³ Of course, if a representative pays the tax on a legacy or a distributive share which is not subject to the tax, or, having erroneously paid it, takes no steps to recover the amount paid, he is chargeable with the amount on his accounting; that is, the legatee or distributee, as the case may be, is entitled to receive his entire legacy or share without deduction of the amount thus erroneously paid,⁶⁴ unless the payment was made with the knowledge and assent of the legatee or distributee.⁶⁵

⁶¹ See *Matter of Sherar*, 25 Misc. 138.

⁶² L. 1896, c. 908, § 225, as amended L. 1901, c. 173. See *Matter of Winters*, 21 Misc. 552; *Matter of Park*, 8 id. 550.

⁶³ *Matter of Howard*, 54 Hun. 305; 7 N. Y. Supp. 594; *Matter of Hall*, 27 St. Rep. 133; 7 N. Y. Supp. 595.

⁶⁴ *Matter of Peyser*, 5 Dem. 244.

⁶⁵ *Farquharson v. Nugent*, 6 Dem. 296.

§ 733. Costs of compulsory proceeding.— In proceedings instituted by a district attorney, at the instance of the county treasurer or State comptroller, costs may be awarded, which, “after the collection and payment of the tax to the treasurer or comptroller, may be retained by the district attorney for his own use.” These costs are in the discretion of the surrogate, but it is provided that they “shall not exceed in any case, where there has not been a contest, the sum of one hundred dollars, or, where there has been a contest, the sum of two hundred and fifty dollars.” It is also provided that, whenever the surrogate shall certify that there was probable cause for issuing a citation and taking the proceedings, the State treasurer shall pay or allow to the treasurer or the State comptroller all expenses incurred for the service of citations and other lawful disbursements not otherwise paid. Where any county treasurer or the comptroller is cited as a party in a proceeding by the representative for the appointment of an appraiser, the State comptroller is authorized to designate and retain counsel to represent such county treasurer or comptroller therein, and to direct the payment of the expenses thereby incurred; except that in the collection of taxes upon estates of nonresidents, which have been concealed, or the taxes thereon evaded, not more than ten per cent. of the tax and penalties collected shall be allowed for legal services.⁶⁶

§ 734. Fees of county treasurer and comptroller.— The treasurer of each county, in which the office of appraiser is not salaried, shall be allowed to retain on all taxes paid and accounted for by him each year, under this act, five per centum on the first fifty thousand dollars, three per centum on the next fifty thousand dollars, and one per centum on all additional sums. Such fees shall be in addition to the salaries and fees now allowed by law to such officers (§ 237).

⁶⁶ L. 1896, c. 908, § 235, as amended L. 1901, c. 173. Where the district attorney commenced the proceeding before the expiration of the eighteen months, and, four days before the expiration of that period, the executors paid the tax assessed upon a life estate and remainders passing under the will, held.—(1) that there having been no “refusal or neglect” to pay

the tax, costs should not have been awarded against the executors, and (2) that there was probable cause for instituting the proceeding, and the district attorney was entitled to a certificate. (*Frazer v. People*, 6 Dem. 174; s. c. as *Matter of Frowe*, 20 St. Rep. 355.) See *Matter of McCarthy*, 5 Misc. 276; *Matter of Hoffman*, 76 Hun, 399.

TITLE SEVENTH.

PAYMENT OF LEGACIES.

ARTICLE FIRST.

DIFFERENT KINDS OF LEGACIES.

§ 735. **General description.**—The most general description of legacies,⁶⁷ with regard to their subject-matter, is that they are either *general* or *specific*. Certain legacies are also called *demonstrative*, having the appearance, in some respects, of a specific legacy, and partaking of the nature of a general legacy. With respect to their enjoyment, legacies are again divided into *vested* and *contingent*, *absolute* and *conditional*. They may also be viewed as subject to other incidents, such as being *cumulative*, in distinction from a repetition of the same legacy. There are also *annuities* and *residuary* legacies.

§ 736. **Specific and demonstrative legacies.**—A specific legacy is a bequest of a particular thing, specified and distinct from all others of the same kind belonging to the testator. It is not subject to abatement, like general legacies, and is payable at the end of the year, with all the advantages which would have accrued to the legatee, had the subject of the gift been delivered when the will took effect.⁶⁸ On the other hand, if the specific legacy be dis-

⁶⁷ Every bequest of personal property is a legacy, including as well those made in lieu of dower and in satisfaction of an indebtedness, as those which are wholly gratuitous. It is the synonym of the word "bequest." (Orton v. Orton, 3 Keyes, 486.)

⁶⁸ Tift v. Porter, 8 N. Y. 516; Bevan v. Cooper, 7 Hun, 117; reversed on another point, approved as to this, in 72 N. Y. 317. A direction to the executors to allow certain persons to take certain property at an appraised or the inventoried value, is not a specific legacy, and, until the property is set apart to such persons, the executors are chargeable with its value. (Matter of Pollock, 3 Redf. 101.) By the terms of a will, property which had been the subject of previous gifts was, in legal effect, given by specific bequests to such prior donees. Held, to amount to a confirmation of such donations. (Decker v. Waterman, 67 Barb. 460.) In Tift v. Porter (*supra*),

the testator owned 360 shares of a certain bank stock, and he bequeathed 240 shares to one legatee, and 120 shares to another, but without indicating that the shares bequeathed were to be taken from those which he owned at the time of his death. Held, that the legacies were general and not specific, and the legatees were not entitled to dividends intermediate his death and the delivery of the stock. Compare De Nottebeck v. Astor, 13 N. Y. 98. In Brundage v. Brundage (60 id. 544), it appeared that the will bequeathed to S. ten shares, and to E., "during life," twenty shares of railroad stock. After the execution of the will, and before the testator's death, the company issued to its stockholders what were styled "interest certificates," stated to be for moneys expended out of its earnings in improvements. By their terms they were made assignable, and were payable, at the option of the company, out of future earnings, with dividends

appointed, as by failure of the specific fund, or delay in its delivery,⁶⁹ the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator. To make a money legacy specific, the money must be so described by the testator as to enable the legatee to point it out to the executor as in a particular place, chest, bag, or purse, or in some person's hands, so that it can be delivered in *specie*. Thus a bequest of "all the money left in the W. S. Bank, after carrying out" certain prior directions contained in the will, is a specific legacy of a chose in action, which the legatee is entitled to receive in *specie*, together only with such increment as may have attached thereto.⁷⁰ No claim will lie, under any circumstances, against the executors, for interest, *eo nomine*, thereon; nor are they bound to make the same productive.⁷¹

A legacy is *demonstrative* when the particular fund or personal property is pointed out, from which it is to be taken or paid,⁷² accompanied by a bequest of the fund or thing given. Thus a bequest of a specified sum in such securities as the legatee may select is a demonstrative legacy and not a specific legacy of the securi-

thereon, or were convertible into stock. The testator received and retained these certificates on the shares held by him, and also the dividends declared thereon, and held the certificates at the time of his death. In an action for the construction of the will, held, that the legatees took the specified number of shares of stock, as they were at the time of the testator's death, and could claim no right to, or interest in, the certificates; that if the certificates were invalid, the stock was unaffected thereby; if valid — having been issued to, and received by, the testator, they became an independent part of his estate. For other illustrations, see *Cogswell v. Cogswell*, 2 Edw. 231; *Clarkson v. Clarkson*, 18 Barb. 646; *Murphy v. Marcellus*, 1 Dem. 288; *Matter of Clark*, 16 Misc. 405; 39 N. Y. Supp. 722.

⁶⁹ *Platt v. Moore*, 1 Dem. 191. Compare *Matter of Stone*, 15 Misc. 317; 37 N. Y. Supp. 583.

⁷⁰ Such a bequest, however, does not include testator's equity in stocks hypothecated as security for a loan by the bank. (*Montignani v. Blade*, 145 N. Y. 111; 64 St. Rep. 558.)

⁷¹ *Larkin v. Salmon*, 3 Dem. 270. In *Matter of Hodgman* (140 N. Y. 421; 55 St. Rep. 800), testator left

his widow, who was made an executrix of the will, the sum of \$50,000, "which may be invested in bank stock * * * and in bonds." Held, that the legacy was not specific, and hence she was not entitled to dividends on the stock or bonds from the testator's death to the time of the payment of the legacy.

⁷² See *Walton v. Walton*, 7 Johns. Ch. 258; *Enders v. Enders*, 2 Barb. 362. In *Florence v. Sands* (4 Redf. 206), the testatrix, after bequeathing certain general and specific legacies, directed the payment of \$50 per month to F. during life, etc., "out of the rents and income of her estate," and further directed the executors to keep down the interest on the mortgage on her real estate, and to pay all taxes, assessments, and repairs. The personal estate was not sufficient to satisfy the general legacies in full. Held, that the legacy to F. was a demonstrative legacy, and should be paid out of the particular fund, in preference to general legacies: if the particular fund was inadequate to satisfy the demonstrative legacy in full, the demonstrative legatee was, as to the unpaid balance of his legacy, a general legatee, and his legacy was subject to abatement with the other general leg-

ties.⁷³ Where, however, only one of these elements is present, *c. g.* — the one directing payment out of a particular fund, it is a specific legacy, and the legatee is entitled to only so much of the fund as existed at the time of the decedent's death.⁷⁴ If the fund or property, out of which a demonstrative legacy is payable, fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy.⁷⁵ As to the legatee, it is considered specific, and, therefore, does not, at common law, abate on failure of assets.⁷⁶

§ 737. **General and residuary legacies.**—Every legacy not specific or demonstrative is a general legacy. The presumption, both in law and equity, is in favor of general legacies.⁷⁷ This definition includes *annuities*, which are defined to be bequests of certain

acies. But when it is clearly the intention of the testator that a fund is to be created by the sale of certain property, and the income of the proceeds of such sale paid to the legatee, it is a specific and not a demonstrative legacy; and it is the duty of the executors to invest the money arising from the sale, and to pay the legatee the income only. (*Watrous v. Smith*, 7 Hun, 544.) See *Matter of Von Keller*, 28 Misc. 600; 59 N. Y. Supp. 1079.

⁷³ *Dunning v. Dunning*, 82 Hun, 462; 31 N. Y. Supp. 719; *Matter of Anderson*, 19 Misc. 210; 43 N. Y. Supp. 1146; *Spencer v. De Witt C. Hay, etc., Assn.*, 36 Misc. 393; 73 N. Y. Supp. 712; *Olcott v. Ossowski*, 34 Misc. 376; 69 N. Y. Supp. 917; *Matter of Van Vliet*, 5 Misc. 169; *Wetmore v. Peck*, 66 How. Pr. 54. In *Matter of Hadden* (1 Connolly, 306), the testator, owning various stocks and bonds, bequeathed to different legatees certain sums of money "out of any stocks or bonds that I may own at the time of my death, the same to be reckoned and counted at their par value dollar for dollar." Held, the legacies were general, not specific, and it was the right and duty of the executors to select the bonds for the legatees. In *Matter of Brett* (57 Hun, 400; 10 N. Y. Supp. 871), the will bequeathed specifically a note, with all portions due thereon, to one legatee and a portion of the proceeds of the sale of specific furniture to another. The rest of the estate was directed to be sold and certain legacies to be paid therefrom, any surplus or deficit to be apportioned among

them. Held, that, as the bequests to the first two legatees were specific, they were not entitled to a proportionate share of the surplus from the residuary estate.

⁷⁴ *Crawford v. McCarthy*, 159 N. Y. 514. In that case, testatrix directed her daughter, out of a deposit, to pay testatrix's son the sum of \$1,500, *the will containing no general bequest of that amount*.—Held, that where the testatrix had reduced, in her lifetime, the amount of the deposit to a sum insufficient to pay the legacy, the son was only entitled to the amount that was left.

⁷⁵ See *Methodist, etc., Church v. Hebard*, 28 App. Div. 548; 51 N. Y. Supp. 546. Legacies directed to be first paid, are a charge upon the general estate, notwithstanding the executors had set apart a special lot of securities to meet them as they became due. (*Collin v. Wilcox*, 47 St. Rep. 917.) As to the application of the rule that where one claimant has two funds to which he may resort, and another has an interest in only one of them, the latter may compel the former to satisfy his claim out of the fund on which the latter has no claim, see *Fargo v. Squiers*, 154 N. Y. 250.

⁷⁶ See *Newton v. Stanley*, 28 N. Y. 61; *Giddings v. Seward*, 16 id. 365; *Pierrepont v. Edwards*, 25 id. 128, and § 754, *post*.

⁷⁷ This presumption must yield to the expressed intention of the testator, that securities shall pass in kind. (*Cramer v. Cramer*, 35 Misc. 17; 71 N. Y. Supp. 60.)

specified sums periodically.⁷⁸ If the fund or property out of which they are payable fail, resort may be had to the general assets as in case of a general legacy.⁷⁹ It also includes *residuary* legacies, which embrace only that which remains after all the bequests of the will are discharged, and the debts of the testator are satisfied. It carries not only what the testator did not attempt to dispose of, but every part of his property which, by lapse or otherwise, is not effectually bequeathed to others,⁸⁰ unless the residuary clause is limited by its terms to what remains after payment of specific legacies. In such case, if any of the legacies are void, there is another residuum which is undisposed of.⁸¹ In the interpretation of a residuary clause, the court will look, not only at the language employed, but at the surrounding circumstances, to discover what the intention of the testator was.⁸²

§ 738. Legacies charged upon land.—So the question whether a particular legacy is a charge upon the real estate, so as to exonerate the personalty from its payment, depends upon the intention of the testator, either clearly expressed by the will, or, with equal clearness, inferred from the language and dispositions of the instrument. Where there is not a clear and manifest intention on the part of the testator to charge a legacy upon lands, and the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies, notwithstanding such legacies, by the terms of the will, are expressly charged upon devisees.⁸³ The usual clause, devising all the rest of the testator's real and personal estate not before devised, is not sufficient to show an intention to charge the real estate;⁸⁴ nor is the mere direction that all debts and legacies are to be paid.⁸⁵ But where the testator directs his

⁷⁸ A gift of the interest on a specified sum, payable annually, is not an annuity. (Matter of Dewey, 153 N. Y. 63.)

⁷⁹ See *Spencer v. Spencer*, 38 App. Div. 403; 56 N. Y. Supp. 460.

⁸⁰ *King v. Strong*, 9 Paige, 93; *Banks v. Phelan*, 4 Barb. 80. See *Pirnie v. Purdy*, 19 id. 60; *Havens v. Havens*, 1 Sandf. Ch. 324.

⁸¹ *Kerr v. Dougherty*, 79 N. Y. 327; *Beekman v. Bonsor*, 23 id. 298, 312. See also *Downing v. Marshall*, id. 382; *White v. Howard*, 46 id. 144.

⁸² *Kerr v. Dougherty*, 79 N. Y. 327. To ascertain the amount of a general residue, all the income of the estate, not otherwise disposed of, must be

added to the residue. (Matter of Benson, 96 N. Y. 499.)

⁸³ *Hoes v. Van Hoesen*, 1 N. Y. 120. See *Dodge v. Manning*, id. 298; *Kelsey v. Western*, 2 id. 500; *Clason v. Lawrence*, 3 Edw. 48.

⁸⁴ *Hindman v. Haurand*, 2 App. Div. 146; 37 N. Y. Supp. 828; *affd.*, 159 N. Y. 546. See *Matter of McKay*, 33 Misc. 520; 68 N. Y. Supp. 925; *Lvons v. Steinhardt*, 37 Misc. 628; 76 N. Y. Supp. 241.

⁸⁵ *Lupton v. Lupton*, 2 Johns. Ch. 614; *Matter of Grotian*, 30 Misc. 23; 62 N. Y. Supp. 996; *Carberry v. Ennis*, 72 App. Div. 489. See *Crawford v. McCarthy*, 159 N. Y. 514.

debts to be first paid, and then devises real estate, or where he devises the residue of his estate, real and personal, *after* payment of debts and legacies, and there is a deficiency of assets to pay the debts or legacies, an intention to charge the real property will be inferred.⁸⁶ And where a will directs one to whom a life estate is given, with full power to dispose thereof, to pay a legacy, whether such devisee be the executor or another, the legacy is charged upon the real estate so devised.⁸⁷ So, too, where all the

⁸⁶ *Rafferty v. Clark*, 1 Bradf. 473; *Flynn v. Croniken*, 9 How. Pr. 214. See *Reynolds v. Reynolds*, 16 N. Y. 257; *Taylor v. Dodd*, 2 Sup. Ct. (T. & C.) 88; *Spilane v. Duryea*, 51 How. Pr. 260; *Tracy v. Tracy*, 15 Barb. 503; *Stewart v. Crysler*, 52 App. Div. 597; 65 N. Y. Supp. 483; *Matter of Ryder*, 41 App. Div. 247; 58 N. Y. Supp. 635; *Hogan v. Kavanaugh*, 138 N. Y. 417; 52 St. Rep. 884. But that rule does not apply where it appears that there was sufficient assets when the will was made. (*Hindman v. Haurand*, *supra*.) In *Kalbfeisch v. Kalbfeisch* (67 N. Y. 354), the testator devised and bequeathed his residuary estate to his nine children equally. By a codicil, he authorized his executors to sell his real estate not specifically devised, and directed that the pecuniary legacies should be paid over, not to the life tenants, but upon their decease, respectively, to their issue, the former receiving only the income; no provision was made in the will for the payment of the testator's debts; his personal property was much more than sufficient to pay them, but the residue, with \$113,000 and the \$15,000 added, was insufficient to pay the pecuniary legacies. Held, that the intent of the testator was to charge the pecuniary legacies upon the residuary real estate, and to authorize the sale thereof, if necessary, to make up the sum required for their payment. See *Matter of Spencer*, 8 Misc. 193; 29 N. Y. Supp. 1083. In *Bevan v. Cooper* (72 N. Y. 317), the will, after directing the payment of the debts out of the personal property, and certain other general bequests to strangers to his blood, and a specific devise of certain real estate, devised and bequeathed all "the rest, residue and remainder of my estate, real and personal, to the executors of my will, in trust, to rent the rest of my real estate, and to invest the rest of my

personal estate, and keep the same invested in good securities." Then followed a specification of the trusts, which were for the benefit of the testator's widow and children. The clause contained the only provision for the latter, and the principal provision for the former, and embraced the largest part of the testator's estate. The personal estate proved insufficient to pay the debts and general legacies, the inadequacy being revealed after the testator's death. Held, that the general legacies were not chargeable upon the residuary real estate. See *Guellich v. Clark*, 3 Sup. Ct. (T. & C.) 315; *Purdy v. Purdy*, 36 App. Div. 535; 57 N. Y. Supp. 166. In *Dunham v. Deraismes* (165 N. Y. 65), testator bequeathed to his wife an annuity during her life, and, in express terms, charged the rents and profits of his real estate with its payment, and by a later clause gave another annuity of \$300 to another person to be paid by his executors, and devised all the rest and residue of his real estate upon a trust that might continue for eighteen years after the making of the will, while the disposition of his personal property was immediate.—Held, upon a consideration of the whole will, that the \$300 annuity was charged upon the real property, even after the expiration of the trust, in exoneration of the personal property although there was no proof of any inadequacy of the latter. See *Matthews v. Studley*, 17 App. Div. 303; *affd.*, 161 N. Y. 633; *Arthur v. Dalton*, 14 App. Div. 108; *Smith v. A. D. Farmer, etc., Co.*, 16 *id.* 438.

⁸⁷ *Colvin v. Young*, 81 Hun. 116; 30 N. Y. Supp. 689; *Wellbrook v. Otten*, 35 Misc. 459; 71 N. Y. Supp. 937; *Hutchins v. Hutchins*, 18 Misc. 633; 42 N. Y. Supp. 601. See *Sherer v. Bartlett*, 45 App. Div. 135; 60 N. Y. Supp. 1067. Compare *Crawford v. McCarthy*, 159 N. Y. 514.

personal estate is specifically bequeathed and power given to the executors to sell the real property for the purposes of administration.⁸⁸ But a direction for the payment of legacies out of the proceeds of the only piece of real property then owned by testator, does not indicate an intent to charge the legacies upon real estate subsequently purchased by him.⁸⁹ Where a testator directs that certain real estate be sold, and the proceeds divided among persons named in the will, the general rule is, that the legatees, if of full age, may elect to take either the land or the money, provided the rights of others are not thereby affected.⁹⁰

§ 739. Personal liability of devisee for legacy charged.—If a devisee of land, charged with the payment of legacies, accepts the devise, he has the personal duty imposed on him to pay, without reference to the fact whether the property devised and accepted is sufficient for that purpose. The liability is created by the acceptance charged with the duty, and the duty being clear and personal, the law will raise an implied promise to discharge it.⁹¹

⁸⁸ *Toch v. Toch*, 81 Hun. 410; 30 N. Y. Supp. 1003; *Matter of James*, 80 Hun. 371; 30 N. Y. Supp. 1. See *Matter of Vandevort*, 8 App. Div. 341; 40 N. Y. Supp. 791; *Matter of Goetz*, 71 App. Div. 272.

⁸⁹ *Jouffret v. Jouffret*, 20 App. Div. 455; 46 N. Y. Supp. 810.

⁹⁰ *Mellen v. Mellen*, 139 N. Y. 210; 54 St. Rep. 670. See *McDonald v. O'Hara*, 144 N. Y. 566; 64 St. Rep. 236; *Harper v. Chatham Nat. Bank*, 17 Misc. 221; 40 N. Y. Supp. 1084; *Prentice v. Janssen*, 14 Hun. 548; *affd.*, 79 N. Y. 478; *Armstrong v. McKelvey*, 104 id. 179. Compare *Foote v. Bruggerhof*, 84 Hun. 473; *Smith v. A. D. Farmer, etc., Co.*, 16 App. Div. 438. A mortgage debt has preference over legacies in the proceeds of a sale of realty to satisfy such legacies. (*Rauchfuss v. Rauchfuss*, 2 Dem. 271; citing *Erwin v. Loper*, 43 N. Y. 521.) See *Beekman v. Vanderveer*, 3 Dem. 619. As to paying debts from proceeds, see *Dunning v. Dunning*, 82 Hun. 462.

⁹¹ *Gridley v. Gridley*, 24 N. Y. 130; *Gilbert v. Taylor*, 148 id. 298; *Collister v. Fassitt*, 163 id. 281; *Thurber v. Chambers*, 66 id. 42; *Keteltas v. Penfold*, 4 E. D. Smith, 122; *Matter of Boyd*, 4 Redf. 154; *Ragan v. Allen*, 7 Hun. 537; *Hoyt v. Hoyt*, 17 id. 192; *Stoddard v. Johnson*, 13 id. 606; *Sanford v. Sanford*, 4 id. 753; *Hillis v.*

Hillis, 16 id. 76; *Shanley v. Shanley*, 22 App. Div. 375; 48 N. Y. Supp. 32; *Zweigle v. Hohman*, 75 Hun. 377; 27 N. Y. Supp. 111. See *Buffalo L. & T. Co. v. Leonard*, 9 App. Div. 384; 41 N. Y. Supp. 294; *affd.*, 154 N. Y. 141; *Colvin v. Young*, 81 Hun. 116; 30 N. Y. Supp. 689. Where a testator gave one-fourth of his residuary estate, and a like share in certain real property, "to have and to hold the same, subject to, and charged with, the payment *by him out of the same*," so soon as practicable, and within two years after testator's death, of specified sums of money to certain persons mentioned (the two years having expired and the legatee having died before payment), it was held, that the bequest was burdened with sub-legacies in the nature of a condition subsequent, and that the executors' duty would be discharged by payment to the primary legatee. (*Brittin v. Phillips*, 1 Dem. 57.) A will giving to two of testator's daughters a farm of 250 acres and directing them to pay to another daughter \$3,000 in annual instalments, in default of which payments, or any of them, she was to take specified sixty acres of the farm.—Held, to give the two devisees the right to elect to refuse to take the sixty acres, and be exonerated from the payment of the \$3,000. (*Damuth v. Lee*, 29 App. Div.

§ 740. **Vested and contingent legacies.**—A legacy is *contingent* when the enjoyment of it depends upon the happening of some event — as the arrival of the legatee at a certain age — and *vested*, when given generally, in which case, if payable out of the personalty, it vests immediately upon the testator's death. The distinction between vested and contingent legacies is important mainly with reference to the question of lapse. It also becomes important as bearing upon the question whether, and from what time, the legatee is entitled to interest on the legacy, and to what person the legacy goes when limited over. The leading inquiry upon which the question of vesting or not vesting turns, is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. If *futurity* is annexed to the substance of the gift, the vesting is suspended; but if it appear to relate to the time of payment only, the legacy vests instantly. The mere circumstance that the gift is future, that is, the actual possession is postponed, does not make time of the substance of the gift, or affix a condition to the immediate vesting of the interest. That question is determined by the intention of the testator, as gathered from the whole will, and not by particular expressions.⁹² The law favors the vesting

26; 51 N. Y. Supp. 648.) Compare the instructive case of *Dill v. Wisner*, 23 Hun. 123. A devise of lands chargeable with a legacy is liable to pay interest on the legacy from the time it was payable, whether payment was demanded or not. (*Glen v. Fisher*, 6 Johns. Ch. 33; *Birdsall v. Hewlett*, 1 Paige, 32; *Tole v. Hardy*, 6 Cow. 333.) See *Gilbert v. Taylor*, 148 N. Y. 298. In such a case, the legacy is an equitable charge upon the land, although the devisee is also the executor or residuary legatee, unless the will indicates a contrary intention. (*Harris v. Fly*, 7 Paige, 421; *Dodge v. Manning*, 11 id. 334; *Jenkins v. Freyer*, 4 id. 47; *Livingston v. Freeland*, 3 Barb. Ch. 510.) If he accept the devise, he is personally liable for the legacy *in equity*, without an express promise. (*Kelsey v. Western*, 2 N. Y. 500.) At common law an express promise, made after the executors had assented to the legacy, and in consideration of his having become seized under the devise, was necessary (*Beecker v. Beecker*, 7 Johns. 99); and an action at law will not lie upon

a mere implied assumpsit arising from the devise. (*Livingston v. Livingston*, 3 Johns. 189.) Compare *Lockwood v. Stockholm*, 11 Paige, 87. But see, now, *Stoddard v. Johnson*, 13 Hun. 606, and *Scott v. Stebbins*, 91 N. Y. 605.

⁹² *Everitt v. Everitt*, 29 N. Y. 39; *Fargo v. Squiers*, 6 App. Div. 485; 39 N. Y. Supp. 648; 154 N. Y. 250; *Rudd v. Cornell*, 58 App. Div. 207; 68 N. Y. Supp. 757; *affd.*, 171 N. Y. 114. For cases in which the language of the will was held to create an immediate vesting of the estate, or otherwise, see *Warner v. Durant*, 76 N. Y. 133; *Loder v. Hatfield*, 71 id. 92; *Fincke v. Fincke*, 53 id. 528; *Stevenson v. Lesley*, 70 id. 512; *Cushman v. Horton*, 59 id. 149; *McLean v. Freeman*, 70 id. 81; *Theological Seminary v. Kellogg*, 16 id. 83; *Tucker v. Bishop*, id. 402; *Bedell v. Guyon*, 12 Hun. 396; *Brown v. Nicholson*, 8 id. 464; *Five Points House of Industry v. Amerman*, 11 id. 161; *Ross v. Roberts*, 2 id. 90; *Hays v. Gourley*, 1 id. 38; *Smith v. Rockefeller*, 3 id. 295; *Delavergne v. Dean*, 45 How. Pr. 206; *Lloyd v. Van*

of estates, and unless a contrary intention is unequivocally expressed, it will not be imputed to the testator.⁹³ The contingency which will render a legacy inalienable must be one which relates to the person who will take, and not to the happening of a future event.⁹⁴ If a legacy is directed to be paid when the legatee attains full age, the gift is absolute, and vests on the death of the testator; but if it is payable when he comes of age, or if, or provided, he lives till he is twenty-one, it does not vest till the contingency happens, and if it never happens, the legacy lapses.⁹⁵

The question of the vesting or nonvesting of a legacy becomes important in the case of the death of a tenant for life, or for the life of another, or until majority, or depending upon any other limitation. If, for example, a legatee who is entitled to income during the life of another, dies, such income passes to the legatee's

Antwerp, 50 id. 81; Betts v. Betts, 4 Abb. N. C. 317; Meyer's Will, 57 How. Pr. 203; Floyd v. Fitcher, 38 Barb. 409; Larocque v. Clark, 1 Redf. 469; Hamlin v. Osgood, id. 409; Kelso v. Cuming, id. 392; Young v. Case, 2 id. 55; Van Wyck v. Bloodgood, 1 Bradf. 154; *Ex p.* Turk, id. 110; Andrews v. N. Y. Bible Soc., 4 Sandf. 156; Marsh v. Wheeler, 2 Edw. 156; Tucker v. Ball, 1 Barb. 94; Sharpsteen v. Tillou, 3 Cow. 651; Post v. Hover, 30 Barb. 312; Williams v. Conrad, id. 524; Dubois v. Ray, 7 Bosw. 244; Ennis v. Pentz, 3 Bradf. 382; Dixon v. Storm, 5 Redf. 419; Steinele v. Oechsler, id. 312; Spencer v. See, id. 442; Magill v. McMillan, 23 Hun, 193; Matter of Bogart, 28 id. 466; Hitchcock v. Peaslee, 89 id. 506; Matter of Cameron, 76 id. 429; McKay v. McAdam, 80 id. 260; Matter of Ball, 11 Misc. 433; Matter of Lehman, 2 App. Div. 531; Farmers' L. & T. Co. v. Ferris, 67 id. 1; Matter of Battelle, 24 Misc. 61; Karstens v. Karstens, 29 App. Div. 229. The rule that, when legacies are payable in the future, without any condition annexed, or expressed intention to the contrary, they vest at testator's death, does not apply where his intention is apparent that they shall only vest at the happening of a particular event and on the fulfilment of the conditions annexed. (Shipman v. Fanshaw, 15 Abb. N. C. 288.) Although, where there is no gift but in a direction to pay at a future time, the vesting is

postponed until that time arrives (Paget v. Melcher, 21 Misc. 196; Matter of Crane, 164 N. Y. 71; Hafner v. Hafner, 62 App. Div. 316); there are many exceptions to the rule. (Carr v. Smith, 25 App. Div. 214; *affd.*, 161 N. Y. 636; Matter of Battelle, *supra*; Matter of Young, 78 Hun, 521; Matter of Watts, 68 App. Div. 357; Bowditch v. Ayrault, 138 N. Y. 222; Matter of Embree, 9 App. Div. 602; *affd.*, 154 N. Y. 778; Shangle v. Hallock, 6 id. 55.)

⁹³ McKinstry v. Sanders, 2 Sup. Ct. (T. & C.) 181.

⁹⁴ Sawyer v. Cubby, 146 N. Y. 192; 66 St. Rep. 582. See Matter of Dipfel, 71 App. Div. 598.

⁹⁵ Patterson v. Ellis, 11 Wend. 259; Burrill v. Sheil, 2 Barb. 457; Hone v. Van Schaick, 20 Wend. 564; Weyman v. Ringold, 1 Bradf. 40; Wheeler v. Lester, id. 213; Post v. Hover, 30 Barb. 312, 319; Dupre v. Thompson, 8 id. 537; Colvin v. Young, 81 Hun, 116; Dimmick v. Patterson, 66 id. 492. A direct gift to a minor is vested, notwithstanding it is given over, in case of his death under age, or "without heirs;" and though liable to be divested on a contingency, the substituted legatees will only take the principal; and the interest accruing meanwhile belongs to the minor, and may be appropriated for his support. (Pinney v. Fancher, 3 Bradf. 198.) See Matter of Goodrich, 2 Redf. 45; Willets v. Titus, 14 Hun. 554; Smith v. Parsons, 146 N. Y. 116.

personal representatives for the remainder of the life of the *cestui que vie*.⁹⁶

§ 741. **Vested right to a contingent estate.**—The estate may be contingent, but the right to take it in possession, *if it ever does vest*, is a vested right.⁹⁷ Contingent estates, some of which form the basis of *vested rights*; although all alike in being outstanding, waiting for the happening of a contingency, fall into two distinct groups: (1) those where the contingency arises, either wholly or partly,⁹⁸ from uncertainty concerning the person to whom they are limited; and (2) where the contingency arises wholly from uncertainty concerning the event on which they are limited to take effect.⁹⁹

§ 742. **Conditional legacies.**—An *absolute* legacy is where a thing is bequeathed without any qualification, while a *conditional* legacy is one depending upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated.¹ But where there is no provision for forfeiture, and nothing to indicate an intention that vesting is to depend upon performance, a provision, in terms a condition, will be held to import a covenant, and not a condition.² The condition may be either precedent or subsequent. If precedent, the estate vests upon its performance; if subsequent, it vests upon the testator's death, subject to be divested by nonperformance.³ Failure to perform is

⁹⁶ *Morgan v. Williams*, 66 How. Pr. 139. See *Tuttle v. Tuttle*, 2 Dem. 48.

⁹⁷ *Hennessy v. Patterson*, 85 N. Y. 91; *Nellis v. Nellis*, 99 id. 505; *Ham v. Van Orden*, 84 id. 257.

⁹⁸ *Haynes v. Sherman*, 117 N. Y. 433.

⁹⁹ See *Chaplin on Susp. of Power of Aliena.*, p. 48, § 73 *et seq.*, for a satisfactory statement of New York law on this subject.

¹ See *Caw v. Robertson*, 5 N. Y. 125; *Cooper v. Remsen*, 3 Johns. Ch. 382; id. 521; 5 id. 459; *Crocheron v. Jaques*, 3 Edw. 207. Of the duty of executors, in the payment of a bequest conditioned on their being satisfied that the beneficiary had reformed from dissipation, see *Dustan v. Dustan*, 1 Paige, 509; *Smith v. Rockefeller*, 3 Hun, 295; *Matter of Keenan*, 15 Misc. 368. A condition that a legatee shall be free from immoral, disorderly, and intemperate conduct, without providing any standard by which or desig-

nating any person by whom that question is to be determined, is too indefinite and uncertain to be capable of observance. (*Horndorf v. Horndorf*, 13 Misc. 343; 34 N. Y. Supp. 560.)

² *Cunningham v. Parker*, 146 N. Y. 29; 65 St. Rep. 774.

³ *Five Points House of Industry v. Amermann*, 11 Hun, 161; *American Church, etc., Soc. v. Griswold College*, 27 Misc. 42; 58 N. Y. Supp. 3; *Matter of Woods*, 33 Misc. 12; 67 N. Y. Supp. 1123. A bequest to a charitable institution, on condition that it care for a certain person, is valid, and the society is entitled to it, if willing to conform to the conditions imposed, although previous to testator's death the party named has been expelled from the institution for a violation of its rules. (*Livingston v. Gordon*, 84 N. Y. 136.) See *De Veaux College v. Highlands Co.*, 63 App. Div. 461. Where a bequest is made to a corporation for its own benefit, no trust

sufficient to warrant the inference that the legatee refused the bequest.⁴ Precedent contingencies are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such that, by their failure or nonperformance, an estate already vested may be defeated.⁵ There are no technical words to distinguish them, and whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate.⁶ Thus a legacy in trust, conditioned upon the immediate and continued engagement of the beneficiary in the business conducted by the testator in his lifetime, fails upon the discontinuance of such services, although caused by illness and permanent physical disability.⁷ If a legatee upon condition accepts the legacy, and enters into possession, he must perform the condition, however burdensome.⁸ He is not bound to make his election whether or not to take the bequest, until the condition and value of the gift can be reasonably ascertained. A mere design or intention to accept will not conclude him, or prevent a retraction, if he was ignorant of the real state of the legacy, and the extent of the charge upon it. If he refuses to accept the legacy, the executor will be considered as a trustee holding the fund for the benefit of those interested in the legatory charges.⁹

is created by a suggestion as to the use of the fund. (Matter of Isbell, 1 App. Div. 158; 37 N. Y. Supp. 919.) S. P., Preston v. Howk, 3 App. Div. 43; 37 N. Y. Supp. 1079; *affd.*, 154 N. Y. 734. Where a will attaches to a legacy an *enabling* condition, it is an immaterial circumstance whether the condition is fulfilled before or after testator's death. Thus, where testator directed that, upon his son "M. attaining the age of twenty-one years," his executors give to his said son the sum of \$10,000, and M. became twenty-one years of age before his father's death; held, upon his petition to compel payment of a portion of his legacy, that the legatee's attainment of majority being the essence of the condition, the purpose was answered by his coming of age in the lifetime of the testator, and the application was granted. (Eisner v. Koehler, 1 Dem. 277.)

⁴ Haebler v. Eichler Brewing Co., 42 App. Div. 95; 58 N. Y. Supp. 894.

⁵ 2 Bl. Comm. 154.

⁶ 4 Kent Comm. 124; Towle v. Remsen, 70 N. Y. 303. See Newkerk v. Newkerk, 2 Cai. 345, where the court

divided on the question whether a certain condition was precedent or subsequent. For conditions held precedent, see Parmelee v. The Oswego & S. R. R. Co., 6 N. Y. 74; Kenyon v. See, 94 id. 563; Bennett v. Culver, 97 id. 250; Matter of Bratt, 10 Misc. 491. Conditions subsequent, see Vail v. L. I. R. R. Co., 106 N. Y. 283; Matter of Traver, 161 N. Y. 54; Matter of Raab, 42 App. Div. 141; Collier v. Fassitt, 7 id. 20; La Chapelle v. Burpee, 69 Hun, 436; Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121; Hogan v. Curtin, 28 id. 162; Garrett v. Scouten, 3 Den. 334; Towle v. Remsen, 70 N. Y. 303. See Chaplin, *Susp. of Power*, etc., § 54. For conditions held void as against public policy, see Matter of Haight, 51 App. Div. 310; Cruger v. Phelps, 21 Misc. 252; O'Brien v. Barkley, 60 St. Rep. 520.

⁷ Welsh v. Welsh, 20 Week. Dig. 369.

⁸ Soper v. Halsey, 85 Hun, 464; 33 N. Y. Supp. 105.

⁹ Wheeler v. Lester, 1 Bradf. 293; Cronkite v. Cronkite, 1 Sup. Ct. (T. & C.) 266; Stoddard v. Johnson, 13 Hun, 666.

§ 743. **Legacy to executor.**—A legacy to a person named as executor in the will is a conditional legacy, and the right of the legatee to receive it depends upon his assumption of the office, unless it appears by the will itself, or the nature of the legacy, or other circumstances, that the legacy was given as a mark of regard, or by reason of relationship of the legatee, in which case the legacy will be considered absolute and not conditional. But the presumption is that a legacy to an executor was given to him in that character, and hence will fail, if he renounces or neglects to accept the appointment, or if, having accepted, he gives up the trust.¹⁰

Before a gift to executors, *eo nomine*, can be held to vest in them individually, the intention that it should so vest must be plainly manifested, and where it is coupled with an expression of confidence that they will follow his known wishes, the gift will be deemed a trust.¹¹

§ 744. **Cumulative legacies.**—Where the will contains two legacies, of the same thing or amount, to the same person, whether the legatee takes both (in which case they are called *cumulative*) or only one (the second being a mere repetition of the first), is always governed by the intention of the testator. The presumption is that the latter legacy is a mere repetition or substitution; but where the two are in different instruments, *e. g.*, where one is given by will and the other by codicil, the presumption is that both are intended. But either presumption is liable to be con-

¹⁰ See *Morris v. Kent*, 2 Edw. 175. In *Campbell v. Mackie* (1 Dem. 185), the testator gave a legacy "to my friend B. or his heirs one thousand dollars," and named B. as an executor. Held, that the bequest was not designed as a compensation for services which testator expected would be rendered by the legatee in the administration of the estate. In *Matter of Cameron* (N. Y. Daily Reg., Jan. 27, 1881), the testator gave \$2,000 to each of his executors. One of them was ten days thereafter discharged on his own application. Held, that he was not entitled to a proportionate share of the legacy. In *Fletcher v. Hurd* (38 St. Rep. 648; 14 N. Y. Supp. 388), testator bequeathed the residue of his estate, to be divided among the executors in lieu of compensation for services. Held, they took in their character of executors; and one who failed to apply for let-

ters, although in consequence of objections raised to his serving by a co-executor and a legatee, took no share in the bequest. Compare *Matter of Brigg*, 39 App. Div. 485; 57 N. Y. Supp. 390; *Matter of Strong*, 5 Misc. 433.

¹¹ *Edson v. Bartow*, 10 App. Div. 104; modified in other respects, 154 N. Y. 199. Also held, in that case, that as to the other two executors who were not aware of their appointment or of the provisions of the will, until its publication, the will made an absolute transfer and the executors, taking as tenants in common, and not as joint tenants, they were entitled to two-thirds of the legacies which failed. See *Trustees of Amherst College v. Ritch*, 91 Hun. 509; *affd.*, 151 N. Y. 282; *Forster v. Winfield*, 142 id. 327. Compare *Clements v. Babcock*, 26 Misc. 90; *Peoples Trust Co. v. Smith*, 62 St. Rep. 104.

trolled and repelled by internal evidence and the circumstances of the case.¹² Where the directions of the will are repugnant, *e. g.*, where, after an absolute legacy of money, there was a subsequent direction to the executors to invest it for the support of the legatee, the two directions are inconsistent, and, therefore, void.¹³

§ 745. **Legacy in lieu of dower.**—Legacies or devises are frequently given to the widow, in lieu of her dower right. In such case, the legatee has an election to accept or refuse the legacy or devise. In cases where the will does not declare, in express terms, that such legacy is in lieu of dower, difficult questions may arise as to whether the widow is put to her election. The general principle is well settled, that unless the testator has manifested his intention to deprive her of her dower, either by express words or by necessary implication, she cannot be deprived of it by a testamentary provision in her favor. It is held, indeed, that the claim of dower must be inconsistent with, or repugnant to, the provisions of the will, before an intention to bar the dower can be implied; that, in other words, the claim cannot be resisted by implication, unless its allowance would disturb or disappoint the will.¹⁴

§ 746. **To executor in lieu of commissions.**—A provision made by the will for specific compensation to the executor, is declared by

¹² De Witt v. Yates, 10 Johns. 156.

¹³ Dorland v. Dorland, 2 Barb. 63.

¹⁴ See Fuller v. Yates, 8 Paige, 328; Hawley v. James, 5 id. 318; Wood v. Wood, id. 596; Sanford v. Jackson, 10 id. 266; Adsit v. Adsit, 2 Johns. Ch. 451; Lupton v. Lupton, id. 614; Babcock v. Stoddard, 3 Sup. Ct. (T. & C.) 207; Fevre v. Toole, 84 N. Y. 95; Bullard v. Benson, 1 Dem. 486; Close v. Eldert, 30 App. Div. 338; Purdy v. Purdy, 18 id. 310; Kimbel v. Kimbel, 14 id. 570; Conner v. Watson, 1 id. 54; Gray v. Gray, 5 id. 132; Horstmann v. Flege, 61 id. 518; Miller v. Miller, 22 Misc. 582; Hopkins v. Cameron, 34 id. 688; Fenton v. Fenton, 35 id. 479; Matter of Grotian, id. 257; 30 id. 23; Dunklee v. Butler, id. 58. Compare Nelson v. Brown, 144 N. Y. 384; Jurgens v. Rogge, 16 Misc. 100; Koezly v. Koezly, 31 id. 397. In Klein v. Hayck (5 Redf. 210), it appeared that the testator was divorced from his wife, and though forbidden to remarry, thereafter cohabited with N. as his wife without a marriage. By his will, he gave to his "beloved wife," N., all his household furniture,

plate, etc., in lieu of dower. Payment of the annuity, "in lieu of dower," was opposed by those interested in the residuary estate, on the ground that it was void. Held, that the misdescription of the legatee as testator's wife did not avoid the legacy, as there was no ambiguity in respect to the person intended, and no fraud was practiced on the testator; that the expressed consideration, "in lieu of dower," though untrue and impossible, did not avoid the legacy, since no consideration was necessary to its validity. As to what will be deemed to be an acceptance of the bequest, see Grout v. Cooper, 9 Hun. 326. As to contribution by parties benefited from widow's election to take or refuse provision, see Tehan v. Tehan, 83 Hun. 368; Matter of Lawrence, 36 Misc. 275; and s. c., 37 id. 702. See also L. 1896, c. 547, § 181, as to when widow is deemed to have elected to accept provision, in lieu of dower. Every provision for a widow, in lieu of dower, is forfeited in a case in which she would forfeit her dower. (L. 1896, c. 547, § 182.)

the statute¹⁵ to be a full satisfaction for his services, in lieu of the commissions, unless he elects to renounce all claim to such specific legacy. He is not required to elect which he will accept, until he has sufficiently ascertained which will be the more advantageous. But to put him to his election, the language of the will should clearly indicate that the legacy was intended as a specific compensation for his services; if it does not, his right to charge commissions is not defeated.¹⁶

§ 747. **Legacies to creditors.**—The rule that a legacy to a creditor is a satisfaction of the debt, is subject to many exceptions. In general, a legacy implies a bounty, and not a payment.¹⁷ But one who accepts a bequest and is put to his election between the gift in the will and a claim against the estate, his acceptance of the former is a satisfaction of the latter; and it is immaterial whether what he takes turns out to be of greater or less value than that which he surrendered.¹⁸ The cases justify the following statement of doctrine on this subject: (1) A legacy is never deemed a satisfaction of a debt contracted after the date of the will. (2) It is not considered a payment, when the will contains an express direction that the debts and legacies shall be paid, such as “after all my debts and legacies are paid, then I give,” etc., or words of like import.¹⁹ (3) Where the particular motive or purpose for which the legacy is stated in the will, *e. g.*, as a token of regard, or from ancient friendship, or from relationship, and the like, it will not be deemed a satisfaction of the debt. (4) Where the legacy is contingent and uncertain, or payable at a future time, or upon condition, it is not a satisfaction. (5) Where the legacy is less than the debt, or the debt is unliquidated, or in negotiable

¹⁵ Co. Civ. Proc., § 2731, amended 1895 (former § 2737).

¹⁶ Matter of Mason, 98 N. Y. 527.

¹⁷ Reynolds v. Robinson, 82 N. Y. 103; Smith v. Murray, 1 Dem. 34. In Adams v. Olin (21 Civ. Proc. Rep. 227), a gift to the testator's wife in lieu “of all dower or other interest in my property and estate.” Held, not to require the satisfaction of a debt, from the husband to the wife for the amount of her separate estate, held by him for investment, especially where the books of the testator indicated the continuance of the obligation by entries made subsequent to the date of the will. See Matter of Sherman, 24 Misc. 65; 53 N. Y. Supp. 376.

¹⁸ Caulfield v. Sullivan, 85 N. Y. 153.

¹⁹ An express direction for the payment of all the testator's debts, rebuts the presumption that a legacy to a creditor was intended as a satisfaction of the debt. (Fort v. Gooding, 9 Barb. 371.) See Boughton v. Flint, 5 Abb. N. C. 215; 74 N. Y. 476. The common-law right of a creditor of the testator, appointed the executor of his will, to pay himself first, if his debt is by specialty or of record, and his right of *retainer* to that end, has been abolished in this State. (2 R. S. 88, § 33; Co. Civ. Proc., § 2719, former § 2739.) See Williams v. Purdy, 6 Paige, 166; Smith v. Kearney, 2 Barb. Ch. 533; Treat v. Fortune, 2 Bradf. 116; and *ante*, § 641.

paper, or in a current account, the debt is not satisfied. (6) Where the legacy is of a different nature from the debt, as where the testator is indebted by bond, and he bequeaths an interest in land, it is not a satisfaction. (7) A specific legacy is never a satisfaction, unless expressly so declared by the will, and it is so accepted by the legatee.²⁰ The general rule is that the effect of a legacy to testator's creditor is governed by testator's intent, and that an intention thereby to pay the debt must be either evidenced by the language of the provision or be fairly inferable from the circumstances.²¹

§ 748. **Legacies to debtors.**—A bequest by a creditor, to his debtor, of the amount of his debt is a forgiveness of the debt, or a specific legacy; it is not a pecuniary legacy.²² The naming of a person executor in a will does not operate as a discharge or bequest of any just claim which the testator had against the executor, but such claim must be included among the credits and effects of the deceased in the inventory, and the executor is liable for the same, as for so much money in his hands at the time the debt or demand becomes due.²³ The discharge or bequest, in a will, of any debt or demand of the testator, against any executor named in his will, or against any other person, is declared by statute not to be valid as against the creditors of the deceased, but is to be construed only as a specific bequest of such debt or demand.²⁴ If

²⁰ Willard on Exrs. 366; Williams v. Crary, 5 Cow. 370; 8 id. 246; 4 Wend. 443; Clarke v. Bogardus, 12 Wend. 67. Compare Mulheran v. Gillespie, id. 349. And see Eaton v. Benton, 2 Hill, 576. A legacy to the creditor's wife, and its acceptance, is not an extinguishment. (Mulheran v. Gillespie, 12 Wend. 349.)

²¹ Sheldon v. Sheldon, 33 St. Rep. 754; 11 N. Y. Supp. 477. In that case, testator gave a legacy to his wife expressly in lieu of dower. Held, not to cancel the wife's claim for moneys received by the testator, the claim being wholly unliquidated at the date of the will, and liable to be largely increased or diminished before his death. See Van Slooten v. Wheeler, 50 St. Rep. 873.

²² Sholl v. Sholl, 5 Barb. 312. As to the effect of a bequest to the obligor's wife, of the interest of a bond which, by its terms, was to bear no interest till after demand, see Sweet v. Irish, 36 Barb. 467. A legacy to a debtor's wife is not sub-

ject to deduction of the husband's debt. (Clarke v. Bogardus, 12 Wend. 67.) But a bequest to a daughter of a mortgage given to secure her husband's bond, will include the latter. (Klock v. Stevens, 20 Misc. 383.) Compare Matter of Lee, 141 N. Y. 58. In Williams v. Crary (5 Cow. 368), the will contained a provision directing the executors to enter satisfaction of A.'s mortgage, and to cancel his bond, upon his paying \$1,600. The bond and mortgage were for \$4,000, and, including his current account against the testatrix, the balance due at her death was \$1,600. Held, not a legacy, but a proposition of settlement, and that A., having paid the \$1,600, could not recover on his account. See Matter of Temple, 36 Misc. 620.

²³ Co. Civ. Proc., § 2714, as amended 1893; adopting 2 R. S. 84, § 13.

²⁴ Co. Civ. Proc., § 2714, as amended 1893. For the common-law rule, see Rickets v. Livingston, 2 Johns. Cas. 97. The provision of the Revised

there are sufficient assets to pay debts without it, it may be paid in the same manner and in like proportions as legacies of that kind. In any case, the intention to relinquish the debt must be clearly expressed in the will, or otherwise proven;²⁵ the presumption is, that such was not the testator's intention.²⁶

§ 749. **Legacy for life, with remainder over.**—Questions sometimes arise between a tenant for life and the remainderman, as to whether the bequest is general or specific. If it is *specific*, and the article bequeathed is necessarily perishable, such as household stores, the tenant for life takes it absolutely; where the articles are not necessarily consumed in the using, and there is no direction to the executor to hold them in trust for the remainderman, the executor may deliver them, taking a receipt for them, recognizing the remainder,²⁷ unless there are special circumstances rendering it hazardous to surrender the principal of the estate to the care of the life tenant without requiring security for the protection of the remainderman.²⁸ But where there is a *general* bequest for life, with remainder over, although it includes articles which are consumed in the using, the whole must be sold by the executor,

Statutes (§ 13) does not discharge a lien upon real estate by which the debt is secured, or so affect it as to give subsequent incumbrances priority of lien; it merely adds to the original obligation a liability to account, as executor, for the debt: and until the executor, in the performance of his trust, has paid the amount of the debt, and thus discharged it, all liens by which it is secured remain in force. (*Soverhill v. Suydam*, 59 N. Y. 140.)

²⁵ *Clark v. Bogardus*, 2 Edw. 387; *Stagg v. Beekman*, id. 89.

²⁶ *Matter of Leslie*, 3 Redf. 280; *Matter of Foster*, 15 Misc. 175; 37 N. Y. Supp. 136. A direction that advancements be not deducted from a child's share, does not release a debt incurred subsequent to the execution of the will. (*Rogers v. McGuire*, 90 Hun. 455.)

²⁷ *Spear v. Tinkham*, 2 Barb. Ch. 211. Although a first legatee is authorized to consume the legacy, if necessary for his subsistence, yet the right to make use of it for that purpose is rather in the nature of a power than an ownership, and a gift over, of what the first legatee shall leave, is good. Where the gift to the first taker is absolute in its terms, or when the use only of the property is given, and

the property is such that its use is its consumption, the gift will be deemed an absolute one, and a gift over would be void for repugnancy. (*Bell v. Warn*, 4 Hun. 406.) A legacy to E., "for her use during her natural life," entitles her to immediate possession. (*Matter of Weppeler*, 2 Dem. 626.) See *Smith v. Van Ostrand*, 64 N. Y. 278. A legacy to a wife "during her lifetime for the support of herself and children," remainder to such children, goes to the wife. (*Clark v. Leupp*, 88 N. Y. 230; *Smith v. Van Ostrand*, 64 id. 278; *Billar v. Lourdes*, 2 Dem. 590.) See *Matter of Beyer*, 10 Misc. 198; *Pell v. Folger*, 68 Hun. 443. Compare *Ketcham v. Ketcham*, 66 id. 608; *Matter of McClure*, 136 N. Y. 238; *Gross v. Mathewson*, 34 Misc. 370; *Baumgras v. Baumgras*, 5 id. 8; *Dwyer v. Wells*, id. 18; *Matter of Geisler*, 36 id. 750; *Matter of Moehring*, 154 N. Y. 423.

²⁸ *Matter of Fernbacher*, 17 Abb. N. C. 339; s. c. as *Fernbacher v. Fernbacher*, 4 Dem. 227. But the executors are grossly remiss in turning over the principal to the life tenant without security, with knowledge of the latter's purpose to appropriate it to her own use, and thereby destroy the interests of the remaindermen. So held

and the interest or income only be paid to the legatee for life.²⁹ Dividends upon stock owned by a testator which had been declared at the time of testator's death, but which were payable subsequently, are principal of the estate and do not go to a legatee who is "to receive the rents, interest, and income." The dividend to which a life tenant may be entitled as income can only be that which the company declares after that relation is acquired.³⁰

It may be stated generally that one having a life interest has a right to call upon the trustee, from time to time, to disclose to him the nature and character of the property in his hands constituting the trust fund; to show its value; the income derived therefrom, and the expenses to which the trustee is subjected in its management, in order that he may be able in the future to watch and look after his own interests.³¹ A remainder may be limited

in proceedings to remove executors for misconduct. (*Ib.*) In *Matter of Lewis* (23 N. Y. Supp. 287), the bequest was to trustees to pay the income to A. for life, and at A.'s death to pay the principal to a third person; the life beneficiary afterward purchased the interest of the remainderman. Held, that the life estate and the remainder were not thereby merged so as to entitle the life beneficiary to the possession of the principal.

²⁹ *Covenhoven v. Shuler*, 2 Paige, 122; *Matter of Beyea*, 10 Misc. 198. Compare *Clark v. Clark*, 8 Paige, 153; *Cairns v. Chaubert*, 9 *id.* 160. In the last case, a life estate in a toll-bridge, the franchise of which was limited to a number of years, was held not to give the legatee all the tolls, but only such portion of them as would equal the interest of a capital equivalent to the cash value of the franchise at the time of the testator's death. And see *Auburn Theological Seminary v. Cole*, 20 Barb. 321; and the Same *v. Kellogg*, 16 N. Y. 83; *Bundy v. Bundy*, 38 *id.* 410. As to what form of bequest will raise a life estate by implication, see *Doughty v. Stillwell*, 1 Bradf. 300. Compare *Minges v. Mathewson*, 66 App. Div. 379; *Kendall v. Case*, 84 Hun. 124.

³⁰ *Matter of Kernochan*, 104 N. Y. 618. Where such stock is sold by the executors at a fixed price per share, and in addition thereto a sum is paid as being equivalent to a ratable proportion of accumulated profits in the hands of the company at the time of the death of the testator, such latter

sum is to be considered as principal and not as income. In such case, the ordinary rule which gives cash dividends, declared from accumulated earnings and profits, to the life tenant, should be applied, whether such accumulated profits are earned before or after the death of the testator. The value of certain options or privileges given to stockholders by various companies to subscribe for and take at par a certain amount of their stock and bonds, should be classed as principal and not as income. (*Ib.*) See, generally, *Matter of James*, 146 N. Y. 78; *Lowry v. Farmers' L. & T. Co.*, 56 App. Div. 408; *Matter of Rogers*, 161 N. Y. 108; *Matter of Kane*, 64 App. Div. 566; *McLouth v. Hunt*, 154 N. Y. 179; *Monson v. New York Security, etc., Co.*, 140 *id.* 498; *Stewart v. Phelps*, 71 App. Div. 91; *Cross v. Long Island Loan Co.*, 75 Hun. 533.

³¹ *Hancox v. Wall*, 28 Hun. 214. The authorities relating to the rights of life tenants and remaindermen respectively, are collated and discussed in *Cragg v. Riggs* (5 Redf. 82; 26 Hun. 90). See also *Scovel v. Roosevelt* (5 Redf. 121), where 5 per cent. governments were exchanged for 4 per cents. No deduction should be made from the income to make up the diminution in value of United States bonds purchased at a premium. (*McLouth v. Hunt*, 154 N. Y. 179; *Matter of New York Life Ins. & Trust Co.*, 24 Misc. 71.) See *Farwell v. Twedde*, 10 Abb. N. C. 94. See also § 626, *ante*. Where the will directed the executors, as trustees, to retain the

upon a bequest of money as well as of other personal property, and the testator may confide the money to a legatee for life, trusting to such legatee to preserve the fund for the benefit of the remainderman; in which case, the legatee for life becomes trustee of the principal, during the continuance of the life estate.³² He may, therefore, be compelled at the instance of the remainderman to give security for the legacy, or to submit to the appointment of a receiver, if it appears that his interests would otherwise be imperiled.³³ An executor may turn over the principal of the life estate to the life tenant, without exacting security, where such an intention on the part of the testator can be gleaned from the terms of the will, unless there are circumstances rendering such a course perilous or unadvisable, but the tendency of the decisions is, that an executor should not turn over property to one who has simply a life estate therein without obtaining from such life tenant security for the protection of the remainderman.³⁴

stock of two banks, pay the income to testator's daughter during her life, and turn over the stock at her death to her issue, and an assessment was made upon the stockholders of one of the banks for the amount of their stock.—Held, that the stock in the other bank should be sold to pay the assessment, since the legatees took the bequest subject to incidental burdens. (*Matter of Bull*, 51 St. Rep. 558.)

³² *Smith v. Van Ostrand*, 64 N. Y. 278; *Russell v. Hilton*, 37 Misc. 642; 76 N. Y. Supp. 233. Where a fund is directed to be invested, and the interest, dividends, and income are to be applied to the use of the beneficiary for life, the profit realized upon the sale of stock, in which a portion of such sum is invested, does not belong to the life tenant as income, but must be added to the principal, of which he is entitled to the interest and income. (*Whitney v. Phoenix*, 4 Redf. 180.) The legatee in remainder may call on the legatee for life for an inventory of the property. (*Westcott v. Cady*, 5 Johns. Ch. 334; *De Peyster v. Clendenning*, 8 Paige, 295; *Covenhoven v. Shuler*, 2 id. 122; *Matter of Hunt*, 38 Misc. 30.) Compare *Douglas v. Hazen*, 8 App. Div. 25.

³³ *Washbon v. Cope*, 22 N. Y. Supp. 241. As to requiring a bond from the life tenant, who is also the trustee, see *Matter of Shipman*, 53 Hun. 511; *ante*, § 473.

³⁴ *Tyson v. Blake*, 22 N. Y. 563;

Smith v. Van Ostrand, 64 id. 281; *Livingston v. Murray*, 68 id. 485; *Montfort v. Montfort*, 24 Hun. 120; *Fernbacher v. Fernbacher*, 4 Dem. 227; *Matter of Lowery*, 19 Misc. 83; *Scott v. Scott*, 6 id. 174; *Matter of Roffo*, 51 App. Div. 35; *Matter of McDougall*, 141 N. Y. 21. Compare *Matter of Ungrich*, 48 App. Div. 594; *Matter of Haskell*, 19 Misc. 206. In *Matter of Landa* (N. Y. Law J., Jan. 30, 1891), the surrogate said: "It is the duty of the executors to exact a bond which will protect the persons who may eventually become entitled to the fund. These possible beneficiaries are of two classes: the possible appointees under the power contained in the will, and the residuary legatees who will become entitled to the fund in case of the failure of the donee of the power to exercise the same. It is, therefore, incumbent upon the executor to require a bond to the full present value of the securities to be transferred. The present value of the securities appears to exceed the original amount of the legacy, and the bond to be given should be on the larger sum. The reason for this course is apparent. After giving a bond for the face of the legacy, the life tenant might dispose of the securities, appropriate the difference, and the bond would be no adequate protection to the persons entitled to receive the securities on the termination of the life estate. The provision in the decree releasing and

ARTICLE SECOND.

ADEMPTION AND SATISFACTION OF LEGACIES.

§ 750. **Ademption defined.**—“Ademption” and “satisfaction” are inaccurately used as synonyms; but they are not, for each is descriptive of a distinct state of facts. When a testator devises or bequeaths specific property which he subsequently disposes of, or if the thing devised or bequeathed is not in existence at his death, the devise or legacy is adeemed or cut off.³⁵ But when a legatee, subsequently to the execution of the will, receives from the testator property in lieu of the devise or legacy, the devise or legacy is satisfied.³⁶ The principle is applicable to a residuary legacy, where such appears to be the clear intent of the testator.³⁷

§ 751. **Ademption of specific legacies.**—Subject to some qualifications,³⁸ the general rule is, that in order to complete the title of the specific legatee to the thing given, it must be in such condition at the testator's death as described in his will. If the particular thing bequeathed has been sold or disposed of, there is complete extinction, and nothing remains to which the words of the will can apply. Whether the testator, by such disposition, intended an ademption, is immaterial,³⁹ though it is otherwise in the case of general legacies, for whether an advancement to the legatee shall be considered an ademption, or in substitution of a legacy given to him by the will, depends upon the intention of the testator.⁴⁰

discharging the executors is improper for the reason that it will be the duty of the executors, upon the termination of the life estate, to deliver and transfer the securities in which the fund may be invested to the persons entitled thereto, or, in case of their inability to do so, to prosecute the bond given for their return.”

³⁵ *Hosea v. Skinner*, 32 Misc. 653. Compare *Matter of Andrews*, 25 id. 72.

³⁶ *Burnham v. Comfort*, 37 Hun, 216.

³⁷ *Matter of Turfler*, 23 N. Y. Supp. 135.

³⁸ Thus there is no ademption of a specific legacy where the alteration of the fund was made by a mere act or operation of law, or where it was made without the testator's concurrence or authority, or fraudulently, or in breach of trust, or, finally, where the testator lends the thing, to be afterward returned. A corporation, stock in which

the testator bequeathed, became insolvent, but renewed its capital under a special statute. Pursuant to the statute, he filled up only a part of his stock, and suffered the remainder to be issued to others. Held, that the part he retained passed by the bequest. (*Havens v. Havens*, 1 Sandf. Ch. 324.) See *Walton v. Walton*, 7 Johns. Ch. 258; *Doughty v. Stillwell*, 1 Bradf. 300.

³⁹ *Beck v. McGillis*, 9 Barb. 35.
⁴⁰ *Tillotson v. Race*, 22 N. Y. 122. See *Terrill v. Public Adm'r*, 4 Bradf. 245; *Glover v. Glover*, 47 St. Rep. 765. A legacy to a church or religious corporation for the purpose of paying off a debt is not adeemed by the reduction of such debt by other means, except to the extent that subsequent subscriptions by testator have contributed thereto. (*Matter of Gasten*, 16 Misc. 125; 38 N. Y. Supp. 948.)

It is also a general rule, that under a bequest of specific articles in the possession of the testator when he made the will, those only pass which he *then* had; but, on the other hand, if the testamentary words relate to the period of his death, the articles which were in his possession at that time will be included.⁴¹ But if a specific legacy does not exist at the death of the testator, it is adeemed, notwithstanding the contrary intention of the testator or the hardship of the case. Thus, where the testator, having specifically bequeathed a bond and mortgage, foreclosed the mortgage and sold, and the purchaser gave him a new bond and mortgage for the price, and the testator left a memorandum declaring that the new mortgage was but a renewal of the one bequeathed, and that he intended it should pass to the legatee, it was, nevertheless, held that the legacy was adeemed.⁴² If a testator, having devised land, sells the same before his death, the proceeds become personalty; and the court will not substitute the money received by testator for the land devised.⁴³

§ 752. Demonstrative legacies.— The question sometimes arises whether a bequest was intended by the testator to be paid at all events, the fund being pointed out by the way only of demonstration. The leading principle is that when a testator bequeaths a sum of money, or, what is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, such intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund; although no positive rule of ready application to every case can be laid down. Each case will depend upon a consideration of all the material provisions of the will, and of the extrinsic circumstances respecting the testator's family and estate, which may be fairly brought to bear upon the question of intent.⁴⁴

⁴¹ See *ante*, § 269.

⁴² *Beck v. McGillis*, 9 Barb. 35. If the mortgage is paid during testator's lifetime, the legacy is adeemed. (*Abernethy v. Catlin*, 2 Dem. 341.) See *Gardner v. Printup*, 2 Barb. 83; *Gilchrist v. Stevenson*, 9 id. 9; *Doughty v. Stillwell*, 1 Bradf. 300; *Logan v. Deshay*, *Clarke*, 209; *De Graaf v. Cochrane*, 21 App. Div. 381; *Hopkins v. Genraud*, 30 Abb. N. C. 235. And see note to this case, giving a synop-

sis of cases showing the course of decisions in this State in applying the doctrine of ademption in the cases of gifts of particular securities, as distinguished from demonstrative legacies payable out of a particular fund.

⁴³ *Philson v. Moore*, 23 Hun. 152.

⁴⁴ *Pierrepont v. Edwards*, 24 How. Pr. 419; *Giddings v. Seward*, 16 N. Y. 365. See *ante*, § 269 *et seq.*, for general rules of construction of wills.

§ 753. Satisfaction of general legacies by advancements.—The doctrine of advancements, included in the Statute of Distributions, applies only to cases of intestacy.⁴⁵ But courts of equity have always treated advancements, by way of portions, as a satisfaction of general legacies given by a parent, or other person standing in *loco parentis*, to a child or grandchild.⁴⁶ Such an advancement will be presumed to have been made in satisfaction of the legacy.⁴⁷ That such was the intention of the testator may be shown by parol evidence,⁴⁸ and even by his declarations, if made *at the time* of making the advancement, but not otherwise.⁴⁹ Declara-

⁴⁵ Thompson v. Carmichael, 3 Sandf. Ch. 120; Hays v. Hibbard, 3 Redf. 28. See *post*, tit. 8, art. 3 of this chapter.

⁴⁶ Story's Eq. Jur., §§ 1111, 1112; 1 Roper on Leg. 374; 2 Wms. on Exrs. 1143; Langdon v. Astor, 16 N. Y. 34; Hine v. Hine, 39 Barb. 507; Benjamin v. Dimmick, 4 Redf. 7; Lawrence v. Lindsay, 68 N. Y. 108. Compare Stevens v. Stevens, 2 Redf. 265; Gilman v. Gilman, 63 N. Y. 41. A direction that all moneys or indebtedness which should appear upon any inventory or ledger or book of account, kept by him or under his direction, charged as due to him from any or either of his children, or from Robert College (a corporation), and as outstanding and unsettled accounts at the time of his decease, should be considered as forming part of his estate, and that a discharge from such indebtedness by his executors should be deemed and taken as an equivalent to an equal amount paid to such child or college on account of his or its share, was held valid in Robert v. Corning, 23 Hun, 299. See Matter of Van Horne, 25 Misc. 391. When a parent procures a third person to convey property to his child, for a consideration, moving from himself, the presumption is that it is an advancement, equally as where he makes the conveyance himself. (Piper v. Barse, 2 Redf. 19.) The circumstance that he subsequently executed a codicil in which he made no reference to the legacy has no weight on the question. (Ib.) As to whether an advancement made in stocks, and charged on the testator's books at an estimated value, may be regarded as a satisfaction, if the stocks were valueless at the time the charge was made, see Marsh v. Gilbert, 2 Redf. 465. See also Matter

of Burdsall, 64 App. Div. 346. Whether or not a conveyance by a decedent, in his lifetime, to the wife of his son, was an advancement, is a question of fact on all the evidence. See Palmer v. Culbertson, 143 N. Y. 213. Unless the will so requires by its terms or by necessary implication, interest is not to be charged against advancements. (Matter of Keenan, 15 Misc. 368; 38 N. Y. Supp. 426; *sub nom.* Matter of Downing, 72 St. Rep. 823.)

⁴⁷ An advance to enable a legatee to engage in business is not within the rule. (Lockwood v. Lockwood, 3 Redf. 330.) As to advancement by way of a marriage portion, see Miller v. Coudert, 36 Misc. 43.

⁴⁸ 2 Whart. on Evid., § 1077; Palmer v. Culbertson, 143 N. Y. 213; 62 St. Rep. 164.

⁴⁹ De Groff v. Terpenning, 14 Hun, 301, and cases cited. Compare Phillips v. McCombs, 53 N. Y. 494. In Piper v. Barse (2 Redf. 19), it was held, that the burden was on the executor to prove the satisfaction raised by him against the claim of the legatee. In Camp v. Camp (18 Hun, 217), the testator, having before his death advanced various sums to several of his children, taking from each a written receipt for the sums, "as a part of my apportionment of his estate," "to be deducted out of the estate," etc., by his will directed his executor to sell his real and personal estate, and divide the proceeds equally among his ten children, naming them. Held, that as the will did not direct the advances to be charged against the recipients, they were not to be considered in dividing the estate. Compare Matter of Bartlett, 4 Misc. 380; Kinyon v. Kinyon, 6 id. 584.

tions made subsequently to the making of the advancement may, perhaps, be shown, to rebut the presumption of satisfaction, and when this is done, similar evidence to the contrary will be allowed.⁵⁰ The testator's books, wherein certain sums are directed to be taken from a child's portion as bequeathed to him by the will, are not *per se* evidence of advancements. The fact of advances must be proved by evidence *aliunde*, which, in connection with the books, would be sufficient for that purpose.⁵¹ There is, however, no presumption of satisfaction where the advancement depends upon a contingency, and the legacy is certain and absolute;⁵² nor where the advancement is expressed to be in satisfaction of an interest to which the child is entitled otherwise than under the will, nor where the bequest to the child is of a residue or some portion of the residue,⁵³ in which case it is not regarded as a portion. And, clearly, a gift to a child will not be held to be an advancement when it expressly appears that the parent intended it should not be so considered.⁵⁴ It has been decided, in England,⁵⁵ that there is no legal presumption that money advanced by a widowed mother to her child was intended as a gift, and not as a loan, such as there is in the case of a father; because there is no such legal obligation upon her to support the child. Hence, the question is one of evidence in such case. The principle of ademption by subsequent portion has not been applied to devises of real estate.⁵⁶

⁵⁰ 3 Greenl. on Evid., § 366; 2 Whart. on Evid., § 974; Hine v. Hine, 39 Barb. 507; De Groff v. Terpenning, *supra*.

⁵¹ Benjamin v. Dimmick, 4 Redf. 7; Lawrence v. Lindsay, 68 N. Y. 108; s. c., on new trial, *sub nom.* Lawrence v. Lawrence, 4 Redf. 278; Marsh v. Brown, 18 Hun. 319. A provision in a will requiring advances made to a testator's children, as shown by his books, to be charged against them in ascertaining their share, is rendered ineffectual by a subsequent entry in the books of a settlement of such advances, with the intention of canceling and discharging the several accounts; there being no force to the objection that such act is equivalent to a change of the testamentary instrument and can only be evidenced by an instrument executed in accordance with the

Statute of Wills: such act amounted to an ademption of the gift of the several accounts. (Webster v. Gray, 54 Hun. 113; 7 N. Y. Supp. 266.) A finding by the surrogate, that a gift of bonds by the testator in his lifetime was an advance upon, and in part satisfaction of, a legacy, was sustained in Matter of Williams, 39 St. Rep. 815; 15 N. Y. Supp. 320. As to moneys advanced or debts contracted after the execution of the will, see Rogers v. McGuire, 90 Hun. 455; Rogers v. Rogers, 153 N. Y. 343.

⁵² De Groff v. Terpenning, 14 Hun. 301; Arnold v. Haroun, 43 id. 278.

⁵³ Hays v. Hibbard, 3 Redf. 28.

⁵⁴ Matter of Morgan, 104 N. Y. 74; Matter of Munson, 25 Misc. 586.

⁵⁵ Bennet v. Bennet, 40 Law T. (N. S.) 379.

⁵⁶ 2 Redf. on Wills, 441.

ARTICLE THIRD.

ABATEMENT OF LEGACIES.

§ 754. **Specific legacies.**—As a general rule, nothing can be abated from specific legacies because the estate of the testator turns out to be insufficient to pay the general legacies; they are not subject to abatement except for the payment of debts, funeral expenses or expenses of administration.⁵⁷ It is the duty of executors to turn over specific legacies at the end of one year, with all the advantage that would have accrued to the legatees, had the property thus bequeathed been deliverable when the will took effect.⁵⁸ But cases may arise, it seems, where even specific legacies (as where the testator directs that they shall come out of his personal estate, or where they are charged with the payment of general legacies) may also be subject to abatement.⁵⁹

§ 755. **General legacies.**—Where there are sufficient assets to pay all the debts in full, and the specific legacies, but not enough to pay all the general legacies in full, the latter are subject to abatement between themselves. The common-law rule to this effect is declared by the Revised Statutes.⁶⁰ In this connection, a distinction is to be observed between legacies which are mere bounties, and such as are given in consideration of a prior indebtedness by the testator to the legatee, or of the relinquishment of dower or for maintenance and education, etc. These latter do not, except as between themselves, so abate, but must be paid in full.⁶¹ In the sense of its being a money bequest, a legacy may be a general one; but where it was given expressly for the maintenance and support of a person or persons standing in near relation to the testator, the latter will be deemed to have intended to give a preference to such legacy over all others of a general character.⁶² So, a

⁵⁷ Taylor v. Dodd, 58 N. Y. 335. See Matter of Tompkins, 9 Misc. 436.

⁵⁸ Bevan v. Cooper, 7 Hun. 117; revd. on a question of jurisdiction, 72 N. Y. 317; Taylor v. Dodd, 58 id. 335.

⁵⁹ Pierrepont v. Edwards, 25 N. Y. 128; Newton v. Stanley, 28 id. 61; Giddings v. Seward, 16 id. 365. A legacy of a specified amount "in government bonds" held a general legacy, payable in a certain manner, and, therefore, subject to abatement in case of deficiency. Matter of Newman, 4 Dem. 65; Tift v. Porter, 8 N. Y. 516.) See § 736, *ante*.

⁶⁰ 2 R. S. 90, § 45; Morse v. Tilden,

35 Misc. 560; 72 N. Y. Supp. 30. Compare Matter of Spencer, 8 Misc. 193; 29 N. Y. Supp. 1083.

⁶¹ Williamson v. Williamson, 6 Paige, 298; Waters v. Collins, 3 Dem. 374, and cases *infra*. This rule does not apply, however, where such legatees are otherwise liberally provided for. (Matter of Carr, 24 Misc. 143; 53 N. Y. Supp. 555.)

⁶² Bliven v. Seymour, 88 N. Y. 469. In Scofield v. Adams (12 Hun. 366), the testatrix, in addition to legacies to others, gave to her husband the use of certain specific articles of furniture, and also the use or avails of \$5,000,

legacy for piety, for the erection of headstones at the graves of the testator's parents or other near relatives, does not abate ratably, and should be paid in full.⁶³

§ 756. **Legacies to widow.**— A bequest to a widow is a general legacy, and, primarily, cannot be paid out of real estate, and, like other general legacies, will abate or fail where the personal property is insufficient.⁶⁴ But a bequest given and accepted in lieu of dower must be paid in preference to other legacies, the widow being regarded as a purchaser for consideration.⁶⁵ The rule applies notwithstanding the legacy exceeds in value the dower right relinquished.⁶⁶

§ 757. **Bequests to executor.**— A legacy to the executor, as such, for his services in that relation, has no preference, however, over general legacies, and is subject to abatement with them, and an assignment of the legacy will not discharge it from abatement.⁶⁷

§ 758. **Residuary legacies.**— A strictly residuary bequest must defer to all general legacies and annuities, and can only be paid after all such claims are satisfied.

§ 759. **Testator's intention governs.**— As to legacies which the testator intended should be paid in full and at all events, and which he has charged upon a particular fund or upon real estate, the general rule is that they are not subject to abatement with general legacies.⁶⁸ There is no positive rule, it is said, for determining whether a particular legacy is to be paid in full, at all events,

with so much of the principal as should be necessary for his comfortable support. What remained on his decease was left to other parties. The estate of the testatrix was insufficient to pay the legacies, it having been supposed by her to be much larger than it was. Held, that though the legacy to the husband was a general one, yet it was not subject to abatement, it having been given for the maintenance and support of a near relation. But where the beneficiary, though a near relative, was not dependent upon the testator in his lifetime, the rule does not apply. (Matter of Hinman, 32 Misc. 536.) In *Petrie v. Petrie* (7 Lans. 90), a legacy for education was declared to be preferred to general legacies.

⁶³ *Wood v. Vandenburg*, 6 Paige, 277.

⁶⁴ *Babcock v. Stoddard*, 3 Sup. Ct.

(T. & C.) 207; *McCorn v. McCorn*, 100 N. Y. 511; *Sanford v. Sanford*, 4 Hun. 753.

⁶⁵ *Babcock v. Stoddard*, 3 Sup. Ct. (T. & C.) 207; *Isenhardt v. Brown*, 1 Edw. Ch. 411; *Brink v. Masterson*, 4 Dem. 525; *Dunning v. Dunning*, 82 Hun. 463. A legacy of the income of the residuary estate to testator's widow in lieu of dower does not abate as other legacies, and hence other residuary legatees are not necessary parties to her action to recover the legacy of the executor. (*Pittman v. Johnson*, 35 Hun. 38; 15 Abb. N. C. 472.)

⁶⁶ *Matter of Brooks*, 30 St. Rep. 941; 10 N. Y. Supp. 20; *Matter of McKay*, 5 Misc. 123.

⁶⁷ *Clapp v. Meserole*, 1 Abb. Ct. App. Dec. 362.

⁶⁸ *Pierrepont v. Edwards*, 25 N. Y. 128; 24 How. Pr. 419. See *Morse v. Tilden*, 35 Misc. 560.

or whether, in case the estate is insufficient to pay all, it shall abate in proportion to others. Each case will depend upon a consideration of all the material provisions of the will to be construed, and of the extrinsic circumstances which bear upon the question of intent.⁶⁹ The mere fact that a legacy is given by a codicil does not entitle it to a preference over other general legacies; nor will the fact that the amount is given for a specific purpose which cannot be accomplished by a lesser payment, indicate an intention that it shall not be subject to abatement with other general legacies.⁷⁰

§ 760. Order of abatement.—In the absence of any express direction in the will giving a priority of payment of a particular legacy, any deficiency of assets is to be charged in the following order: (1) Residuary legacies. (2) General legacies.⁷¹ (3) Legacies given for a valuable consideration, or for the relinquishment of dower or some right or interest. (4) Specific and demonstrative legacies.

§ 761. Liability of legatee to refund or contribute.—At common law, a legatee who had received his legacy might be compelled, at the suit of the executor, to refund the legacy where, after payment, debts appeared, of which he had no previous notice, and which he was obliged to discharge.⁷² The statute provides a similar remedy to the creditor, directly against the legatee, etc.⁷³ So, on

⁶⁹ Where a will provided for the conversion of the bulk of the estate into money and the payment of the various legacies therewith, most of which were not to be paid before the expiration of two years after the probate of the will, but some were excepted from this restriction, and the latter were paid in full—the executors having reason to believe that the estate would suffice to pay all in full, which proved not to be the case owing to the subsequent depreciation in its value.—Held, that the preference of the legacies last mentioned extended only to the time of payment, and that they were to abate, *pro rata*, with the other legacies. (Harvard College v. Quinn, 3 Redf. 521.) In Matter of Williams (27 Misc. 716; 59 N. Y. Supp. 606), the testatrix, who gave the estate to executors in trust, directed a sale thereof upon the death of her husband, and the payment of the “following respective bequests in the order named in this my will,” which were five bequests of \$2,000

each, to five separate sets of grandchildren. The estate proving insufficient to satisfy all of them, and a belief on the part of the testatrix being indicated that it would be sufficient.—Held, that no one set of legatees had a preference, since among a group of general legacies which are mere bounties, priority will not be given to any, unless the intention to create a preference is most clearly and unequivocally expressed.

⁷⁰ Wetmore v. St. Luke's Hospital, 56 Hun, 313; 9 N. Y. Supp. 753.

⁷¹ See Lyons v. Steinhardt, 37 Misc. 628; 76 N. Y. Supp. 241.

⁷² The surrogate has no power to compel a legatee to restore an overpayment, but the executor should resort to an action. (Matter of Lang, 144 N. Y. 275.)

⁷³ Co. Civ. Proc., § 1837, which provides that “an action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or

a deficiency of assets, one legatee who has received his legacy is liable at the suit of another legatee, who has not been paid, to refund a proportionable part to make up the deficiency; although, if the deficiency has been caused by the *waste* of the executor, it is said that the legatee who has been paid may retain the advantage he has gained by his superior diligence, as against his co-legatee.⁷⁴ But this rule does not apply as between general and residuary legatees.⁷⁵

§ 762. **Contributing to share of post-testamentary child, etc.**—Express provision is made by the statute⁷⁶ for an action by a child, born after the making of a will, who is entitled to succeed to a part of the property of the testator, or by a subscribing witness⁷⁷ to a will, who is also entitled to succeed to a share, against the legatees or devisees, as the case requires, to recover his share of the property; “and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.” The design of the statute, in reference to posthumous children, was to give them the same portion precisely as they would have if the parent had died intestate; and where the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute, in proportion to his devise, to make up such share of the property as would have gone to the after-born in case of intestacy, and subjecting each devise to the same burdens as the after-born, in proportion to the estate held — *i. e.*, to contribute proportionally toward the payment of any claim against the deceased, to enforce which, proceedings are taken against the devisees and heirs, in default of personal property.⁷⁸

legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.” Actions of this class are regulated by sections 1837–1860. See *Howell v. Wallace*, 37 App. Div. 323; *Mertens v. Roche*, 39 id. 398; *Siegel v. Cohen*, 23 Misc. 365. It is beyond the scope of this work to present this subject further.

⁷⁴ *Lupton v. Lupton*, 2 Johns. Ch. 614; *Mills v. Smith*, 141 N. Y. 256; 57 St. Rep. 388. Compare *Buffalo Loan, etc., Co. v. Leonard*, 154 N. Y. 141.

⁷⁵ *Gilbert v. Taylor*, 76 Hun. 92; *affd.*, 148 N. Y. 298; *Mills v. Smith*, 141 id. 256; 57 St. Rep. 388. Residuary legatees are liable to refund if there proves to be a deficiency of assets (in case they have been paid without decree), but, in the absence of fraud or collusion, they take the payment without other risk. (*Ib.*)

⁷⁶ Co. Civ. Proc., § 1868.

⁷⁷ See *Matter of Smith*, 1 Tuck. 83.

⁷⁸ *Rockwell v. Geery*, 4 Hun. 607. The rule as to the mode of determin-

ARTICLE FOURTH.

LAPSE OF LEGACIES.

§ 763. **Death of legatee prior to testator's death.**—The common-law rule, that the legacy is extinguished by the death of the legatee before the testator's death, was modified by the Revised Statutes, so that now, when the devisee or legatee is a child or other descendant of the testator, and such legatee or devisee dies during the testator's lifetime, leaving a child or other descendant who survives the testator, the devise or legacy does not lapse, but the property vests in the surviving child or other descendant of the legatee or devisee, as if the devisee or legatee had survived the testator, and had died intestate.⁷⁹ It will be observed that the statute provides only for the case of a testator who is the ancestor of his legatee or devisee. The word *descendant* is limited to issue, in any degree, of the person referred to, and does not, therefore, embrace collateral relations.⁸⁰ Hence, a bequest to a person, not a descendant, though to him "and his heirs," lapses on such person's death before the testator; the words "and his heirs" being words of limitation, and not of substitution.⁸¹

§ 764. **Death prior to execution of will.**—In view of the remedial character of the statute, the courts have given its provisions a liberal construction, and the words "shall die," in the statute, have been construed as not referring to a time intermediate the making of the will and the death of the testator, and hence that

ing the share of a post-testamentary child in the estate of his deceased parent is discussed in *Sanford v. Sanford*, 4 Hun. 753. In estimating the amount of the several contributions, even a legacy to the widow, in lieu of dower, must be taken into account. (*Mitchell v. Blain*, 5 Paige, 588.) See *Sanford v. Sanford*, 5 Lans. 486; s. c., 61 Barb. 293.

792 R. S. 66, § 52; *Vernon v. Vernon*, 53 N. Y. 351; *Savage v. Burnham*, 17 id. 561, 575; *Matter of Wells*, 113 id. 396; *Cruikshank v. Home for the Friendless*, id. 338; *Matter of Hafner*, 45 App. Div. 549; 61 N. Y. Supp. 565.

⁸⁰ *Van Buren v. Dash*, 30 N. Y. 393. In that case, the testatrix devised separate aliquot shares of her real estate to two sisters and to cer-

tain nephews and nieces, several of whom died in her lifetime, some leaving children and others without issue. Held, that the shares of all those devisees so dying before her lapsed, and that such shares descended to her heirs-at-law. See *Hamlin v. Osgood*, 1 Redf. 409; *Bishop v. Bishop*, 4 Hill, 138; *Christie v. Phyfe*, 22 Barb. 195; *Armstrong v. Moran*, 1 Bradf. 314. A bequest to a charitable home, to care for the wife of the testator and retain the residue after her death.—Held to fail, the wife dying before the will took effect. (*Matter of Dempsey*, 25 Misc. 257; 55 N. Y. Supp. 427.)

⁸¹ *Kimball v. Chappel*, 27 Abb. N. C. 437; 18 N. Y. Supp. 30. See *Matter of Wells*, 113 N. Y. 396; *Bolles v. Bacon*, 3 Dem. 43, and cases cited.

the statute would apply to the case of the death of a proposed legatee (if a descendant), before the date of making the will.⁸²

§ 765. Death of legatee subsequent to testator's death.— Unless the intention of the testator was to the contrary, a legacy vests on the testator's death, though not payable until one year thereafter; and hence the legatee's death within the year does not affect a lapse, but his interest passes to his personal representatives.⁸³ So, too, where a sum of money is directed to be held in trust, the income to be paid to the beneficiary until the happening of certain event, remainder over, no lapse will be effected by the death of the beneficiary before the event takes place.⁸⁴ If the legatee acquires only a contingent interest, his death before the happening of the contingency, even after the death of the testator, will effect a lapse of the legacy. The distinction between a vested and contingent legacy, which is mainly important as bearing on the question of lapse, has been already considered.

§ 766. Lapse of joint legacies.— Where a legacy is given to two or more persons jointly, if one dies, even in the lifetime of the testator, such interest does not lapse, but the survivor will take

⁸² *Barnes v. Huson*, 60 Barb. 598. "Where the proposed devisee or legatee, being a descendant of the testator, had died before the testator, leaving lineal descendants, who were, of course, equally the descendants of the testator, the presumption is strong that, except for ignorance, inadvertence, or accident, the will would have been so altered as to continue the designed provision in the line which had been intended. Therefore, the Legislature designed to provide a remedy in such a case, against the consequences of such ignorance, inadvertence, or accident, by enacting, that in case the proposed devisee or legatee, who had died before the testator, was a child, or other descendant of the testator, then the issue of such proposed devisee or legatee should take in his place. No reason can be perceived for any different rule, whether the death happen before or after the making of the will; either occurrence is entirely within the mischief intended to be remedied." (Ib., per Talcott, J.) In *Matter of Howard* (3 Misc. 170; 23 N. Y. Supp. 836), testator bequeathed the residue of his estate, after giving the income to his widow for life, to "my sisters, and to their heirs and assigns;" the children to take the same share that

their parents would have received if living at the decease of the wife. Held, that the members of each class must be ascertained as of the date of the determination of the life estate, and that a son of one of the testator's sisters, who had died before the execution of the will, was entitled to the share his mother would have taken, had she been living at the widow's death. See *Westcott v. Higgins*, 42 App. Div. 69; 58 N. Y. Supp. 938.

⁸³ See *Owens v. Owens*, 64 App. Div. 212; 71 N. Y. Supp. 1108; *Matter of Gardner*, 140 N. Y. 122; 55 St. Rep. 299. Where a legacy is directed to be paid at a certain time after testator's death, with limitation over in case of legatee's death before payment, the limitation does not take effect if the legatee lives to become entitled to it, although payment has not been made. (*Finley v. Bent*, 95 N. Y. 364.)

⁸⁴ *Montanye v. Montanye*, 29 App. Div. 377. Compare *Southgate v. Continental Trust Co.*, 36 Misc. 415. The court will seize upon any expression in a will to prevent the disinheritation of the issue of the primary object of the gift in the event of the death of that object before the period for distribution. (*Shangle v. Hallock*, 6 App. Div. 55; 39 N. Y. Supp. 619.)

the whole.⁸⁵ So, too, where, for any cause, any one of the legatees is disqualified to take his share, *e. g.*, because he is a witness to the execution of the will, the testator does not die intestate as to that share, but the same passes to the remaining legatees, as a class.⁸⁶ But in the case of a bequest to several legatees named, "equally, share and share alike," the legatees are tenants in common, and the share of any one happening to die before the testator lapses for the benefit of the testator's next of kin.⁸⁷

§ 767. **Lapse of prior estate.**— Where the bequest depends upon an intervening estate under the will, and is thus made to take effect only at the termination of the prior estate, and the prior estate lapses by the death of the legatee or devisee during the life of the testator, this will not defeat the estate over, but it will take effect immediately.⁸⁸ In such a case, both estates vest at the same time, and if both devisees survive the testator, the estate in remainder will not fail by the devisee in remainder dying before the tenant for life.⁸⁹ Where both legatees survive the testator, but both die during the prior estate, the legacy over is defeated, and, as against the next of kin of the latter legatee, the estate over goes to the testator's next of kin.⁹⁰ A legacy to "W., or to his heirs," upon the death of a life tenant, vests in the next of kin upon W.'s death, — the word "or" preventing the lapsing of the legacy.⁹¹

§ 768. **Lapse of legacy to a debtor or creditor.**— As we have seen, where the intention of the testator was that a legacy to his debtor should be deemed a satisfaction of the debt, the acceptance of the

⁸⁵ Gardner v. Printup, 2 Barb. 83; Hoppock v. Tucker, 3 Sup. Ct. (T. & C.) 653; 1 Hun. 132; *affd.*, 59 N. Y. 202; Matter of Keenan, 15 Misc. 368; 38 N. Y. Supp. 426. The principle of survivorship, as applied to legacies, is stated in Everitt v. Everitt, 29 N. Y. 39. Compare Fisher v. Banta, 66 id. 468. For cases of gift held made to a class, or otherwise, see Matter of Baer, 147 N. Y. 348; Matter of Russell, 168 id. 169; Matter of Watts, 68 App. Div. 357; Matter of Collins, 70 Hun. 273; Bisson v. West Shore R. Co., 66 id. 604; Matter of Merriman, 91 id. 120; Eckert v. Wilklow, 26 Misc. 294; Dougherty v. Thompson, 27 id. 738; Matter of Munter, 19 id. 201; Smith v. Lansing, 24 id. 566.

⁸⁶ Martineau v. Simonson, 59 App. Div. 100; 69 N. Y. Supp. 185.

⁸⁷ Matter of Kimberly, 150 N. Y. 90; Hornberger v. Miller, 28 App.

Div. 199; 50 N. Y. Supp. 1079; *affd.*, 163 N. Y. 578; Matter of Riches, 37 Misc. 464; Hart v. Marks, 4 Bradf. 161; McLoskey v. Reid, 4 id. 334; Floyd v. Barker, 1 Paige, 480; Matter of Howard, 5 Misc. 293. See Weyman v. Ringold, 1 Bradf. 40; Downing v. Marshall, 1 Abb. Ct. App. Dec. 525; Embury v. Sheldon, 68 N. Y. 227; 2 Abb. N. C. 404.

⁸⁸ See Norris v. Beyea, 13 N. Y. 273; Taylor v. Wendel, 4 Bradf. 324; McLean v. Freeman, 9 Hun. 247.

⁸⁹ Terrill v. Public Adm'r, 4 Bradf. 245; Barker v. Woods, 1 Sandf. Ch. 129. See Conklin v. Moore, 2 Bradf. 179; Anthony v. Brouwer, 31 How. Pr. 128; Adams v. Beekman, 1 Paige, 631.

⁹⁰ Williams v. Seaman, 3 Redf. 148.

⁹¹ McCormick v. Burke, 2 Dem. 137, and cases cited.

legacy will satisfy the debt. If a *creditor* dies before the testator, and the personal representative of the creditor accepts a legacy, a contract is completed, by which the latter becomes entitled to the legacy, not as a bounty, but as the purchase price of the claim which was thereby canceled or abandoned.⁹²

§ 769. **Effect of lapse.**—Where a legacy lapses, it falls into the residuum unless it is expressly excluded therefrom.⁹³ In case there is no residuary bequest, it goes to the next of kin, as estate undisposed of by the will.⁹⁴ If the remainder itself lapses, it also goes to the next of kin, including life tenants upon whose death, without issue, the remainder was limited.⁹⁵ In the case of a devise of real property failing, whether because it was originally void or because the devisee is incompetent to take, the common-law rule is, that the property goes, not to the residuary devisees, but to the heirs of the testator;⁹⁶ but since the Revised Statutes has changed the rule that a will of land speaks as of its date, the rule as to lapsed devises is changed also, and such devises now fall into the residuum.⁹⁷ In respect to lapsed legacies, or those which for any reason fail of execution, the will is to be considered the same as though it gave no such legacies; they do not constitute a fund separate and apart from the rest of the estate, to which the residuary legatees are entitled in any event, and notwithstanding the fact that the assets are insufficient to pay the debts and the general legacies. Until the general legacies have been satisfied, nothing can be devoted to the residuary legatees.⁹⁸

⁹² *Cole v. Niles*, 3 Hun. 326; 5 Sup. Ct. (T. & C.) 451; *affd.*, 62 N. Y. 636. See *Lyons v. Mahan*, 1 Dem. 180; *Rauchfuss v. Rauchfuss*, 2 id. 271; *Williams v. Crary*, 4 Wend. 444.

⁹³ *Gilman v. Gilman*, 111 N. Y. 265; *Matter of Crossman*, 113 id. 503; 23 St. Rep. 259; *Matter of Hodgman*, 69 Hun. 484; *affd.*, 140 N. Y. 421; *Matter of Bonnet*, 46 Hun. 529; *affd.*, 113 N. Y. 522; *Wetmore v. Peck*, 66 How. Pr. 54; *Kimball v. Chappel*, 27 Abb. N. C. 437; *Matter of Champion*, 39 St. Rep. 400; 15 N. Y. Supp. 768; *Carter v. Board of Education*, 144 N. Y. 621; 64 St. Rep. 218; *Matter of Howard*, 3 Misc. 170; *Spencer v. De Witt C. Hay, etc., Assn.*, 36 id. 393; *Newcomb v. Newcomb*, 33 Misc. 191; *U. S. Trust Co. v. Black*, 146 N. Y. 1.

⁹⁴ *Armstrong v. Moran*, 1 Bradf. 314. See *Brown v. Richter*, 25 App. Div. 239; 49 N. Y. Supp. 368; *Spencer v. De Witt C. Hay, etc., Assn.*,

supra; *Matter of Whiting*, 33 Misc. 274.

⁹⁵ *Doane v. Mercantile Trust Co.*, 160 N. Y. 494.

⁹⁶ *Van Kleeck v. Dutch Church*, 20 Wend. 498.

⁹⁷ *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; 22 St. Rep. 738; *Moffett v. Elmendorf*, 152 N. Y. 475; *Matter of Allen*, 151 id. 243; *Youngs v. Youngs*, 45 id. 254; *Hillis v. Hillis*, 16 Hun. 76; *Adams v. Anderson*, 23 Misc. 705; 53 N. Y. Supp. 141. See *Downing v. Marshall*, 23 N. Y. 366; *Leslie v. Marshall*, 31 Barb. 560; *Gallavan v. Gallavan*, 57 App. Div. 320; 68 N. Y. Supp. 30. For a case of the lapse of a conditional devise, see *Ditmas v. Baas*, 50 St. Rep. 632.

⁹⁸ *Wetmore v. St. Luke's Hospital*, 56 Hun. 313; 9 N. Y. Supp. 753. See *Matter of Whiting*, 33 Misc. 274. Compare *Matter of Botsford*, 37 App. Div. 73; 55 N. Y. Supp. 495.

§ 770. **Legacies charged on land.**—Unlike bequests payable out of the personal estate, legacies charged on land lapse on the death of the legatee *before payment*, unless payment is deferred to accommodate the estate, and not out of regard to the condition or circumstances of the legatee.⁹⁹

ARTICLE FIFTH.

PROCEEDINGS TO COMPEL PAYMENT OF LEGACIES.

§ 771. **Executor's assent to legacy.**—Though title to a legacy passes by the will, yet it does not become perfected at law, until after the assent of the executor, from whom only possession of the legacy can be obtained. He has a right to the possession of the whole of the estate for the purpose of applying it, in the first place, to the payment of debts; and a legatee cannot, therefore, take the thing bequeathed, without the assent, expressed or implied, of the executor,¹ though his assent may be compelled, if wrongfully refused.

§ 772. **When legacies are payable.**—At common law, a legacy was due on the expiration of one year *after the death* of the testator; but the statute declares that “no legacy shall be paid by any executor or administrator until after the expiration of one year from the *time of granting letters* testamentary or of administration, unless directed by the will to be paid sooner.”² The manifest

⁹⁹ Marsh v. Wheeler, 2 Edw. 163; Harris v. Fly, 7 Paige, 429; Birdsall v. Hewlett, 1 id. 32, in which case Chancellor Walworth said he was not aware that the rule stated had ever been extended to a case where the estate was devised to a stranger, upon the express condition that he paid the legacy charged thereon. See also Sweet v. Chase, 2 N. Y. 73; Loder v. Hatfield, 71 N. Y. 92; Hillis v. Hillis, 16 Hun, 76.

¹ Tole v. Hardy, 6 Cow. 333; Hudson v. Reeve, 1 Barb. 89. See Matter of Pye, 18 App. Div. 306; 46 N. Y. Supp. 350. The assent of the executors, once given to a specific legacy, vests the interest at law irrevocably in the legatee. (Onondaga Trust & Deposit Co. v. Price, 87 N. Y. 542.) To the same effect, Linthicum v. Caswell, 19 App. Div. 541; 46 N. Y. Supp. 610; affd., 160 N. Y. 702.

² Co. Civ. Proc., § 2721, as amended 1893; adopting 2 R. S. 90, § 43. This

statute is inapplicable to the case of a legacy given by the execution of a power of appointment contained in the will. (Dixon v. Storm, 5 Redf. 419.) The words “letters testamentary” or of “administration” include temporary letters, so that, where such letters have been granted, pending the probate proceedings, interest on a legacy begins to run one year after the date of the issue of such letters. (Matter of McGowan, 124 N. Y. 526.) In Matter of Patterson (5 Misc. 178), decedent left two wills, one dated April 18, 1888, and the other dated April 19, 1888. The first will named different executors from those named in the second will. It was admitted to probate, and all the legacies but petitioner's were paid out under it (being identical with those contained in the second will). Subsequently the probate of the first will was revoked and the will of April 19, 1888, admitted to probate. Letters were

object of the statute is to give the representative a specified time to reduce the estate to possession and turn it into money, to ascertain and liquidate the claims of creditors, and to await the expiration of the year allowed, after probate, to persons interested, to present a petition for the revocation of the probate, on allegations.³ After the expiration of the year, the executor must discharge the specific legacies and pay the general legacies, if there be assets; and if there be not sufficient assets, then an abatement of the general legacies must be made in equal proportions.⁴

§ 773. **Voluntary anticipation of payment.**— Although the statute is in form prohibitory, it is not regarded as making it illegal and a breach of trust to anticipate payment, but only as negating the right of the claimant, and as throwing upon the executor, if such payments are made during the year, the peril of making good the deficiency, in case the assets are found insufficient for the demands which prove to be entitled to prior satisfaction. It is not uncommon, where the assets are ample, and there is no practical doubt of the justice of such a course, to deliver specific legacies, and pay a portion or all of the legacies, and a portion of distributive shares in advance of the period thus limited. But an executor who withdraws productive funds, in order to pay legacies before they become due, is chargeable with the loss thus occasioned to the residuary estate, that is, the interest which might have been earned.⁵ An executor who advances to legatees from his own funds is entitled to be subrogated to their rights, but he can be credited only with their *pro rata* share of the assets available for distribution at the time of the accounting.⁶ He cannot, as trustee, advance to a beneficiary any money in anticipation of income,

issued under the first will on July 26, 1888, which were afterward revoked. Letters under the second will were issued on May 26, 1892. Petitioner claimed interest from July 26, 1889, one year after issuance of letters under the first will, on the ground that the other legacies were all paid at that time, and have, therefore, had the benefit of subsequent interest or use, the petitioner's legacy not being paid then because he was an infant. Respondent claimed that interest should only be allowed from one year from the issuance of letters under the second will, the only one now in force, under which the executors were acting, and under which the

petitioner claimed his legacy. Held, on the authority of *Matter of McGowan (supra)*, that petitioner was only entitled to interest from the year after the grant of letters on the last will. "If the other legacies were paid prematurely, that is a matter between them and the residuary legatees, and does not warrant a departure from the rule in this instance."

³ Co. Civ. Proc. § 2647. See § 276 *et seq.*, *ante*.

⁴ Co. Civ. Proc. § 2721, as amended 1893; adopting 2 R. S. 90, § 45.

⁵ *McLoskey v. Reid*, 4 Bradf. 334.

⁶ *Tickel v. Quinn*, 1 Dem. 425. See *Matter of Rogers*, 10 App. Div. 593; 42 N. Y. Supp. 133.

when there is no income in his hands, and reimburse himself thereafter out of subsequently accrued income.⁷

§ 774. Liability and remedy of executor for erroneous payment of legacy.—An executor who voluntarily overpays a legatee, or pays a void legacy, is, of course, bound to make the estate good for the amount so erroneously paid. The general rule is, that where an executor volunteers to pay the whole or any portion of a legacy, and it subsequently turns out that the assets are not sufficient to justify a payment to that extent, the loss must fall on him, and he cannot compel the legatee to refund.⁸ But it is held that this rule does not apply to a case where the payment is not made voluntarily and upon the assumption that there are assets sufficient, which assumption turns out to be erroneous. Where the will directs a legacy to be paid, and the executor has no reason to believe that it is, for any reason, a void legacy, he does nothing more than his duty in paying it, and will be protected in so doing; a remedy at law against the legatee being given him for a refund of the amount paid.⁹ The sole remedy of the executor, in such a case, or in a case where he has overpaid a legatee, is by an action. The Surrogate's Court has no power, where it is found, on the executor's accounting, that he has overpaid a legatee, to render an affirmative judgment for the excess.¹⁰ When the fact of overpayment is determined, the excess is, in contemplation of law, in the hands of the accounting executor, and the fact thus found should be conclusive in any further litigation between the executor and the legatee, when it comes in question.¹¹

§ 775. Legacies directed by will to be paid within the year.—If the will directs that a legacy be paid before the lapse of a year from the issue of letters, the executor may require, as a condition of payment, a bond, with two sufficient sureties, conditioned that

⁷ Matter of Odell, 1 Connoly, 91.

⁸ Matter of Hodgman, 140 N. Y. 421; 55 St. Rep. 800. An overpayment to some of the legatees of a class, the estate not sufficing to pay all in full, is made at the risk of the executor, and he cannot compel the others to wait until he shall have recovered back the excess of payments, but is personally liable to them for their share. (Matter of Robertson, 51 App. Div. 117; 64 N. Y. Supp. 385; affd., 165 N. Y. 675.) As to an action by one of the next of kin, to set aside a release of his interest in a lapsed legacy, paid by the executor, and to

recover the same, see Haviland v. Willets, 141 N. Y. 35. See also Matter of Tatum, 34 Misc. 25.

⁹ Carter v. Board of Education, 68 Hun. 435.

¹⁰ Matter of Lang, 144 N. Y. 275; 63 St. Rep. 694; Johnson v. Weir, 34 Misc. 683; 70 N. Y. Supp. 1020.

¹¹ Matter of Underhill, 117 N. Y. 471; 27 St. Rep. 720. It seems that, by virtue of his power to direct and control the conduct of executors, the surrogate can direct the collection of the debt from the legatee by action. (Ib.)

if any debts against the deceased shall duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatee shall refund the legacy so paid, or such ratable portion thereof, with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee; and that if the probate of the will be revoked, or the will declared void, then that the legatee shall refund the whole legacy, with interest.¹² It is suggested that, where the will directs the payment of one legacy before another, and it is not made preferential, the executor should not pay the first legacy in full when due, even after the year, if a deficiency of assets appears probable, without requiring a bond for repayment, as in the case of a legacy paid within the year.¹³

§ 776. **Interest on general legacies.**— As the statute, above cited, prohibits the payment of legacies until a year after the granting of letters, the general rule is, that interest upon legacies is not payable until the principal of the legacy becomes due. If, in any case, interest is allowed before that time, without a specific direction in the will, it constitutes an exception to the rule, and is founded generally upon certain facts which the courts have agreed are equivalent to an express direction in the will to pay interest, because, from such facts, the courts will presume an intention on the part of the testator to have it paid.¹⁴ Such a case is where the

¹² Co. Civ. Proc., § 2721, as amended 1893; adopting 2 R. S. 90, § 44.

¹³ Harvard College v. Quinn, 3 Redf. 514. See Matter of Williams, 27 Misc. 716; 59 N. Y. Supp. 606.

¹⁴ Per Peckham, J., Thorn v. Garner, 113 N. Y. 198; citing Bradner v. Faulkner, 12 id. 472; Cooke v. Meeker, 36 id. 18; Brown v. Knapp, 79 id. 136; Goodwin v. Crooks, 58 App. Div. 464; 69 N. Y. Supp. 578; Matter of McGowan, 124 N. Y. 526; s. c. below, *sub nom.* Matter of Wallace, 32 St. Rep. 226; 24 id. 405, expressly overruling surrogates' decisions in Carr v. Bennett, 3 Dem. 459; Duntan v. Carter, id. 149; Clark v. Butler, 4 id. 378; Matter of Gibson, 24 Abb. N. C. 45. The General Term case of Campbell v. Cowdrey (31 How. Pr. 172), which reversed Matter of Fish (1 Tuck. 122; s. c., 19 Abb. Pr. 209), is also, in effect, overruled. The rule stated in the text was followed by the

General Term in Matter of Prior (32 St. Rep. 712; 10 N. Y. Supp. 861). In Kerr v. Dougherty (17 Hun. 341), the General Term had held, in effect, that interest only began to run from a year after the grant of letters. (Aff'd., 79 N. Y. 327, without discussion of this question.) Referring to this case, the court, in the McGowan case, said: "While it is probably true that, in no other case, has this court been required to pass on the question, still the effect of the statute in that respect has been commented on so frequently as to leave no room to doubt the view of the court, though Kerr v. Dougherty were not controlling." See Matter of Oakes, 19 App. Div. 192; 45 N. Y. Supp. 984. Whether the assets of an estate have been fruitful or unproductive does not affect the right of a legatee. He is in the same position as a creditor, and entitled to be awarded interest

income of an estate, or of a designated portion, is given to a legatee for life. Such a bequest is not a part of the principal of the estate, or of any property possessed by the testator in his lifetime, but of that which is to arise or accrue after his death from a specified fund to be set apart for that purpose. As it is the income which constitutes the legacy, the executor is accountable for the income from the time of testator's death, unless there is some provision in the will from which a contrary intent can be inferred.¹⁵

§ 777. Interest from testator's death.— Where the beneficiary is a child of the testator or a person to whom he stood *in loco parentis*, the bequest bears interest from the date of the testator's death, especially where there is no other provision made in the will for the maintenance of such legatee.¹⁶ It is not needed, for the application of this rule, that the testator should have been under a legal obligation, at the time of his death, to support the legatee; it is sufficient that he has voluntarily assumed such a relation, similar in some respects to that of parent, so that it may be presumed he did not intend to leave the legatee without support.¹⁷ It is, therefore, entirely competent to prove the surrounding circumstances in order to raise a presumption that testator intended the legacy to draw interest, as it is also proper to prove all those circumstances in order to rebut any such presumption, or to show

at the legal rate for such time as he is kept out of his demand. (Ib.) But where a legacy is payable out of rents or income, interest should be allowed only from the time sufficient had accumulated to pay the legacy. (Wells v. Disbrow, 48 St. Rep. 746; 20 N. Y. Supp. 518.) Where the probate of a will is revoked and a later will admitted to probate, the interest on a legacy begins to run a year after the issue of letters under the later will. (Matter of Patterson, 5 Misc. 178.)

¹⁵ Matter of Stanfield, 135 N. Y. 292; 47 St. Rep. 813. To same effect, see Cooke v. Meeker, 36 N. Y. 15; Matter of Slocum, 60 App. Div. 438; 69 N. Y. Supp. 1036; 169 N. Y. 153; Pierce v. Chamberlain, 41 How. Pr. 501; Matter of Lynch, 52 id. 367; Powers v. Powers, 49 Hun. 219; 16 St. Rep. 770; Barrow v. Barrow, 55 Hun. 503; 29 St. Rep. 240; Craig v. Craig, 3 Barb. Ch. 76; Booth v. Ammerman, 4 Bradf. 129. A bequest in such securities as the legatee may select draws interest from the death of the testator. (Wetmore v. Peck, 66

How. Pr. 54.) Except under special circumstances, interest is not allowed upon arrears of an annuity. (Isenhart v. Brown, 2 Edw. 341.) Compare Lawrence v. Embree, 3 Bradf. 364; Matter of O'Hara, 19 Misc. 254.

¹⁶ Brown v. Knapp, 79 N. Y. 136; Matter of Travis, 85 Hun. 420; 32 N. Y. Supp. 887; Nahmens v. Copely, 2 Dem. 253, and cases cited. See, in addition, King v. Talbot, 40 N. Y. 76; Lupton v. Lupton, 2 Johns. Ch. 614; Burtis v. Dodge, 1 Barb. Ch. 77; Loder v. Hatfield, 71 N. Y. 92; Lyons v. Steinhardt, 37 Misc. 628; 76 N. Y. Supp. 241. A legacy given to an adult married daughter for her support, although not out of the residue of the estate.—Held, to bear interest from testator's death at the same rate as the fund, if invested as directed, would have produced. (Matter of Lasak, 2 Conno(y, 380.) See Matter of Wood, 1 Dem. 559; Bliss v. Olmstead, 3 id. 273; Morgan v. Valentine, 6 id. 18; Neder v. Zimmer, 6 id. 180; Keating v. Bruns, 3 id. 233.

¹⁷ Brown v. Knapp, *supra*.

that no such intent could have existed.¹⁸ It will be presumed that a legacy to testator's widow, in lieu of her dower or thirds, was intended to draw interest from his death, in the absence of some express or implied directions in his will to the contrary.¹⁹ The fact that the will makes a legacy to a son payable a certain number of months after testator's death, there being no provision for the payment of interest, or for the support of the legatee until it is paid, precludes the idea that testator intended the legatee to have interest on the legacy previous to the expiration of the time fixed for its payment.²⁰ A direction in the will that the legacy

¹⁸ *Lyon v. Industrial School Assn.*, 52 Hun. 359. As to interest on a legacy to a posthumous child, see *Lawrence v. Lawrence*, 1 Edw. 557.

¹⁹ *Williamson v. Williamson*, 6 Paige, 298; *Parkinson v. Parkinson*, 2 Bradf. 77; *Seymour v. Butler*, 3 id. 193; *Matter of Combs*, 3 Dem. 348; *Matter of Fogg*, 5 id. 422; *Matter of McKay*, 5 Misc. 123; *Carr v. Bennett*, 3 Dem. 433; *Stevens v. Melcher*, 80 Hun. 514; 62 St. Rep. 599; 152 N. Y. 551. Compare *Matter of Barnes*, 7 App. Div. 13; 40 N. Y. Supp. 494; *affd.*, 154 N. Y. 737. Where the widow receipts for her legacy, given in lieu of dower, this is an admission that she has received all she is entitled to on account of the legacy, and she is not entitled, on the executor's accounting, to be allowed a further sum by way of interest. (*Matter of Hodgman*, 69 Hun. 484; 23 N. Y. Supp. 725; *affd.*, 140 N. Y. 421.)

²⁰ *Thorn v. Garner*, 113 N. Y. 198; *Van Rensselaer v. Van Rensselaer*, id. 207. In *Vernet v. Williams* (3 Dem. 349), the testator gave a legacy to his daughter, V., a married woman, directing his executors to pay it "as soon as practicable" after his death; and, by a later clause, provided that, "after the payment" of V.'s legacy, and "as soon as possible" after his death, the executors should invest a specified sum, and pay to his widow the interest and increase "commencing from my (his) decease." Held, that no feature of the case took the bequest to V. out of the operation of the general rule, that interest does not begin to run on a legacy until the expiration of a year after the death of the testator, in the absence of an express or implied direction of the will to the contrary. See *Matter of Hodgman*, 140 N. Y. 421; 55 St. Rep.

800. Where some action is made necessary on the part of the legatee by the terms of the will — *e. g.*, proceedings for the sale of property to have a legacy paid — the legatee cannot claim interest during his delay to institute such proceedings. (*Crocheron v. Jaques*, 3 Edw. 207.) See *Haight v. Pine*, 10 App. Div. 470; 42 N. Y. Supp. 303. In *Kerr v. Dougherty* (17 Hun. 341; *affd.*, 79 N. Y. 327), the will provided that "the legacies are to be paid as soon as the amount can be collected out of the funds now invested in bond and mortgage at the city of Grand Rapids, Mich." Held, that interest ran only from one year after the issue of letters. The time when interest begins to run depends largely upon the question whether the legacy vested upon the testator's death, or afterward, upon the happening of a contingency. See *ante*, § 740, and cases there cited. See also *Harward v. Hewlett*, 5 Redf. 330; *Dixon v. Storm*, id. 419; *St. F. Xavier College v. Doherty*, id. 536; *Platt v. Moore*, 1 Dem. 191; *Matter of Gerard*, id. 244. Thus, a remainderman is entitled to interest only from the termination of the life estate. (*Dodge v. Manning*, 1 N. Y. 298; *Wheeler v. Ruthven*, 74 id. 429.) The legal rate of interest is proper, though, pending the administration, a less rate has been earned by the executor. (*Godon's Estate*, 5 Law Bul. 15; *Hoffman v. Penn. Hospital*, 1 Dem. 118; *Clark v. Butler*, 4 id. 378.) A legacy which, by the direction of the will, draws interest from the attainment of the majority of the legatee, draws interest from such time, although the death of the testator took place subsequent thereto. (*Matter of Brownell*, 1 Connoly. 175.) See *Kerrigan v. Kerrigan*, 2 Redf. 517; *Pinney v. Fancher*, 3

be paid "with interest," but specifying no time from which interest is to be computed, does not take the case out of the operation of the rule that interest commences from the expiration of the year.²¹

A legacy of a debt draws interest from the date of the will;²² but a legacy to an executor for executing the office does not in general draw interest.²³

§ 778. Remedy of legatee by action.— The legatee has a remedy for the recovery of his legacy, by action, or by a special proceeding in the Surrogate's Court. The executor is liable *individually* for a tortious conversion of the legacy, but his mere failure to pay the full amount of the legacy, when due, will not, in the absence of proof of some illegal or improper conduct, or that he himself claims to be entitled thereto, authorize an action against him individually for the amount due.²⁴ Rights of

Bradf. 198. Where a legacy is given to be paid at a future day, the amount should be raised from the personal estate, and invested until it becomes payable; and the interest in the meantime, if not otherwise disposed of, belongs to the widow and next of kin. (Hone v. Van Schaick, 7 Paige, 221; affd., 20 Wend. 564.) The executor may take one year to make the investment, in analogy to the time allowed for paying legacies. (Cogswell v. Cogswell, 2 Edw. 231.) See Matter of Howard, 23 N. Y. Supp. 836. In Matter of Maine (62 Hun, 334; 17 N. Y. Supp. 114), the will gave \$5,000 to testator's daughter and her children, which the executor was directed to invest in a house, and deed it to her for life and after her death to sell it and divide the proceeds among the children, the money for the purchase to be raised by the sale of a farm at the termination of a lease to the daughter's husband, and the will provided for the payment of interest on \$5,000, until a house was purchased; the daughter died before such purchase, which, in fact, was never made. Held, that the children were entitled to interest on \$5,000 from her death until the executor's accounting, and annually thereafter until they were paid the principal; the rule that interest is not due upon a legacy until the legacy itself is due not applying in such a case.

²¹ Lawrence v. Embree, 3 Bradf.

364. See Booth v. Ammerman, 4 id. 129.

²² Gilbert v. Morrison, 53 Hun, 442.

²³ Morris v. Kent, 2 Edw. 175.

²⁴ Hurlbut v. Durant, 21 Hun, 481. A surrogate's decree, directing the executor to pay a legacy, renders it a personal debt, and in a legatee's action on the decree, a debt due the executor personally may be set off. (Dubois v. Dubois, 6 Cow. 494.) In Bellinger v. Potter (36 St. Rep. 601; 13 N. Y. Supp. 9), property specifically bequeathed was sold by an executor. Held, that he was not chargeable at the suit of other legatees with the proceeds, as he was presumably accountable to the particular legatee therefor, in the absence of evidence of the latter's abandonment of the legacy. In Camp v. Smith (117 N. Y. 354; 27 St. Rep. 322), the executor having given a legatee notes of himself and others for the amount of her legacy, which were received for, and treated as, payments upon a subsequent judicial settlement of his account.—Held, that he could not thereafter be charged, as upon an implied personal obligation, to pay the legacy arising out of the transaction, but that the remedy was upon the note. The rule, that delivery of the debtor's obligations to the creditor are not considered a payment of the debt previously existing, does not apply in such case, as the executor is not personally indebted to the legatee except by reason of the notes.

action against the representative, by a legatee for his legacy, and by a next of kin for his distributive share, are given by the statute. Where, after one year from the granting of letters testamentary or of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain an action against him. "But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before."²⁵ Formerly, the statute²⁶ required that the demand of payment, preliminary to the action, should be accompanied with an offer of a bond of indemnity in double the amount of the legacy, conditioned for the refunding of the legacy, if necessary, etc. But, by the present statute, such a bond is required only on an application to the surrogate, after judgment in the action, for an order on which execution may be issued.²⁷

§ 779. Defenses to action; judgment.—By the former statute,²⁸ the representative might plead insufficiency of assets, and if such insufficiency was shown, the plaintiff could recover only a proportionate part of the assets. But under the new system of procedure, the existence, sufficiency, or want of assets cannot be pleaded by either party, in an action for money, against an executor or administrator, in his representative capacity, and the plaintiff's right of recovery is not affected thereby.²⁹ An execution upon a judgment for the amount of a legacy, or distributive share, as in every case of a judgment against the representative as such, can be issued only upon the order of the Surrogate's Court which

²⁵ Co. Civ. Proc., § 1819. See *Mat-
ter of May*, 31 St. Rep. 50; 9 N. Y.
Supp. 785; *Cocks v. Haviland*, 31 St.
Rep. 742; 9 N. Y. Supp. 872. A
widow may maintain an action for her
share under this statute. (*Betsinger
v. Chapman*, 24 Hun. 15.) Where the
action is brought by a guardian *ad
litem*, he must give a bond, etc. See
Co. Civ. Proc., § 1820.

²⁶ 2 R. S. 114, §§ 9-11.

²⁷ Co. Civ. Proc., § 1827. An un-
dertaking, and not a bond, is required.
The last clause of section 1819 (*supra*)
is new, and is intended to change the
rule with respect to the Statute of
Limitations adopted in *American Bible
Soc. v. Hebard*, 51 Barb. 552; *affd.*,
41 N. Y. 619, n. See also *Clark v.
Ford*, 3 Keyes, 370. For illustrations
of the principles regulating actions

for the recovery of legacies and dis-
tributive shares, see *Rundle v. Alli-
son*, 34 N. Y. 180; *Eberhardt v.
Schuster*, 6 Abb. N. C. 141; *Hoyt v.
Hoyt*, 17 Hun. 192; *Hitchcock v.
Linsley*, *id.* 556; *Nichols v. Nichols*,
12 *id.* 428; *Lewis v. Maloney*, *id.* 207;
Porter v. Kingsbury, 13 *id.* 33;
Prentice v. Janssen, 79 N. Y. 478;
Fisher v. Hubbell, 65 Barb. 74; *De
Groff v. Terpenning*, 14 Hun. 302. An
action to enforce the legal liability of
the devisee and executor may be
brought in this State, although the
testator was a resident of, and the
executor was appointed in, another
State. (*Brown v. Knapp*, 79 N. Y.
137.)

²⁸ 2 R. S. 115, § 13.

²⁹ Co. Civ. Proc., § 1824. See
§§ 631, 677, *ante*.

granted the letters,³⁰ and in the case of such a judgment, the court may, and in a proper case it must, before permitting an execution to be issued, require the applicant to give an undertaking, conditioned as provided.³¹ Having already described the proceeding by a judgment creditor for leave to issue execution, it will not be necessary to speak further of it here.³²

§ 780. Remedies by special proceeding.— Besides the remedy by action, a person entitled to a legacy, or other pecuniary provision under a will, or to a distributive share in an intestate's estate, is given a remedy by special proceeding in the Surrogate's Court, which may be availed of either *before* or *after* the expiration of a year from the grant of letters. It is desirable to speak of the latter proceeding first.

§ 781. Compulsory payment of legacy after the year.— At any time after one year has expired since letters were granted, "a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share," may petition for a decree directing the executor or administrator to pay the same or its just proportional part.³³ This remedy by a legatee is given by the same section which gives a like remedy to a creditor for the payment of a debt, and it has been held, in Surrogates' Courts, that the remedy in each case was confined to the creditor or legatee, as the case might be, and could not be availed of by his assignee. The Supreme Court has decided, however, that the language of the section does not limit it to original creditors, and that there is no distinction between the position of an assignee of a claim and the original owner of a claim, if it had not been assigned.³⁴ The language above quoted, as to the remedy of a legatee to obtain payment, has been held not to include the assignee of a legatee, as an assignee cannot be said to take "under the will," but under his assignment; and that an assignee's only remedy for the recovery of the amount of the legacy is by an application that it be paid him, on the judicial settlement of the executor's account,—the statute authorizing the surrogate, in that proceeding, to decree payment to legatees "or their assigns."³⁵ It may be suggested, however, that the

³⁰ Co. Civ. Proc., §§ 1825, 1826.

³¹ Co. Civ. Proc., § 1827.

³² See § 681, *ante*.

³³ Co. Civ. Proc., § 2722, as amended 1893 (former § 2717, subd. 2).

³⁴ Matter of Moderno, 63 Hun. 261. See § 690, *ante*.

³⁵ Peyser v. Wendt, 2 Dem. 221; a testamentary trustee for satisfac-

Matter of Brewster, 1 Connoly. 172. In Tilden v. Dows (3 Dem. 240), it was said that the language of Co. Civ. Proc., § 2804, which allows a person who "is entitled, by the terms of the will," to the payment of money or delivery of property, to proceed against

words "*under the will*" are words of description, and not of limitation, and refer to the words "or any other pecuniary provision," not to the words "of a legacy;" and that an assignee of a legacy, or the representative of a deceased legatee, is "a person entitled to a legacy," within the meaning of the statute.³⁶

§ 782. **Petition for payment.**—Upon the presentation of the petition, the surrogate must issue a citation, "and upon the return thereof, he must make such a decree in the premises as justice requires."³⁷ The petition should set forth the necessary jurisdictional facts, the possession of assets, and the nonpayment of the legacy. It is not necessary that the petition should allege, except in a general way, that there is money applicable to the petitioner's claim—this being more likely to be known to the executor than the legatee.³⁸ Nor is it necessary to allege a demand on the executor and his refusal to pay.³⁹ The petition must be presented within six years from the day the legacy is payable—that is, speaking

tion, indicates, even more strongly than that of section 2717 [now section 2722], relating to executors, etc., a purpose to postpone, until a judicial settlement of the account, proceedings to enforce claims made against a testator's estate by persons holding *assignments* of legacies.

³⁶ *Matter of Duncomb* (32 St. Rep. 333; 10 N. Y. Supp. 247) was an application by the administrator of a deceased legatee, and it was not objected (as it might have been on the interpretation of the statute in the above case) that the petitioner took under his letters of administration, and *not* "under the will." But, in *Matter of Hodgman* (11 App. Div. 344; affd., 161 N. Y. 627), it was held that the next of kin of a legatee cannot maintain an action or prosecute a claim for the share of the estate which under the will went to the legatee. An application by a general guardian of an infant legatee for the payment to him of the legacy and authority to apply the same to the support of the infant cannot be granted under section 2722 of the Code. (*Matter of Paton*, 7 Misc. 377; 28 N. Y. Supp. 160.) A proceeding to compel an executor of a deceased executor to pay a legacy under the earlier will, cannot be maintained. (*Matter of Mochring*, 154 N. Y. 423.)

³⁷ Co. Civ. Proc., § 2722, as amended 1893. In *Matter of Duncomb* (*supra*), instead of a petition, the application

was by a motion upon affidavit, stating the necessary facts. Held, that the affidavit was sufficient as a petition to authorize a citation, and that the notice of motion did no harm. But in *Matter of Lyon* (1 Misc. 447; 23 N. Y. Supp. 146), it was held, that the court does not acquire jurisdiction where no petition is presented, or citation issued, or answer filed, and no proof that there is sufficient personality to pay the legacy. Compare *Matter of Hitchler*, 21 Misc. 417. Where the executor is a testamentary trustee, an application to compel a payment of income cannot be made under this section, citing respondent as executor, but he must be cited as a testamentary trustee under sections 2804, 2805. (*Matter of Byrnes*, 26 Abb. N. C. 380; 14 N. Y. Supp. 371.) See § 791, *post*. A will devising to executors the residue of testator's property, in trust, during the life of two grandchildren, authorizing them to mortgage or lease the real estate, to receive the rents and profits and to pay the same to designated beneficiaries, creates the executors testamentary trustees. (*Ib.*)

³⁸ *Matter of Macaulay*, 94 N. Y. 574. See *Thomson v. Taylor*, 71 id. 217.

³⁹ *Matter of Dunham*, 1 Connolly, 323; 22 Abb. N. C. 479; *Matter of May*, 31 St. Rep. 50; 9 N. Y. Supp. 785.

generally, six years after the expiration of one year, or seven years in all, after the grant of letters — or it is barred by the Statute of Limitations.⁴⁰ When the will fixes a date for payment, the time is computed from that day.⁴¹ Where, by reason of a deficiency of assets, the proceeding, if commenced within the time, would have been fruitless, an exception to the rule might arise. Inasmuch as a demand is not necessary to entitle a legatee or distributee to maintain an action or proceeding for his legacy or share, the time cannot be computed from the time the claimant has actual knowledge of the facts, as is permitted in certain cases.⁴² A legatee may include in one petition an application for the payment of his legacy, and for the settlement of the executor's accounts.⁴³

§ 783. **The answer to the petition.**— If the application is opposed, the answer must be in writing and verified, and must “set forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality, absolutely or upon information and belief.” It is not sufficient merely to deny the validity or legality of the petitioner's claim; it must set forth *facts* showing that the claim is *doubtful*.⁴⁴ If the petition

⁴⁰ In *Matter of Dunham* (1 Conolly, 323), it was held that section 1819, providing that “for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled and not before,” applies to actions only, and not to special proceedings, and, therefore, a legatee cannot take this proceeding after the Statute of Limitations has run against the legacy; also held, that this proceeding is not governed by section 410, which provides that where a right grows out of the receipt or the retention of money or property by a person acting in a fiduciary capacity, the time within which an action must be brought is to be computed from the time when the person having a right to make the demand therefor, has actual knowledge of the facts upon which the right depends. See *Cobb v. McCormack*, 3 Dem. 606; *House v. Agate*, 3 Redf. 307; *Matter of Van Dyke*, 44 Hun. 394. A payment made within six years, to a person other than the moving party, in the absence of proof as to the circumstances under which it was made, will not take the proceeding out of the statute.

(*Matter of Miller*, 15 Misc. 556; 37 N. Y. Supp. 1129.) A right of action to recover a remainder does not accrue until the death of the life tenant. (*Gilbert v. Taylor*, 148 N. Y. 298.) Whether it is the duty of an administrator to plead the Statute of Limitations in every action brought against him to recover a legacy, as it would be in an action for a debt of the testator, was *doubted* in *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 352; 46 N. Y. Supp. 1035; *affd.*, 166 N. Y. 593.

⁴¹ In *Smith v. Remington* (42 Barb. 75), the legacy was payable, by the terms of the will, when the legatee reached his majority. Held, that a proceeding to compel the payment of the legacy was barred after six years from that time. See *McCartee v. Camel*, 1 Barb. Ch. 455, 465.

⁴² See *Matter of May*, *supra*.

⁴³ *Matter of Macaulay*, 27 Hun. 577; *affd.*, 94 N. Y. 574.

⁴⁴ *Matter of Macaulay*, 94 N. Y. 574; *Hurlburt v. Durant*, 88 id. 121; *Matter of Muller*, 25 App. Div. 269; 50 N. Y. Supp. 786; *Matter of Riley*, 4 Misc. 338; *Matter of Alexander*, 83 Hun. 147; 31 N. Y. Supp. 411. A denial of knowledge or information sufficient to form a belief is not suffi-

of an assignee of a legatee can be entertained at all, it is no sufficient answer to it to deny knowledge whether the assignment to the petitioner is sufficient, in law, to transfer the legatee's interest. An answer denying the incorporation of the legatee applying for payment of its legacy, is insufficient to oust the surrogate of jurisdiction where the validity of claim is not put in question.⁴⁵ An answer that, by the express terms of the will, the legacy was to be paid "after the sale of" certain real property, and that the executors had not yet sold the property, is good.⁴⁶ When payment of a legacy is left to the discretion of the executor, although he cannot arbitrarily postpone delivery to the legatee indefinitely,⁴⁷ where the answer puts in issue a question of the construction of the will affecting the petitioner's rights, the proceeding should be dismissed.⁴⁸ Where it appeared, notwithstanding a proviso in the will that the legatee should have no portion of the estate until he had accounted for and settled the account charged against him on the testator's books, for money advanced, etc., that an adjustment of this account between the legatee and the executor had been had and a balance was found due to the legatee, it was held that while this adjustment might be impeached on the final accounting of the executor, it removed the objection to an advancement to the legatee for the balance, founded upon this clause of the will; and the legatee might apply for a decree directing the payment of this balance.⁴⁹

cient. (*Moorhouse v. Hutchinson*, 4 Dem. 362.) In answer to a petition for payment of an instalment of a legacy, amounting to \$500, after the same had become payable by the terms of the will, the executor alleged upon information and belief, that petitioner had unlawfully come into possession of four bonds, of the value of \$4,000, formerly belonging to decedent, of which respondent was entitled to possession as executor, and had unlawfully converted the same, and refused to transfer them or to pay their value, and that an action was pending between the parties "for the recovery of said bonds or their value." Held, that the answer was insufficient as a defense. (*Matter of Selling*, 5 Dem. 225.) See *Cocks v. Haviland*, 28 St. Rep. 389; 7 N. Y. Supp. 871.

⁴⁵ *Matter of Congregational Church of Cutchogue*, 37 St. Rep. 179; 13 N. Y. Supp. 140. Compare *Matter of*

Young Men's Christian Assn., 22 App. Div. 325; 47 N. Y. Supp. 854.

⁴⁶ *Matter of Fischer*, N. Y. Law J., Jan. 30, 1892. "The surrogate is without power to compel a sale of the lot, and is, therefore, compelled to deny the application. The remedy of petitioners is in a court of equity to compel a sale or to move for the revocation of letters for the alleged misconduct of the executors in refusing to carry out the terms of the will. (*Ib.*) But, in *Matter of Travis* (85 Hun, 420; 32 N. Y. Supp. 887), it was said that where the will effects an equitable conversion of the realty and the executor has neglected to sell the same, the surrogate may compel payment of past-due interest on a legacy to a minor.

⁴⁷ *McKay v. McAdam*, 80 Hun. 260; 30 N. Y. Supp. 288.

⁴⁸ *Matter of McClouth*, 9 Misc. 385; 30 N. Y. Supp. 274.

⁴⁹ *Gilman v. Gilman*, 63 N. Y. 41.

§ 784. **Dismissing the proceeding on the answer.**—The statute is imperative that upon the presentation of these facts which affect the jurisdiction of the court, in the manner therein provided, the surrogate must dismiss the proceeding. When the right of the claimant is denied by the representative, the surrogate is prohibited from hearing and deciding the issue thus formed, and the party is remitted to another proceeding or tribunal to establish or enforce his claim.⁵⁰ Where the identity of the petitioner with the legatee is put in doubt by the answer, it is the duty of the court to dismiss the proceeding.⁵¹ An answer setting up notice of an assignment of a portion of the legacy by the petitioner, greater than the amount then in the executor's hands, is enough to create a doubt, and requires a dismissal of the proceeding.⁵² Where, pending probate proceedings, one of the next of kin, who was named as legatee in the disputed instrument, applied for a decree directing the payment to her of a sum of money, to be reckoned as part of her distributive share, or of her legacy, according to the event, the executor filed an answer setting forth that the applicant was opposing the admission to probate of the alleged will, which contained a clause declaring that, in case any legatee should contest the validity of the instrument, the provision in his favor should cease, and fall into the residue; it was held that the facts set forth showed the claim to be "doubtful," and the petition was dismissed.⁵³

§ 785. **What questions will be determined.**—Possessing only limited powers, the surrogate cannot in these proceedings determine

⁵⁰ *Fiester v. Shepard*, 92 N. Y. 251. It was held, in a proceeding under the Revised Statutes (*Riggs v. Cragg*, 89 N. Y. 479), that the surrogate had jurisdiction to decree payment only where the legacy was undisputed. An application by residuary legatees for the payment to them of a sum in excess of the balance of personalty after payment of debts, on the ground that, by a provision of the will directing the sale of the realty and distribution of the proceeds among others, there was a conversion which subjected the realty to a *pro rata* liability for debts, should be dismissed where the answer of the executor denies this and alleges that the personalty is the primary fund. (*Matter of Mansfield*, 7 Misc. 383; 28 N. Y. Supp. 394.)

⁵¹ *Matter of Hedding Meth. Epis. Church*, 35 Hun. 315. As to the power of the court, on the accounting, to de-

termine the validity of the legacy, see *c. XIX. post*.

⁵² *Matter of Phalen*, 22 St. Rep. 908; *affd.*, 6 N. Y. Supp. 252. In *Matter of Hammond* (92 Hun. 478; 36 N. Y. Supp. 1074), the proceeding was dismissed upon an allegation, by the executor, that the legatee had released his interest.

⁵³ *Rank v. Camp*, 3 Dem. 278. As to the effect of such a clause in a will on the rights of the contesting legatee, see *Woodward v. James*, 16 Abb. N. C. 246; *Matter of Stewart*, 1 Connolly, 412; *Matter of Bratt*, 10 Misc. 491; *Matter of Beck*, 6 App. Div. 211; *affd.*, 154 N. Y. 750; *Scott v. Ives*, 22 Misc. 749. A clause in a will, that "should any legatee be dissatisfied with any gift herein made, then, in that case, said gift shall be wholly withheld," is void for want of certainty. (*Matter of Jackson*, 20 N. Y. Supp. 380.)

every question which may arise between the executor and a legatee. He cannot, for example, pass upon the validity of a legatee's alleged debt to the estate, set up by the executor in reduction of the legacy;⁵⁴ nor can he determine the validity of a release given by the legatee to the executor,⁵⁵ or other like questions. The power of a Surrogate's Court to determine the validity of a legacy or the capacity of a legatee to take, is a necessary incident of its power to order the payment of a legacy.⁵⁶ Where the standing of the beneficiary is such as to render the approval of any provision for him, in particular, contrary to public policy, as for example, where the beneficiary has murdered the testator, the legacy is void.⁵⁷

§ 786. **Dismissal on the merits.**— If the application is entertained on the petition and answer, then to entitle the executor to a dismissal, it must be proved "to the satisfaction of the surrogate" that there is no "money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction."⁵⁸ A mere doubt, raised by the answer, as to whether there is money or other property of the estate applicable to the payment of the legacy, will not justify a dismissal of the proceeding. Where the only question before the surrogate, on the merits, is whether there is money or property so applicable, and such application can be made without affecting the rights of others, etc., an accounting should be ordered to determine the question.⁵⁹ But where it appears that several suits are pending against the estate, to pay which, if they are successful, there are

⁵⁴ *Matter of Colwell*, 15 St. Rep. 742; *Matter of Jones*, 10 id. 176.

⁵⁵ *Matter of Wagner*, 119 N. Y. 28; and other cases cited, *ante*, § 692.

⁵⁶ See § 253, *ante*.

⁵⁷ *Riggs v. Palmer*, 115 N. Y. 506. See *Matter of Fleming*, 5 App. Div. 190; 39 N. Y. Supp. 156. In Pennsylvania, a devise to an "infidel society" is void for the same reason. (*Zeisweiss v. James*, 63 Pa. St. 465.)

⁵⁸ Co. Civ. Proc., § 2722, as amended 1893 (former § 2718, subd. 2); *Matter of Macaulay*, 94 N. Y. 574. In *Neaves v. Neaves* (2 Dem. 230), an application to compel payment of a legacy "to A. until his youngest child shall come of age, the fund then to be divided between A. and his said children," was dismissed, as it did not

appear how many of them were in being when the petitioner attained majority, such children having the right to be joined with the petitioner.

⁵⁹ *Brown v. Phelps*, 48 Hun. 219. A legacy ought not to be ordered paid pending the executor's accounting. (*Matter of Harris*, 1 Civ. Proc. Rep. 162.) Compare *Matter of Ockershausen*, 32 St. Rep. 709; 10 N. Y. Supp. 928. But where an executor fails to apply for an accounting for six years, and, when compelled to do so, files a bill for construction of the will for the obvious purpose of securing a delay, the surrogate may properly direct payment of a legacy. (*Matter of Scheideler*, 75 Hun. 185; 27 N. Y. Supp. 7; *affd.*, 142 N. Y. 668.)

not sufficient assets in the estate, the surrogate will not direct the executors to pay the legacies.⁶⁰ Where the application is made pending an action in another court, which involves the validity of the legacy in question, it will not be dismissed, but be allowed to stand undetermined until the decision is had in the other court.⁶¹

§ 787. When payment ordered within the year.— While the statute gives no absolute right to the legatees and next of kin, to insist on payment of what is coming to them from the estate until the expiration of the year, the representative may, though at his peril, make such payments to legatees and next of kin, in advance,⁶² and the statute expressly authorizes an appeal to be made, at any time, to the discretion of the surrogate, to direct a payment or part payment, if the condition of the assets is such as to make it safe to allow so doing. Such application may be made at any time after letters granted, although a year has not expired. To warrant the court in granting such an application, the following must appear, in addition to the validity of the claim, to wit:

1. That there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.

2. That the amount of money, and the value of the other property, in the hands of the executor or administrator, applicable to the payment of debts, legacies, and expenses, exceed, by at least one-third, the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class.

3. That the payment or satisfaction of the legacy, pecuniary

⁶⁰ Matter of Brewster, 1 Connolly, 172; 19 St. Rep. 698. Compare Matter of O'Connor, 90 Hun, 284; 35 N. Y. Supp. 779; *aff'd.*, 149 N. Y. 573.

⁶¹ Where a will has been declared invalid and a decree made directing distribution to the next of kin, and only one residuary legatee has appealed and given an undertaking thereon.—Held, that the executors should set aside and retain a sum sufficient to protect appellant's interest, in case of a possible reversal on appeal, and then carry out the directions of the decree so far as they will not be affected by appellant's success.

(Matter of Kavanagh, 29 St. Rep. 215; 9 N. Y. Supp. 443.) Where two legacies in a will were declared invalid and one of the legatees appealed.—Held, that it should appear that the time for the other legatee to appeal had expired before the executors should be compelled to distribute the amount of such legacy, or else there should be some arrangement made for reimbursing the executors in case it should be finally adjudicated that the fund should be differently disposed of. (Matter of Armstrong, 32 St. Rep. 441.)

⁶² Matter of Austin, 19 St. Rep. 211.

provision, or distributive share, or some part thereof, is necessary for the support or education of the petitioner.⁶³

These restrictions on the power of the surrogate do not apply to the case of a legacy directed by the will to be paid within the year. It is, consequently, no ground for dismissing a petition for the payment of such a legacy that it does not allege such a state of facts as can alone justify a direction to pay under this section of the Code.⁶⁴ But where there is no such testamentary direction, all three requirements as to the state of facts necessary to give the court jurisdiction must be complied with — that is, satisfactory proof must be given, for instance, that there is a surplus of assets by at least one-third, and the surrogate must so adjudge, on the proof, before granting the order for an advance payment.⁶⁵ He cannot, by mere force of the language of the Code, make the order for payment as a matter of discretion or of arbitrary power.⁶⁶ His discretion is a judicial discretion, and his decree is, therefore, subject to review, on appeal. The fact that the representative has neglected to ascertain the debts by advertising a notice to creditors to present their claims is not a good ground of objection to the petition, provided the advertised notice would have been completed if he had published it, as soon as he was entitled to do so, after grant of letters.⁶⁷

§ 788. Payment pending probate controversy.— Before the amendment (1881) of section 2672, authorizing the court to direct the payment of a legacy or distributive share *by a temporary*

⁶³ Co. Civ. Proc., § 2723, as amended 1893 (former § 2719). See *Hoyt v. Jackson*, 1 Dem. 553.

⁶⁴ *Matter of Selling*, 5 Dem. 225.

⁶⁵ *Barnes v. Barnes*, 13 Hun. 233. The language of the former statute was, "at least one-third more of assets in the hands of the executor or administrator than necessary to pay all the debts, legacies, and claims against the estate then known." (2 R. S. 98, § 83.) Under this, it was held, that the residuary legacies might be excluded in computing the amount of the legacies. (*Lockwood v. Lockwood*, 3 Redf. 330.)

⁶⁶ *Matter of McGowan*, 28 Hun. 246, as explained and distinguished in *Matter of Hoyt*, 31 id. 176.

⁶⁷ *Matter of Cain*, 42 St. Rep. 145; 17 N. Y. Supp. 11: affg. a decision of Surrogate's Court of New York county, in which the surrogate said:

"It is frequently urged in defense to applications of this character that the period for advertising has not expired; but it is obvious that it would be fruitful of delay in the settlement of estates if a personal representative might delay advertising and then interpose his own neglect successfully as a defense to the payment of a legacy. The time for the payment of legacies is a year from the issuance of letters, and the law for years has fixed the time when the executor could procure leave to advertise, so that he was amply protected in their payment when due. Since the 1st of September, 1890, when the law went into effect permitting advertisement for claims at any time after the issuance of letters, there is less reason than ever for an executor urging as a reason for delay in distribution the possible existence of debts."

administrator, appointed pending a contested probate proceeding, it was held that there was no power to decree the payment of a legacy or distributive share pending a controversy over the probate, and that it must be first determined whether the decedent died testate or intestate.⁶⁸ But since such amendment, the pendency of such a controversy is no bar to the proceeding; nor is the pendency of a proceeding to revoke the probate of the will already granted. In effect, the executor, in the last case, is a temporary administrator, and he is free to do substantially the same acts which such an administrator may do, his functions beyond those acts being suspended, unless the surrogate expressly authorizes them to be used.⁶⁹ But this statutory provision was not intended to restrict the powers of the surrogate, in respect to orders, and, therefore, a surrogate may authorize an executor, pending a proceeding to revoke the will, to do any act or make any payment, the performance or making of which the surrogate is authorized to direct, by other sections of the Code.⁷⁰

§ 789. Petition and proof.— The petition and proof should show the petitioner's station in life, his age, the state of his health, the stage of his education, if a minor, etc. Where the petitioner is entitled to receive, under the will, the interest only of a specified sum, which is bequeathed in trust for his benefit, with remainder over, only an advance of such interest as has accrued is proper; a sum to be paid annually cannot be ordered as an advance, but only a specific amount to meet present needs.⁷¹ Whether the advance is necessary for the support or education of the petitioner must depend upon the facts of each case as it arises. The petitioner's actual income, if any, from other sources, should appear, and the amount thought to be necessary should be stated. If the papers do not disclose the facts, with sufficient fullness to satisfy the court, a reference may be ordered. A widow, to whom

⁶⁸ *La Bau v. Vanderbilt*, 3 Redf. 284; *Riegelman v. Riegelman*, 4 id. 492; *Riegelman v. McCoy*, 1 Dem. 86.

⁶⁹ Co. Civ. Proc., § 2650; *Matter of Hoyt*, 31 Hun. 176. It is no objection that the petitioner for the payment of the legacy is the contestant in the pending probate proceedings, if he is both a legatee and next of kin, and thus entitled, in any event, to a portion of the estate. (*Rank v. Camp*, 3 Dem. 278.) See *Matter of Hitchler*, 21 Misc. 417; *Matter of Peaslee*, 81 Hun. 597; 30 N. Y. Supp. 1028. Payment of a legacy should not be de-

ferred, where there are sufficient assets to pay it, because the proponent of another will of the testatrix intends to appeal from a decree denying its probate. (*Matter of O'Connor*, 90 Hun. 284; 35 N. Y. Supp. 779; *affd.*, 149 N. Y. 573.)

⁷⁰ *Matter of Hoyt*, *supra*.

⁷¹ *Lockwood v. Lockwood*, 3 Redf. 330; *Matter of Skaats*, N. Y. Law J., July 8, 1892; *Matter of Hitchler*, 21 Misc. 417. But in *Kerrigan v. Kerrigan* (2 Redf. 517), the payment of an annuity was ordered in advance.

a legacy is given in lieu of dower, may make the application as well as any other legatee.⁷²

§ 790. Bond on granting order.—It is a condition of granting the prayer of the petition that a bond be filed in the office of the surrogate, and approved by him, conditioned as prescribed by law with respect to a bond which an executor may require from a legatee, upon payment of a legacy, before the expiration of the year, pursuant to a direction to that effect, contained in the will.⁷³ It is essential, to confer jurisdiction, that the bond should conform to the terms of the statute. Where the condition was for the refunding of the money “if necessary,” instead of “when-ever required,” for the payment of debts, etc., the order was held improperly granted.⁷⁴

§ 791. Proceeding against testamentary trustee.—Besides the remedy for the recovery of debts and legacies, as against the personal representative, a remedy is furnished, by which a person who is entitled, under a will, to the payment of money or the delivery of personal property by a testamentary trustee, may petition the surrogate for the payment of the money or the delivery of the property.⁷⁵ This remedy is available at any time after the petitioner's right to the money or property has become absolute, as where the event, upon the happening of which a legacy was conditioned, has occurred. A citation will issue, as upon the application of a general legatee, and, upon its return, the trustee

⁷² *Seymour v. Butler*, 3 Bradf. 193; *Estate of Jones*, 17 St. Rep. 724.

⁷³ Co. Civ. Proc., § 2723, as amended 1893 (former § 2719); *Matter of Austin*, 19 St. Rep. 211; 2 N. Y. Supp. 875. For the form of the condition, see Co. Civ. Proc., § 2721, as amended 1893. See § 775, *ante*; *Matter of Selling*, 5 Dem. 225.

⁷⁴ *Barnes v. Barnes*, 13 Hun. 234. The Surrogate's Court has no power to direct the sale of real estate for the purpose of paying legacies. (*Matter of Connor*, 1 Law Bul. 8.)

⁷⁵ Co. Civ. Proc., § 2804. No disposition of income of a trust can be made, in the proceeding, until it has accumulated. (*Matter of Foster*, 30 Misc. 573; 63 N. Y. Supp. 1102.) A proceeding cannot be instituted under this section to compel a trustee, who has been removed from office, either alone or in conjunction with his successor, to pay to petitioner income of the trust received before removal.

(*Moorhouse v. Hutchinson*, 4 Dem. 362.) A proceeding under this section and one for the judicial settlement of the trustee's accounts under sections 2807 and 2809, are separate and distinct proceedings, and should not be joined. (*Matter of Rogers*, 2 Conolly, 639; 16 N. Y. Supp. 197.) Where such proceedings are so joined and it appears that the petitioner is not entitled to maintain the proceeding for payment, he may be permitted to continue as for an accounting. (Ib.) An action at law by one of several beneficiaries to recover for himself alone from a trustee, as such, a share of a trust estate belonging to all, cannot be maintained, at least until the trust has been closed and the balance ascertained. If the trust is still open, the accounts of the trustee unsettled, and the amount going to the particular beneficiary unknown, resort must be had to a court of equity. (*Husted v. Thomson*, 158 N. Y. 328.)

may file an answer, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, or denying its validity or legality, absolutely, or upon information and belief. Where, on the face of the papers, the claim appears to be doubtful, the petition must be dismissed; otherwise the court may hear the allegations and proofs of the parties, and make such a decree as justice requires.⁷⁶ The powers of the surrogate are substantially the same as upon an application for the payment of a general legacy by an executor. On this proceeding, however, the court may, in a proper case, require the trustee, where he is unable to deliver the specific property, to pay its value in money;⁷⁷ and where it appears, upon presenting the petition, that a decree for the payment or delivery might affect the rights of other persons, with respect to the estate or fund, the citation must also be directed to such persons, and if it afterward appears, upon the hearing, that all the persons whose interests may be affected are not parties, they must be brought in by a supplemental citation, before a decree in favor of the petitioner can be made.⁷⁸

§ 792. Payment and investment of legacies to minors.—At common law, the father, as guardian by nature merely, was not permitted to receive legacies bequeathed to his minor children, nor their distributive shares in the surplus of an intestate's estate,⁷⁹ — a rule which was not changed by Revised Statutes. By the Code of Civil Procedure,⁸⁰ it is provided that "when a legacy

⁷⁶ Co. Civ. Proc., § 2805. See *Matter of Stevens*, 20 Misc. 157; 45 N. Y. Supp. 908; *Matter of Foster*, 37 Misc. 581; 75 N. Y. Supp. 1067.

⁷⁷ Co. Civ. Proc., § 2805; *Peck v. Sherwood*, 5 Redf. 416; *Steinele v. Oechsler*, id. 312. A legatee who was to receive the income, interest, profits, and earnings of a specified sum, given by the will in trust, is not entitled to the advance in the value of bonds in which the sum was invested, and which were thereafter sold, though she is entitled to the enhanced income arising from such advance. (*Duclos v. Benner*, 62 Hun. 428; 17 N. Y. Supp. 168; *revd.*, on other points, 130 N. Y. 560.)

⁷⁸ Co. Civ. Proc., § 2806. The section relating to an application to compel an executor to pay a legacy, and section 2806 containing a similar provision in reference to a *testamentary trustee*, have essentially the same purpose. They establish modes of pro-

cedure whereby a beneficiary under a will may obtain prompt relief, where it is plain that the rights of other persons cannot be thereby prejudiced; while, on the other hand, where the grant of such relief may prove prejudicial to others, the latter are required to be allowed an opportunity to be heard. (*Beekman v. Vanderveer*, 3 Dem. 221.) A direction to "apply to the use of" is equivalent to one "to pay over." (*Stoples v. Hawes*, 39 App. Div. 548.) See *Gasquet v. Pollock*, 1 App. Div. 512; *affd.*, 158 N. Y. 734.

⁷⁹ See *Genet v. Tallmadge*, 1 Johns. Ch. 3; *Rieck v. Fish*, 1 Dem. 75; *Whitlock v. Whitlock*, id. 160; *Kerrigan v. Kerrigan*, 2 Redf. 517.

⁸⁰ Co. Civ. Proc., § 2746, as amended 1900. Where an infant, entitled to an expectant estate which has vested, but the time of possession is postponed until the majority of such infant, is destitute of other sufficient means of

or distributive share is payable to an infant, the decree may, in the discretion of the Surrogate's Court, direct it, or so much of it as may be necessary, to be paid to his general guardian, to be applied to his support and education; or when it does not exceed fifty dollars, the decree may order it to be paid to his father, and if his father be dead, then to his mother, for the use and benefit of such infant. The court may, in its discretion, by its decree, direct any legacy or distributive share, or part of a legacy or distributive share, not paid or applied as aforesaid, which is payable to an infant, to be paid to the general guardian of such infant, upon his executing and depositing with the surrogate in his office, a bond running to such infant, with two or more sufficient sureties, duly acknowledged and approved by the surrogate, in double the amount of such legacy or distributive share, conditioned that such general guardian shall faithfully apply such legacy or distributive share, and render a true and just account of the application thereof, in all respects, to any court having cognizance thereof, when thereunto required, the sureties in which bond shall justify as required in this act, unless the surrogate shall determine that the general bond given by the guardian is ample and of sufficient amount to cover such legacy or distributive share.⁸¹ Said court may, in its discretion, from time to time, authorize or direct such general guardian to expend such part of such legacy or distributive share, in the support, maintenance, and education of such infant, as it deems necessary.⁸²

support, the Surrogate's Court has power to direct the trustee to pay to the general guardian a suitable sum out of the rents and profits, to be applied to the maintenance and education of the infant. (Matter of Fritts, 19 Misc. 402; 44 N. Y. Supp. 344.) See Matter of Lehman, 2 App. Div. 531; 37 N. Y. Supp. 1086. As to application of income, directed by the will to be accumulated, to the use of a destitute minor, see L. 1897, c. 417, § 5.

⁸¹ The surrogate may order a legacy of an infant, deposited with the county treasurer, to be paid to a guardian subsequently appointed; but not before the guardian's bond is shown to be sufficient. (Matter of Moody, 2 Dem. 624.) But an ancillary guardian, who is also the general guardian and has given security as such, cannot be required to give an additional bond to entitle him to possession of the ward's property. (Mat-

ter of Hunt, 24 Civ. Proc. Rep. 239; 34 N. Y. Supp. 1088.) In Matter of Tucker (28 Misc. 595; 59 N. Y. Supp. 1022), it was said not to be improper for the trustees to make payments to the general guardian, being the mother of the *cestui que trust*, instead of applying the money themselves, although the general guardian had not given any bond under Co. Civ. Proc., § 2746, which has no bearing on the application of income.

⁸² But no order can be made directing the reimbursement of the guardian for past maintenance. (Matter of Sherrer, 24 Misc. 351; 53 N. Y. Supp. 714.) Where executors are given a fund, the income of which they are to apply to the maintenance of an infant daughter, and proof is presented of lack of good faith on the part of the executors in exercising their discretion, the surrogate may direct a suitable payment out of the principal. (Matter of Berry, 5 Dem. 458.) See

“On such infant’s coming twenty-one years of age, he shall be entitled to receive, and his general guardian shall pay or deliver to him, under the direction of the Surrogate’s Court, the securities so taken, and the interest or other moneys that may have been paid to or received by such general guardian, after deducting therefrom such amounts as have been paid or expended in pursuance of the orders and decrees of said court, so made as aforesaid, and the legal commissions of such guardian; and the said general guardian shall be liable to account, in and under the direction of the Surrogate’s Court, to his ward, for the same; in case of the death of said infant, before coming of age, the said securities and moneys, after making the deductions aforesaid, shall go to his executors or administrators, to be applied and distributed according to law, and the general guardian shall, in like manner, be liable to account to such administrator or executor.

“If there be no general guardian, or if the Surrogate’s Court do not order or decree the payment or disposition of the legacy or distributive share in some of the ways above described, then the legacy or distributive share, or part of the same not disposed of as aforesaid, whether the same consists of money or securities, shall, by the order or decree of the Surrogate’s Court, be paid and delivered to and deposited in said court, by paying and delivering the same to and depositing it with the county treasurer of the county, to be held, managed, invested, collected, reinvested, and disposed of by him, as prescribed and required by section two thousand five hundred and thirty-seven of this act. The regulations contained in the general rules of practice, as specified in section seven hundred and forty-four of this act, and the provisions of title three of chapter eight of this act apply to money, legacies, and distributive shares paid to, and securities deposited with, the county treasurer, as prescribed in this section; except that the Surrogate’s Court exercises with respect thereto, or with respect to a security in which any of the money has been invested, or upon which it has been loaned, the power and au-

§ 793, *post*, note 84. Where the direction in the will was to “apply the net income of each child’s share to the support, maintenance, and education of said child until such child arrives at the age of twenty-one years,”—Held, that it was not necessary for the trustees to apply all of the net

income every year to such support, but that they were to exercise a reasonable discretion in view of the age, surroundings, and general environment of the child. (Matter of McCormick, 22 Misc. 309; 49 N. Y. Supp. 1119; *affd.*, 40 App. Div. 73.)

thority conferred upon the Supreme Court by section seven hundred and forty-seven of the Code.”⁸³

§ 793. **Applying principal of fund.**—Where a will lodges in the trustee a discretion as to the emergency which will justify the application of principal to the support of minors, or as to the amount so to be applied, the court will never interfere in its exercise, unless an abuse of discretion is shown.⁸⁴

TITLE EIGHTH.

THE PAYMENT OF DISTRIBUTIVE SHARES.

ARTICLE FIRST.

DEVOLUTION OF PROPERTY MADE VACANT BY DEATH.

§ 794. **Object of statute.**—The law of intestate succession and the law of wills are both civil institutions, established from considerations of political policy and general expediency. The statutes which regulate intestate succession are not designed or intended as favors bestowed upon a man's widow, children, or other kindred, for their own benefit; but like all other laws of property, they rest upon the foundation of general utility and the common advantage. In furtherance of this subject, and to prevent uncertainty as to the ownership of property made vacant by death, and thus avoid strife and maintain the peace and harmony of families, the law arbitrarily designates, generically, the members of the present owner's family, whether naturally or artificially composed, who shall be invested with rights of ownership on his death. The law which prescribes the course of succession of real property of an intestate is the Statute of Descents, so

⁸³ Co. Civ. Proc., § 2746, as amended 1900. The surrogate has no power to direct the investment of the personal property of an infant in real estate so as to affect the descent thereof upon the death of the infant during minority. (Matter of Bolton, 150 N. Y. 129.)

⁸⁴ Banning v. Gunn, 4 Dem. 337; Matter of Keinz, 88 Hun. 298; 34 N. Y. Supp. 339; Matter of Dinkelspiel, N. Y. Surr. Decis., 1891, p. 169; Matter of Kitson, id., p. 178; Matter of Ruge, N. Y. Law J., June 23, 1892. In the last case, the court said: "There is no allegation or suggestion in the petition that there has been an

abuse of discretion. The answer filed by the executor denies information as to many of the matters set forth in the petition which might, under ordinary circumstances, warrant the granting of an application for support. He alleges that he is ignorant as to the existence of the emergency described in the will. The estate now amounts to \$3,361. The petitioner wishes the matter summarily disposed of and desires to avoid the expense of a reference. I am unable to decide upon the papers, and, therefore, direct a reference to an assistant, who will take the testimony of the parties and report the same."

called, and that which prescribes the succession of an intestate's personal property is known as the Statute of Distributions.

§ 795. What law governs intestate succession.—The law is well settled in England and this country that in all matters which concern the succession of personalty, the law of the decedent's last domicile is to control, without regard to the location of the assets;⁸⁵ while in all matters which concern the descent and heirship of realty, the law of the place where it is situated is absolute.⁸⁶ Hence, where an intestate, last domiciled in another State, left assets in this State upon which administration was granted here, our courts, in directing the distribution of such assets, will be governed by the laws of such foreign State and not by our own laws. So, where by the laws of the domicile of the intestate (who was an illegitimate), his relations on his mother's side were not entitled to share in his estate, they will not be allowed to share in the distribution of the surplus made here, although, by our law, they would be so entitled.⁸⁷ Contrariwise, when an illegitimate

⁸⁵ In *Parsons v. Lyman* (20 N. Y. 103, 112), Denio, J., stated the doctrine thus: "It is an established doctrine, not only of international law, but of the municipal law of this country, that personal property has no locality. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate. The principle, no doubt, has its foundation in international comity; but it is equally obligatory, as a rule of decision in the courts, as a legal rule of purely domestic origin. It does not belong to the judges to recognize or deny the rights which individuals may claim under it, at their pleasure or caprice, but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the State to change it whenever a change becomes desirable. But the right which an individual may claim to personal property in one country, under title from a person domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect

to the legal assertion of that title it has no extra-territorial force. As a result of this doctrine it is now generally held everywhere, and it is well settled in this State, that an executor or administrator appointed in another State has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed." To the same effect, *Palmer v. Palmer*, 71 Hun, 30; 24 N. Y. Supp. 613; *revd.*, on other points, 150 N. Y. 139; *Matter of Devoe*, 66 App. Div. 1; 72 N. Y. Supp. 962; *affd.*, 171 N. Y. 281; *Simonson v. Waller*, 9 App. Div. 503; 41 N. Y. Supp. 662; *Matter of Rupaner*, 15 Misc. 654; 37 N. Y. Supp. 429; *affd.*, 9 App. Div. 422; *New York Life, etc., Co. v. Viele*, 22 App. Div. 80; *affd.*, 161 N. Y. 11.

⁸⁶ *White v. Howard*, 46 N. Y. 144.

⁸⁷ In *Public Adm'r v. Hughes* (1 Bradf. 125), the intestate was illegitimate and domiciled in England, by whose laws there was an absolute obstruction of succession, she having no lineal descendants and no lawful ancestors or collateral relatives. Held, therefore, that her brother, having no interest in the estate, was not entitled to administer on her estate, and letters were accordingly granted to the public administrator as being entitled to the custody of *bona vacantia*. In *Graham v. Public Adm'r* (4 Bradf. 127), the intestate having died here

child has, by the subsequent marriage of its parents, become legitimate by virtue of the laws of the State or country where such marriage was celebrated,⁸⁸ or where the parents were domiciled at the time,⁸⁹ it is legitimate everywhere. Hence, also, where the widow of a person dying domiciled in Maryland is, by its law, entitled to a certain share in his personal estate where he leaves a will in which she is unprovided for, she is entitled to such share in his personal property situated in this State, notwithstanding a will executed by him when a resident of this State, and admitted to probate here, by which he disposes of his entire estate to others.⁹⁰

Where the whole surplus of a nonresident's estate is brought within the jurisdiction of a surrogate here, he will not decline to distribute it, according to the law of the intestate's domicile; yet it is evident that the statute does not contemplate the distribution of a part or portion of an estate, where the residue is subject to the control of the tribunal of a foreign domicile, and, in such a case, the court here, after satisfying domestic creditors, will transmit the surplus to the foreign jurisdiction for distribution.⁹¹

on her way from Scotland, her domicile of origin, to Canada, distribution of her estate must be governed by the law of Scotland. See *Cruger v. Phelps*, 21 Misc. 252. See, generally, *Shultz v. Pulver*, 3 Paige, 182; *affd.*, 11 Wend. 361; *Vroom v. Van Horne*, 10 Paige, 549; *Suarez v. The Mayor*, 2 Sandf. Ch. 173; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Matter of Braithwaite*, 19 Abb. N. C. 113. In *Burr v. Sherwood* (3 Bradf. 85), a married woman, domiciled in Connecticut, having a vested right in the residuary estate of her grandfather, after coverture, received, in satisfaction of such portion, bank stock in this State, and her husband drew the dividend but never reduced the stock to possession, nor administered on her estate, though he survived her. Held, that, as by the law of Connecticut, the property vested in the husband at the time of the transfer, his administrator (appointed here) was entitled to the proceeds for distribution among his next of kin, according to the laws of Connecticut. Whether a deceased person died intestate is to be determined by the law of the last domicile of the deceased. (*Moultrie v. Hunt*, 23 N. Y. 394.) So also as to the validity of the execution of a will (*Dupuy v. Wurtz*, 53 N. Y. 556; see § 179, *ante*),

and the validity of a bequest to a foreign corporation. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Matter of Huss*, 126 id. 537; 37 St. Rep. 789; *Hope v. Brewer*, 136 N. Y. 126.) The rights of a wife as creditor of her husband under the law of France, where the marriage was contracted, continue and attach to the property of the husband, where he abandons her and dies domiciled abroad. Accordingly, where the husband had appropriated the proceeds of real estate inherited by the wife during coverture, it was held that as by the French law she was entitled to priority out of his estate as against legatees, she should be given such priority here, notwithstanding that the property bequeathed had all been acquired by the husband in this State subsequent to his desertion of his wife. (*Bonati v. Welsch*, 24 N. Y. 157.)

⁸⁸ *Miller v. Miller*, 91 N. Y. 315; *Bates v. Violelet*, 33 App. Div. 436; 53 N. Y. Supp. 893.

⁸⁹ *Stack v. Stack*, 6 Dem. 280; s. c. as *Estate of Stack*, 10 St. Rep. 690; *Bates v. Violelet*, *supra*.

⁹⁰ *Matter of Braithwaite*, 19 Abb. N. C. 113.

⁹¹ *Parsons v. Lyman*, 20 N. Y. 103. See *Hardenberg v. Manning*, 4 Dem. 437. Compare *Simonson v. Waller*, 9

Nevertheless, where there are two administrators of an estate, one in the place of domicile and the other in a foreign jurisdiction, the question whether the courts of the latter will decree distribution of the assets, or remit them to the jurisdiction of the domicile, is a question, not of jurisdiction, but of judicial discretion, depending upon the circumstances of the particular case.⁹²

SUBDIVISION 1.

THE STATUTE OF DESCENTS.

§ 796. **Order of descent.**⁹³—"§ 281. The real property⁹⁴ of a person,⁹⁵ who dies without devising the same, shall descend:

"1. To his lineal descendants;

"2. To his father;

"3. To his mother; and

"4. To his collateral relatives.

"as prescribed in the following sections of this article."

App. Div. 503. By Co. Civ. Proc., § 2700, it is provided that the person to whom ancillary letters are issued must, unless otherwise directed by an order of the surrogate or by the judgment or order of a court of record, transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the State, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof. Money, or other property so transmitted by him, at any time before he is so directed to retain it, must be allowed to him upon an accounting. See *ante*, § 317.

⁹² *Matter of Hughes*, 95 N. Y. 55; *Despard v. Churchill*, 53 id. 192.

⁹³ The present rule of descent in this State was first prescribed by statute passed February 23, 1786, which was afterward adopted by the Revised Statutes in 1830. (1 R. S. 750.) In 1896 the provisions of the statute were incorporated into the Real Property Law (L. 1896, c. 547) without substantial alteration.

⁹⁴ The term "real property," as used in the statute, is declared, by section 280, to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are deter-

mined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto: leases for years, estates for the life of another person, and real property held in trust, not devised by the beneficiary. The term "inheritance" is to be understood to mean real property, as above defined, descended according to the provisions of the statute. Thus, where a testator devised lands with certain limitations, by which, according to the construction put upon the devise, M. had an equitable life estate and his son a remainder in fee, it was held, that, upon the death of the son without lineal descendants, this remainder in fee passed to M., his father, under the Statute of Descents. (*Vanderheyden v. Crandall*, 2 Dem. 9.) Where land is sold in a partition suit, and the money paid into court, or otherwise disposed of, until the persons entitled to such money come of age, and they die before majority, the money is divided as if it were real estate. (*Valentine v. Wetherill*, 31 Barb. 655.) And money invested in land for the use of the intestate follows the same rule. (*Champlin v. Baldwin*, 1 Paige, 563.)

⁹⁵ The property of an insane person descends as if he were of sound mind. (2 R. S. 55, § 25.)

§ 797. Lineal descendants in equal degrees.—"§ 282. If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts, however remote from him, the common degree of consanguinity may be."

§ 798. Lineal descendants of unequal degree.—"§ 283. If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead; so that each living descendant shall inherit such share as would have descended to him, had all the descendants in the same degree of consanguinity, who shall have died leaving issue, been living; and so that issue of the descendants, who shall have died, shall respectively take the shares which their ancestors would have received."

§ 799. When father to inherit.—"§ 284. If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother,⁹⁶ and she be living;⁹⁷ if she be dead, the inheritance descending on her part shall go to the father for life and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee."

§ 800. When mother to inherit for life, and when in fee.—"§ 285. If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the de-

⁹⁶ "The expressions, 'where the inheritance shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift, or descent from the parent referred to, or from any relative of the blood of such parent." (§ 280.) Where one who inherited real estate from his father conveyed it for a valuable consideration to his mother by whom it was devised to him.—Held, that under the Statute of Descents the property must be deemed to have come to him upon the part of his mother and to descend to those of her blood. But where he had pur-

chased real estate, part of the price of which was procured by mortgage on real estate which came to him from his mother, the property purchased does not to the extent of the amount of the mortgage, on that account, go to those of the blood of the mother exclusively, but descends in equal shares to the descendants of the brothers and sisters of the father and the mother. (Adams v. Anderson, 23 Misc. 705; 53 N. Y. Supp. 141.)

⁹⁷ When a person is described as living, it means living at the time of the death of the intestate from whom the descent came: when he is described as having died, it means that he died before such intestate. (§ 280.)

seccendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living,⁹⁸ and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister, or descendant thereof, the inheritance shall descend to the mother in fee.”⁹⁹

§ 801. Collateral relatives.—“§ 286. If there be no father or mother, capable of inheriting the estate, it shall descend, in the cases hereinafter specified, to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.”

§ 802. Brothers and sisters, and their descendants.—“§ 287. If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living, and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister, shall inherit such share as would have descended to him or her, if all the brothers and sisters of the intestate, who shall have died leaving issue, had been living; and so that such descendants, in whatever degree, shall collectively inherit the share, which their parent would have received, if living;¹ and the same

⁹⁸ Such revision vests in the brothers and sisters living at the time of the intestate's death, and is not suspended by the outstanding life estate. (*Barber v. Brundage*, 169 N. Y. 368.) See L. 1896, c. 547, § 280.

⁹⁹ Construing this section in connection with section 15 (now section 290), “the true interpretation is that the terms “brother” and “sister,” as employed here, embrace only brothers and sisters of the whole blood, and such brothers and sisters of the half blood as are, under section 15, entitled to inherit, and that a half brother or sister excluded from taking by section 15 should not be deemed a brother or sister of the intestate, within the meaning of section 6 (now section 285), the distinction between the whole blood and the half blood being retained as to the excluded class.” (*Per Rapallo, J. Wheeler v. Clutterbuck*, 52 N. Y. 67.) The section re-

fers only to the case of relatives inheriting from the same ancestor, or from each other, and recognizes the distinction between relatives of the full blood and of the half blood. (*Wood v. Mitcham*, 92 N. Y. 375, 379.) The statute does not interfere with the right of a remainderman to dispose of his vested remainder. (*Embury v. Sheldon*, 68 N. Y. 227.)

¹ Under the Statute of Descent of 1786 (1 R. L. of 1813, p. 52), no representation was allowed among collaterals beyond brothers' and sisters' children. By the Revised Statutes, however, the principle of representation was changed, so as to extend to all lineal descendants of a brother or sister, however remote. (*Hannan v. Osborne*, 4 Paige, 340.) Before the Revised Statutes, all lineal descendants, of equal degrees of consanguinity, took equally, however remote they all might be from the intestate; and if

rule shall prevail, as to all direct lineal descendants of every brother and sister of the intestate, whenever such descendants are of unequal degrees."

§ 803. Brothers and sisters of father, and their descendants.—

"§ 288. If there be no heir entitled to take under either of the

any of that class had died, leaving issue, such issue took by representation. But, in regard to collaterals, they took by representation, although they all stood in equal degree. By 1 R. S. 752, §§ 8, 9, 10, lineals and collaterals were placed on the same footing, and both take as do lineals. (Pond v. Bergh, 10 Paige, 140.) The rule now among both lineals and collaterals is that if all the heirs are in the same degree of consanguinity to the intestate, they take equally, however remote they may be from him; but if some of the class of relatives nearest to the decedent are dead and leave issue, the survivors of the class take equally among themselves, and the representatives of those who are dead take the share which their ancestors of that class would be entitled to, if living. (Ib.) Where the inheritance descends to or through brothers and sisters, or both, the primary division is to be made between the nearest surviving relative and the descendants of those of the same degree who may have died, so that the descendants of such shall collectively take the share which would have fallen to their ancestor had he or she been living. This is the construction to be put on 1 R. S. 751, §§ 7, 8, 9, taken together. (Hyatt v. Pugsley, 23 Barb. 285, 300.) In that case, the intestate's nearest surviving relatives were his first cousins, and if all of them had survived him they would have inherited equal parts of what descended to them respectively. But as several of them had previously died, the question arose whether the cousins must not be assumed as the stock, and the inheritance be divided into as many equal shares as there were first cousins living, or who had died leaving descendants. Held, that such was the division required by the statute. In Kelly v. Kelly (5 Lans. 443), one of testator's children, to whom a fee was devised, survived the testator and died intestate. Held, that a daughter of the testator's deceased brother, and

the two sons of another deceased brother, took, each of them, as heirs-at-law of the intestate, an equal one-third share of the estate—that is, the niece and nephews took *per capita*, and not *per stirpes*. In all cases of a newly-purchased inheritance, which can arise under this section, all brothers and sisters, and their descendants of the half blood, are to take as relatives of the whole blood. The common-law rule, which gives a preference to the blood of the father in the descent of a newly-purchased inheritance, applies only where there are relatives on the side of both father and mother—not where the descent is to brothers and sisters and their descendants. In respect to brothers and sisters of the father and mother of the half blood, and their descendants, the common-law rule was abolished by section 13. (Brown v. Burlingham, 5 Sandf. 418.) Not only do the class of nearest relatives of the decedent take equally where they are his only heirs-at-law, but all the original members of that class take equally by themselves, or by their representatives, where some of them have died leaving issue, in the same manner as if they had survived the person last seized, and had then died intestate. And if all the original class of those who would have been his heirs die before the testator, there is no representation of any in that class, but the next class become his heirs, and take with the representatives of any deceased in that class. Hence, where the only heirs are a son of a deceased sister of the intestate, and four sons and a granddaughter of a deceased brother of the intestate, the first named is not entitled to one-half the lands of the intestate as the representative of the deceased sister, and the sons and granddaughter of the deceased brother to the remaining one-half, but each is entitled to an equal share, *i. e.*, one-sixth of the inheritance. (Adams v. Smith, 20 Abb. N. C. 60.)

preceding sections, the inheritance, if it shall have come to the intestate on the part of his father, shall descend:

“ 1. To the brothers and sisters of the father of the intestate in equal shares, if all be living;

“ 2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living, and to the descendants of such as shall have died;

“ 3. If all such brothers and sisters shall have died, to their descendants.

“ 4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or, if all have died, to their descendants. But if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid.² If the inheritance has not come to the intestate, on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants, in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants, in like manner as if they had been the brothers and sisters of the intestate.”

§ 804. Illegitimate intestate.— “ § 289. If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, it shall descend to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inherit-

² The Revised Statutes abolished the rule of the common law which declared that, when the intestate was the first purchaser of the inheritance, relatives on the side of the father should be entitled to take so as to exclude those on the side of the mother, until the blood of the father was wholly exhausted. (*Brown v. Burlingham*, 5 Sandf. 418.) This rule, at any rate, was only applicable when the descent, from the want of near relatives, could pass to collaterals only, and when, consequently, those only could be entitled to take who were able to trace their descent from a common ancestor. It did not apply as between brothers and sisters. Thus, where A., the first purchaser, died intestate, leaving B., a niece, and C. and D., her brother and sister by the half blood,—Held, that B., C. and D. each took one-third of the estate. (*Id.*) As to the meaning of the expressions “where the estate shall have come to the intestate on the part of his father,” or “mother,” see § 799, note 96, *ante*.

ance shall descend to him as if he were legitimate.³ In any other case, illegitimate children or relatives shall not inherit."⁴

§ 805. Relatives of the half blood.—"§ 290. Relatives of the half blood and their descendants shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from an ancestor; in which case, all those who are not of the blood of such ancestor, shall be excluded from such inheritance."⁵

§ 806. Relatives of husband or wife.—(§ 290*a*.) "When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled thereto, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate."⁶

§ 807. Common law to prevail in cases unprovided for.—"§ 291. In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law."⁷

³ If the mother be living at the illegitimate's death, the case provided for in the statute, in which the intestate's relatives on the part of the mother take, does not arise, and the common-law rule governs (*St. John v. Northrup*, 23 Barb. 25); hence, if the mother is an alien, and so cannot inherit, the brother of the intestate does not acquire a right to inherit through her. (*Ib.*)

⁴ By the common law, an illegitimate, not having inheritable blood, could neither inherit lands himself, nor transmit them by descent to any other person, excepting his own legitimate offspring, or persons otherwise capable of inheriting, claiming by inheritance from or through them. But that provision is now modified so that now the widow and descendants of an illegitimate intestate have as many rights as if the decedent were legitimate. By L. 1855, c. 547 (repealed by L. 1896, c. 547), "Illegitimate children, in default of lawful issue, may inherit real and personal property from their mother, as if legitimate; but nothing in this act shall affect any right or title in or to any

real or personal property already vested in the lawful heirs of any person heretofore deceased." They cannot inherit from the ancestor of a deceased mother. (*Matter of Mericlo*, 63 How. Pr. 62.) The term "illegitimate" defined. (*Miller v. Miller*, 91 N. Y. 315; and overruling *Bollermann v. Blake*, 24 Hun, 187.) By L. 1895, c. 531; L. 1899, c. 725, children whose parents have intermarried, or who may do so, are made legitimate, but not so as to interfere with vested rights. See *Davis v. Davis*, 27 Misc. 455; 59 N. Y. Supp. 223.

⁵ Hence, where an intestate leaves as his nearest relatives, a great-uncle, great-aunts, and descendants of great-aunts, the great-uncle will inherit to the exclusion of the females of the same degree and their descendants, as at common law, since the Statute of Descents includes no other collateral relatives of an intestate than brothers, sisters, uncles, and aunts, and their descendants. (*Hunt v. Kingston*, 3 Misc. 309; 23 N. Y. Supp. 352.)

⁶ Added by L. 1901, c. 481.

⁷ This section refers to the immediate ancestor from whom the intestate

§ 808. **Posthumous descendants and relatives.**—"§ 292. A descendant or a relative of the intestate, begotten before his death, but born thereafter, shall inherit in the same manner, as if he had been born in the lifetime of the intestate, and had survived him."⁸

§ 809. **Shares of heirs.**—"§ 293. When there is but one person to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons, they shall take as tenants in common, in proportion to their respective rights."⁹

§ 810. **Alienism of ancestor.**—"§ 294. A person capable of inheriting under the provisions of this article, shall not be precluded

received the inheritance, not a remote ancestor who was the original source of title. The term "ancestor" embraces collaterals as well as lineals, through whom an inheritance is derived (*Wheeler v. Clutterbuck*, 52 N. Y. 67); so that a half-brother of the deceased, whose estate he inherits, is deemed to derive the inheritance from an ancestor, as the term refers to antecessors in estates, and not necessarily to those in pedigree. (*Adams v. Smith*, 20 Abb. N. C. 60.) The term "the blood" of the ancestor includes his relations of the half blood. (*Beebe v. Grisling*, 14 N. Y. 235.) See *Champlin v. Baldwin*, 1 Paige, 563; *Emanuel v. Ennis*, 48 N. Y. Super. 432. The provisions of this section refer to the immediate, and not the remote, source of the intestate's title—that is, an ascendant of the intestate in the right line, as father, etc. The statute does not include collateral relatives, as brothers and sisters. Thus, where A. died intestate, seized of land, and leaving children, B., C., and D., and a widow, who married again, and had a child, E., and afterward the widow died, and the children C. and D. died, without issue, and afterward B. died, without issue, it was held, that, on her death, B. owned the whole estate—one-third by direct descent from her father, and two-thirds by descent from her sisters C. and D., and that, as to the one-third she derived directly from her father, it went to his brothers and sisters, to the exclusion of her half-sister E., but that the two-thirds which she derived by descent from her own sisters C. and D. went to her half-sister E. (*Valentine v. Wetherill*, 31 Barb. 655.)

⁸ See L. 1896, c. 547, § 46 (1 R. S. 725, §§ 30, 31). After-born children, unprovided for in a parent's will, are entitled to share in the estate (2 R. S. 65, § 49, as amended 1869, c. 22), the same as if the parent had died intestate. The statute applies to an illegitimate child unprovided for by the mother's will made before her birth, who would have been entitled under L. 1855, c. 547, to have inherited her mother's estate, if the mother had died intestate. (*Bunce v. Bunce*, 27 Abb. N. C. 61; 14 N. Y. Supp. 659.) The birth of a posthumous child creates an intestacy only as to its share. The balance of the estate passes, under the will, to those entitled. (*Davis v. Davis*, 27 Misc. 455; 59 N. Y. Supp. 223; *Matter of Murphy*, 144 N. Y. 557; 64 St. Rep. 249.) Where the children are the devisees, the object of the statute can only be accomplished by requiring each to contribute, in proportion to the amount of his devise, to make up the share to which the after-born child would have been entitled, if the parent had died intestate. (*Rockwell v. Geery*, 4 Hun, 606.) See Co. Civ. Proc., § 1868. As to the method of determining the share of post-testamentary children, see *Sanford v. Sanford*, 61 Barb. 296; *McCormack v. McCormack*, 60 How. Pr. 196; *Mitchell v. Blain*, 5 Paige, 588. Gifts *causa mortis* should contribute. (*Bloomer v. Bloomer*, 2 Bradf. 339; *House v. Grant*, 4 Lans. 296.) A child *en ventre sa mere* is to be considered *in esse*, for most purposes of property. (*Mason v. Jones*, 2 Barb. 230.) See *Hone v. Van Schaick*, 3 Barb. Ch. 488.

⁹ See *Coe v. Irvine*, 6 Hill, 634, where this section is construed in connection with an action of ejectment.

from such inheritance, by reason of the alienism of any ancestor." ¹⁰

§ 811. When advancement to be set off.—"§ 295. If a child of an intestate shall have been advanced by him, by settlement or

¹⁰ This provision is prospective, and has no application to cases which occurred previous to its original adoption, *i. e.*, January 1, 1830. (Jackson v. Green 7 Wend. 336; Redpath v. Rich, 3 Sandf. 81.) Compare Hall v. Hall, 81 N. Y. 130; Kilfoy v. Powers, 3 Dem. 198; Maynard v. Maynard, 36 Hun, 227. This section does not enable a person to deduce title through an alien ancestor still living, who would himself inherit the estate if he were a citizen. (People v. Irvin, 21 Wend. 128.) Accordingly, where decedent left a sister and a niece, her daughter, the former an alien and the latter a citizen, the niece does not take by inheritance. The statute enables those only to inherit who would be entitled to the estate by the ordinary law of descent, on the death of the person last seized, but for the alienism of some person through whom title is derived. (McLean v. Swanton, 13 N. Y. 538.) If some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien. (Jackson v. Green, 7 Wend. 334; Orser v. Hoag, 3 Hill, 79; Luhrs v. Eimer, 80 N. Y. 171.) The provision of this section, however, protects the inheritance whether the claimant derives title through lineal or collateral ancestors, or through both. (McCarthy v. Marsh, 5 N. Y. 263.) An alien female who marries a citizen becomes herself a citizen, and is capable of taking title by descent. (Burton v. Burton, 1 Keyes, 359; Halsey v. Beer, 52 Hun, 366.) In Luhrs v. Eimer (15 id. 399), intestate's father, at the death of his son, a citizen, was a nonresident alien, and incapable of taking from the son; but a sister of intestate, capable of taking, by her marriage with a citizen, was seized of the land, directly from the intestate, her brother, and not through her alien father. To the same effect, Smith v. Reilly, 31 Misc. 701; 66 N. Y. Supp. 40. The wife of a resident alien is entitled to dower. (L. 1845,

c. 115, § 2; L. 1896, c. 547, § 5.) A woman born in this country, or who has been otherwise a citizen thereof, notwithstanding her marriage with an alien, and residence in a foreign country, by dying intestate transmits real property by descent to her lawful children of such marriage, and their descendants, in like manner as if such children were native-born, or naturalized citizens of the United States (L. 1872, c. 120; L. 1896, c. 547, § 6); nor is her title to real estate descending to her impaired by her marriage with such alien. (Ib. and L. of 1889, c. 42.) So, too, an alien female who comes to the United States a minor, and who, before majority, marries an alien, by the marriage becomes, upon the subsequent admission of the husband to citizenship, *at once* a citizen, without any declaration, on her part, of her intention to become such. (Renner v. Muller, 57 How. Pr. 229.) Notwithstanding the deceased mother, through whom the estate is claimed, was an alien, the inheritance, to one otherwise capable of taking, is not barred. (Ib.) Collateral descent from the brother to the representatives of a deceased sister, the alien mother surviving, is immediate, and such alien mother cannot impede the descent, the pedigree being deduced from the brother last seized, by passing over the alien mother, she not being a *medium hereditas*. This section only applies to ancestors, and, therefore, the children of a *surviving* alien sister, though citizens, are barred. (Ib.) As to when resident aliens, on filing deposition, etc., may take and hold lands, see 1 R. S. 720, §§ 16-20; L. 1845, c. 115; L. 1857, c. 576; L. 1868, c. 513; L. 1872, cc. 120, 141, 358; L. 1874, c. 261; L. 1875, c. 336; L. 1877, c. 111; L. 1896, c. 547, § 5; Nolan v. Command, 11 Civ. Proc. Rep. 295; Wainwright v. Low, 132 N. Y. 313; Maynard v. Maynard, 36 Hun, 227; Daly v. Beer, 32 St. Rep. 1064. If any alien resident of this State, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase

portion, real or personal estate, the value thereof must be reckoned, for the purposes of descent and distribution, as part of the real and personal property of the intestate descendible to his heirs, and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share, which such child would be entitled to receive, of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate;¹¹ but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property of the intestate, as shall be sufficient to make all the shares of all the children, in the whole property, including the advancement, equal.¹² The value of any real or personal property so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given.¹³ Maintaining or educating a child, or giving him money without a view to a portion or settlement in life, is not an advancement.¹⁴ An estate

and take, a conveyance of real estate within this State, has died, or shall hereafter die, leaving persons who, according to the statutes of this State, would answer the description of heirs of such deceased person, or of devisees, under his last will, and being of his blood, such persons so answering the description of heirs, or of such devisees of such deceased persons, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs, or such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease. (L. 1845, c. 115, § 4, amended by L. 1875, c. 38; repealed and re-enacted in L. 1896, c. 547, § 5.) See *Ettenheimer v. Hofferma*n, 66 Barb. 374; *Goodrich v. Russell*, 42 N. Y. 177; *Brown v. Sprague*, 5 Den. 545; *Smith v. Smith*, 70 App. Div. 286; 74 N. Y. Supp. 967. "The right, title, or interest in or to real property in this State of any person entitled to hold the same cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judg-

ment or otherwise." (L. 1896, c. 547, § 7.) The State alone can question the right of an alien to hold land. (*Belden v. Wilkinson*, 33 Misc. 659; 68 N. Y. Supp. 205.)

¹¹ This section applies only where the decedent left no will, and not to a case where a testator has disposed by will of only a portion of his estate. (*Kent v. Hopkins*, 86 Hun. 611; 33 N. Y. Supp. 767; *Messman v. Egenberger*, 46 App. Div. 46; 61 N. Y. Supp. 556; *Thompson v. Carmichael*, 3 Sandf. Ch. 120.) For the statute as to advancements being reckoned as a part of surplus of the personal estate, see Co. Civ. Proc., § 2733, as amended 1853. See § 830, *post*. Under this section, grandchildren are entitled to insist that advancements, made to his children by the intestate, shall be brought by them into *hotchpot*, and that the grandchildren shall be entitled to share therein. (*Beebe v. Estabrook*, 79 N. Y. 246.) An advancement is presumed from paying consideration and taking title in the name of the child. (*Piper v. Barse*, 2 Redf. 19; *Sanford v. Sanford*, 61 Barb. 299.)

¹² See *Hobart v. Hobart*, 58 Barb. 296; *Bell v. Champlain*, 64 id. 393; *Sanford v. Sanford*, 61 id. 299.

¹³ 1 R. S. 754, § 25.

¹⁴ 1 R. S. 754, § 25; 2 R. S. 98,

or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust, with a right of selection, is an advancement."

§ 812. How adjusted.— "§ 296. When an advancement to be adjusted consists of real property, the adjustment must be made out of the real property descendible to the heirs. When it consists of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other."

§ 813. Certain estates not to be affected.— The statute declares that the estate of a husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of its provisions; nor shall the same affect any limitation of an estate by deed or will." ¹⁵

§ 814. Additional portion to widow.—The provision of L. 1889, c. 406, § 1, that, "if the intestate shall leave a widow and a descendant or descendants, then such widow, in addition to any interest to which she may be entitled, under the [foregoing] sections, shall be entitled to the use, during her life, of an additional portion of the estate, not exceeding in value one thousand dollars; and in case the intestate shall leave a widow and no descendant or descendants, then the widow shall be entitled to the absolute ownership, in fee, of such additional portion of the estate," was repealed by L. 1890, c. 173, § 1.

§ 815. Adopted children.— By a statute passed June 25, 1873,¹⁶ which legalized the adoption of minor children, it was provided (§ 10) that a child, when adopted, "shall take the name of the

§ 78. But otherwise where such intention is shown. (*McRae v. McRae*, 3 Bradf. 199; *Matter of Morgan* 104 N. Y. 74.)

¹⁵ L. 1896, c. 547, § 280 (1 R. S. 755, § 20). See *Graham v. Luddington*, 19 Hun, 246; *Leach v. Leach*, 21 id. 381; *Zimmerman v. Schoenfeldt*, 3 id. 692; *Arrowsmith v. Arrowsmith*, 8 id. 606; *Coit v. Grey*, 25 id. 444; *Kirk v. Richardson*, 32 id. 434; *Matter of Winne*, 2 Lans. 21; *Burke v. Valentine*, 52 Barb. 412; *Hatfield v. Sneden*, 54 N. Y. 280. *Contra*, *Billings v. Baker*, 28 Barb. 343.

¹⁶ L. 1873, c. 830, § 10. The statute does not apply to adoptions consummated before its passage (*Hill v. Nye*, 17 Hun, 457), except those authorized in a few cases by special statutes. (*Carroll v. Collins*, 6 App. Div. 106.) But a child adopted in 1886, pursuant to L. 1873, c. 830, § 10, takes as an heir of the person adopting, as provided by the amendment by L. 1887, c. 703. (*Dodin v. Dodin*, 16 App. Div. 42; 44 N. Y. Supp. 800; *affd.*, 162 N. Y. 635.)

person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the rights, and be subject to all the duties, of that relation, excepting the right of inheritance, except that, as respects the passing and limitations over, of real and personal property, under and by deeds, conveyances, wills, devises, and trusts, said child adopted shall not be deemed to sustain the legal relation of child to the persons adopting." By an act passed June 25, 1887,¹⁷ this section was amended in several important particulars. They were (1) to substitute "*including*," instead of "*excepting*" the right of inheritance; and (2) to interpose the declaration that "the [right of the] heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person so adopting, except,"¹⁸ etc.; and (3) changing the last exception to the original act, under which the adopted child was prevented from taking by virtue of any instrument, unless designated therein; in other words, from taking by the description of "child," "issue," "descendant," etc. But the amendment gave the right to take by inheritance, as a child, and also the right to take as a child by a testamentary or other provision in favor of a "child" or "children," etc., except that, as respects the passing or limitation of property, "dependent upon the person adopting dying without heirs,"¹⁹ the child adopted shall not be deemed to sustain the legal relation of child to the person so adopting, so as to defeat the rights of remaindermen." In other words, the statute allowed the use of the general term "child" or "children" to include an adopted child, for the purpose of cutting off the heir; but not for the purpose of cutting off a devisee or remainderman. If, however, the will or other instrument is so expressed that the adopted child takes by name and not under the general word "child" or "children," the gift would be good in either case.²⁰ The Act of 1887 was, with some modification in phraseology, carried into the Domestic Relations Law²¹ in the following language: "The [adopted] child takes the name of the foster parent. His rights of inheritance and succession from his natural parents

¹⁷ L. 1887, c. 703. See *Smith v. Allen*, 161 N. Y. 478.

¹⁸ Under this amendment, it would seem that the giving the right of inheritance to an adopted child includes the right to take by representation. For a different construction given to a similar Massachusetts statute, see *Wyeth v. Stone*, 144 Mass. 441; 4 N. Eng. Rep. 462.

¹⁹ Including next of kin. (*Keteltas v. Keteltas*, 72 N. Y. 312.) See *ante*, § 269, notes.

²⁰ See remarks on the statute in *N. Y. Daily Reg.*, Oct. 21, 1887; also note in 29 *Abb. N. C.* 49.

²¹ L. 1896, c. 272, § 64, as amended L. 1897, c. 408.

remain unaffected by such adoption. The foster parent or parents, and the minor, sustain toward each other the legal relation of parent and child, and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, * * * and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.”²²

SUBDIVISION 2.

THE STATUTE OF DISTRIBUTIONS.

§ 816. **Origin and policy of the statute.**—Our statute regulating the distribution of the surplus of the personal property of an intestate, is taken from the English statute of 22 & 23 Charles II., c. 10, which was borrowed from the 118th novel of Justinian, and, except in some few instances mentioned in the statute, is governed and construed by the rules of the civil law, and not, as is the Statute of Descents, by the common law.²³ The share which comes to a person under this statute is designated a distributive share.

The kindred of every one, who are entitled to distributive shares, are naturally divided into three classes: (1) his children and their descendants; (2) his father and mother and their descendants; (3) his collateral relatives, including (*a*) his brothers and sisters and their descendants, and (*b*) his uncles, cousins, and other relatives of either sex who have not descended from his brother or sister. Ascendants and descendants are *lineal* kindred; other relatives are *collateral* kindred. The general policy of the statute is, first, to provide for the widow, children, father and

²² The statute also provides that upon the adoption, the rights of the parents of the minor by descent or succession cease; and further that a subsequent marriage of the parent or foster parent does not affect his right to the property of the child by descent or succession.

²³ 2 Blackst. Comm. 504, 515; 2 Kent's Comm. 422; *Sweezey v. Willis*, 1 Bradf. 495; *Matter of Marsh*, 5 Misc. 428.

mother of the intestate, that is, his lineal kindred, and, after them, the next of kin of equal degree. When the claimants are of an unequal degree, the *nearest* of kin takes the whole, unless the remote class can come in by representation, which, by the statute, was, until recently, prohibited as to collaterals, except in the solitary case of brothers' and sisters' children.²⁴

§ 816a. **Order of distribution.**— The Statute of Distributions, so called, was transferred by L. 1893, c. 686, from the Revised Statutes²⁵ to the Code of Civil Procedure, where it constitutes section 2732. The eighth paragraph of the original statute is subdivided so as to make paragraphs 8 and 9; the other changes are merely verbal. It provides as follows:

“ If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

“ 1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

“ 2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

“ 3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

“ 4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

²⁴ See *Doughty v. Stillwell*, 1 Bradf. 302; *Adee v. Campbell*, 79 N. Y. 52; *Hurtin v. Proal*, 3 Bradf. 414; *Murdock v. Ward*, 67 N. Y. 387. The term “relatives,” when used in a will relating to personalty, only embraces persons within the Statute of Distributions. (*Gallagher v. Crooks*, 132 N. Y. 338; 44 St. Rep. 436.)

²⁵ 2 R. S. 96, § 75.

“ 5. If there be no widow, and no children, and no representatives of the child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives.

“ 6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

“ 7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

“ 8. If the deceased leave a mother and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

“ 9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

“ 10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

“ 11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

“ 12. Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate.²⁶

²⁶ As amended by L. 1898, c. 319; upon this subdivision of the statute in effect Sept. 1, 1898. See remarks in N. Y. Law J., May 9 and 19, 1898.

" 13. Relatives of the half blood, shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

" 14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

" 15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.²⁷

" 16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this chapter; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person."²⁸

§ 817. Partial intestacy.— The statute applies not only to cases of total, but also to cases of partial, intestacy.²⁹ Whatever personal assets are not effectually disposed of by the will, or consumed in the administration of the estate, come within its scope. Thus, where residuary legatees are, by the terms of the will, tenants *in common*, and not joint tenants, and one dies before the testator, the share of such a one constitutes assets not disposed of by the will, and must be distributed according to the statute.³⁰ And where a testator bequeathed to his children a contingent interest, for life, in the income which might accrue from a residuary fund,

²⁷ Added by L. 1897, c. 37; in effect Mar. 9, 1897.

²⁸ Added by L. 1901, c. 410; in effect Sept. 1, 1901.

²⁹ *Fry v. Smith*, 10 Abb. N. C. 224; *Kearney v. Missionary Soc.*, id. 274; *Finch v. Wilkes*, 17 Misc. 428; 41 N. Y. Supp. 227; *Doane v. Mercantile Tr. Co.*, 24 Misc. 502; 53 N. Y. Supp. 902; *affd.*, 39 App. Div. 639.

³⁰ *Hart v. Marks*, 4 Bradf. 161.

Compare *Lefevre v. Lefevre* (59 N. Y. 434), in which case the testator, by his will, gave to his wife one-third of his estate, but it was not stated to be in lieu of dower or other claim. The residuary bequest was declared void. Held, that the testator died intestate as to that portion of his estate, and it was to be distributed under the statute.

after the happening of a particular event, and provided for the disposal of a portion only of the income previous to that time, it was held that the surplus must be distributed as in case of intestacy.³¹ There seems to be some uncertainty whether, a trust of personalty being declared void as contrary to the statute against perpetuities, the unlawful accumulation is to be distributed according to the Statute of Distributions, or whether it goes to those entitled "to the next eventual estate" under the will.³²

§ 818. **The doctrine of representation.**—The statute provides that, when descendants and next of kin are of unequal degrees of kindred, the surplus is to be apportioned among those entitled thereto, according to their respective stocks, so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent, whom they represent, if living, would have been entitled.³³ The words "legal representative," as used in this statute, do not mean, as in some statutes, executors or administrators, but *issue*,³⁴ who, in certain cases, are allowed to represent, or take in place of, a deceased parent or grand parent. If a son or daughter died before the intestate, but left children or grandchildren who survive the intestate, the law preserves to these grandchildren or great-grandchildren, the distributive share which their parent, his child, would have taken had he survived, and the share is divided among them according to their number. This is not regarded as affecting the rules which govern the computation of degrees, but the children of the second or third generation represent their deceased parent for the purpose of distribution. If, however, the intestate's son or daughter survives him, and afterward, but before distribution, dies, leaving issue, the doctrine of representation does not apply. The right to a distributive share of the intestate's estate is, in general, vested on his death; and if a distributee, having a vested right, dies before distribution is made, the share is to be paid to his executors or administrators.³⁵ It is a part of his estate, to be distributed, not by the doctrine of representation, but according to the other provisions of the Statute of Distributions

³¹ *Vail v. Vail*, 4 Paige, 317.

³³ Co. Civ. Proc., § 2732, as amended

³² See *Manice v. Manice*, 43 N. Y. 1893, subd. 11.

³⁸⁵: *Van Emburgh v. Ackerman*, 3

³⁴ *Greenwood v. Holbrook*, 111 N. Y.

Redf. 499; *Robinson v. Robinson*, 5

465.

Lans, 165. See § 263, *ante*.

³⁵ *Rose v. Clark*, 8 Paige, 574; *Willcox v. Smith*, 26 Barb. 316.

as applied to his family. Prior to 1898 the doctrine of representation did not apply to collaterals beyond brothers' and sisters' children,³⁶ but in that year it was extended to collaterals "in the same manner as allowed by law in reference to real estate." Just what that means is not at all clear. If the intestate left both real and personal estate, then, in accordance with the Statute of Descents, those entitled to succeed to a share of the real property, together with those who would be next of kin under the Statute of Distributions, will be the lawful next of kin of the decedent. But if personalty only is involved, the problem is not so easy of solution, particularly where the intestate left collateral relatives beyond the degree of brothers and sisters and their descendants. Space will not permit further discussion of this very interesting subject, but if an opinion may be hazarded, it would seem that, in the case of brothers and sisters and their descendants, representation is unlimited; but where an intestate dies, leaving personal estate only, and leaving more remote collateral relatives, his estate must be distributed to his nearest of kin in equal degree, and the doctrine of representation will not apply to their descendants."³⁷

§ 819. Adopted children.—Reference has already been made to the statute by which an adopted child has all the rights and is subject to all the duties of the legal relation of parent and child, including the right of inheritance; and the heirs and next of kin of such adopted child are the same as if the adopted child were the legitimate child of the person adopting,³⁸ thus extending the doctrine of representation to adopted children.

³⁶ Before the amendment of subd. 12 it had been held that the limitation was not modified by subd. 5 of the section, providing that, in case there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed "to the next of kin in equal degree." Hence, where an unmarried intestate left, as his next of kin, a brother and sister, and four grandchildren of a deceased half-brother, it was held, that the surviving brother and sister took the whole; the grandchildren of the deceased brother being one degree beyond the statute. (Matter of Suckley, 11 Hun. 344.) That subdivision, however, applied only to domestic

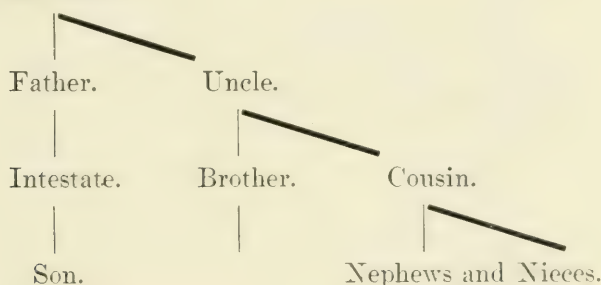
wills which, by their terms, were to be executed here. (Simonson v. Waller, 14 Misc. 95; revd., 9 App. Div. 503.)

³⁷ See Matter of Davenport, 67 App. Div. 191; 73 N. Y. Supp. 653. In that case, an intestate left a nephew, niece, uncles, and aunts, and descendants of deceased uncles and aunts; held, that his estate should be distributed to the nephew, niece, and the living uncles and aunts, as next of kin in equal degree, in equal proportion, no representation being allowed to deceased uncles and aunts.

³⁸ L. 1896, c. 272, § 64, as amended L. 1897, c. 408 (former statute, L. 1887, c. 703). See *ante*, § 815.

§ 820. **Computing degrees of kindred.**—There is little difficulty in determining questions of distributions, except where there are no descendants and no widow. In such cases, the whole surplus is to be distributed “to the next of kin in equal degree, to the deceased and the legal representatives;” and it frequently becomes necessary to determine who are of an *equal degree* of consanguinity to the deceased, and how far the distribution may be made among those who are of unequal degrees of relationship to the decedent. In determining the persons who are next of kin of a decedent “in equal degree,” the rule of the civil and common law is to count up, from either of the persons related to the common ancestor, and then down to the other person related, reckoning a degree to each person ascending and descending; while the canon law reckoned by counting down, from the common ancestor, the number of removals in the longest line, thus:

Grandfather.

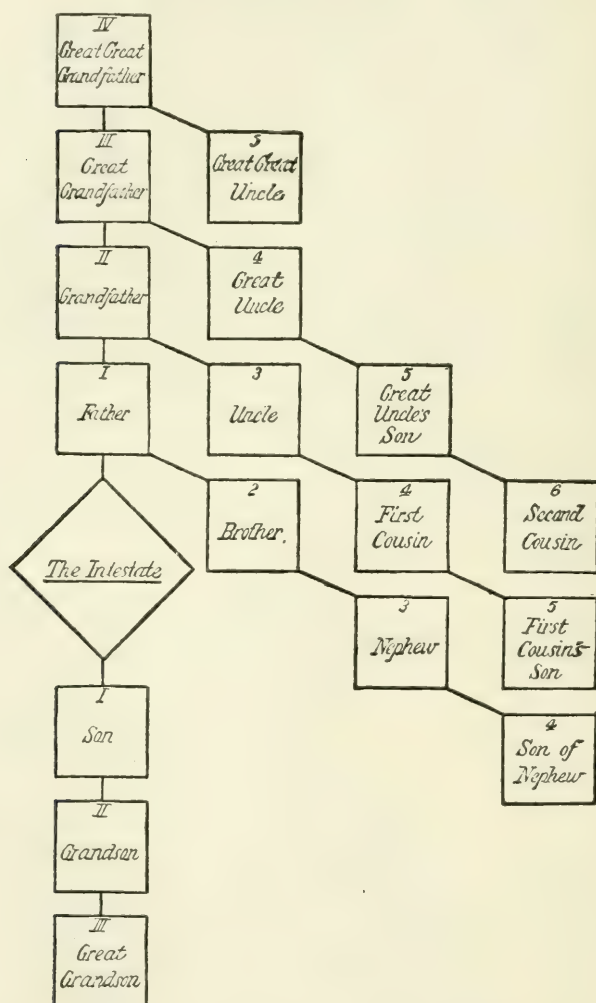


In other words, if we regard the lines as forming a triangle, of which the common ancestor is the apex, the civil law counts all the spaces in both legs of the triangle; the canon law counts only the spaces in the longest leg. Thus, by the canon law, the son of the intestate is in the third degree, alike from the cousin of the intestate, from the uncle of the intestate, and from the grandfather of the intestate, while, by the civil law, the son of the intestate is in the third degree from the grandfather, the fourth degree from the uncle, and the fifth from the cousin.³⁹

It will not be expected that we should exhaust the subject of the Statute of Distributions. It will suffice if we give the fore-

³⁹ Bogert v. Furman, 10 Paige, 496. Bradf. 495; Haring v. Coles, 2 id. and cases cited; Sweezy v. Willis, 1 349; Hurtin v. Proal, 3 id. 414.

going paradigm, showing the mode of computing collateral consanguinity, according to the common law, in force in this State;



and the following ready-reference table showing the mode of distribution in a number of supposable cases.

TABLE SHOWING MODE OF DISTRIBUTION OF PERSONAL PROPERTY OF INTESTATE.

RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

A. Husband dying survived by wife and a descendant or descendants of one or of both.

<i>If intestate die leaving</i> (1) Wife and child or children.	One-third to wife; residue to child or children equally, deducting advancements made to such child or children by intestate in his lifetime.
(2) Wife, child, or children and issue of predeceased children.	One-third to wife; residue to child or children, and grandchildren, the former taking <i>per capita</i> , the latter <i>per stirpes</i> .
(3) Wife and grandchildren.	One-third to wife; residue to grandchildren equally.
(4) Wife and his children by two or more marriages.	One-third to wife; residue to intestate's children equally.
(5) Wife and her children by a last or former marriage.	One-third to wife; residue to intestate's children equally.

B. Husband dying survived by wife, but by no descendant of either or of both.

(6) Wife only.	One-half to wife; residue to next of kin.
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C. Husband survived by wife and by brother, sister, nephew, or niece, but by no descendant or parent.

(7) Wife, and brother, sister, nephew, or niece.	One-half to wife; the whole to her when it does not exceed \$2,000. If the residue exceeds that sum, wife to have, in addition to one-half, \$2,000; residue to brothers and sisters and their representatives. (Doughty v. Stillwell, 1 Bradf. 300.)
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D. Husband survived by wife and by mother, but by no descendants or father.

(8) Wife and mother.	One-half to wife; residue to mother.
(9) Wife and mother, brother, sister, nephew, or niece.	One-half to wife; residue to mother, brother, sister, nephew, and niece equally. See Doughty v. Stillwell, 1 Bradf. 300.

E. Husband survived by wife and by father, but by no descendant.

(10) Wife and father.	One-half to wife; residue to father.
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RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

F. Husband survived by wife, but by no descendant, nor by parent, brother, sister, nephew, or niece.

<i>If intestate die leaving</i> (11) Wife only.	The whole to the wife.
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G. Husband dying after wife, survived by a descendant or descendants of one or of both.

(12) Child or children.	The whole to the children equally.
(13) Children and issue of predeceased children.	Whole to children <i>per capita</i> , and to issue of deceased children <i>per stirpes</i> .
(14) Grandchildren.	Equally among the grandchildren.
(15) Children by two or more marriages by him.	Equally among all the children.
(16) Children by wife's last and a former marriage.	Whole to intestate's children equally.

H. Husband dying after wife, survived by no descendant; or a man dying unmarried.

(17) Father only.	Whole to father. (Harring v. Coles, 2 Bradf. 349.)
(18) Mother only.	Whole to mother.
(19) Father and mother.	Whole to father.
(20) Father, mother, and brothers and sisters.	Whole to father.
(21) Father and brothers or sisters.	Whole to father. See Matter of Cruger, 34 N. Y. Supp. 191.
(22) Mother and brothers or sisters.	Whole to them equally.
(23) Father, mother, brothers or sisters and children of predeceased brothers or sisters.	Whole to father.
(24) Father, brothers or sisters, and children of predeceased brothers or sisters.	Whole to father.
(25) Mother, brothers or sisters, and children of predeceased brothers or sisters.	Whole to mother and brothers and sisters, <i>per capita</i> , and to the children <i>per stirpes</i> .
(26) Father, mother, and children of predeceased brothers or sisters.	Whole to father.

RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

H. Husband dying after wife, survived by no descendant; or a man dying unmarried.

<i>If intestate die leaving</i> (27) Father and children of predeceased brothers or sisters.	Whole to father.
(28) Mother, and children of predeceased brothers or sisters.	Whole to them equally.
(29) Father, mother, children and grandchildren of predeceased brothers or sisters.	Whole to father.
(30) Father, children and grandchildren of predeceased brothers or sisters.	Whole to father.
(31) Mother, children and grandchildren of predeceased brothers or sisters.	Whole to mother and to children of deceased brothers and sisters equally; the shares of the latter going to their children <i>per stirpes</i> .
(32) Brothers or sisters only.	Whole to them equally.
(33) Brothers and sisters, and nephews or nieces, children of predeceased brothers or sisters.	Whole to brothers and sisters <i>per capita</i> , to children of predeceased brothers and sisters <i>per stirpes</i> .
(34) Brothers or sisters and grandnephews or nieces, children of predeceased brothers' or sisters' deceased children.	Whole to brothers and sisters <i>per capita</i> , and to grandnephews or nieces <i>per stirpes</i> .
(35) Brothers or sisters, nephews or nieces and grandnephews or nieces, children of predeceased brothers or sisters and of their deceased issue.	Whole to brothers and sisters <i>per capita</i> , and to nephews and nieces, grandnephews and nieces <i>per stirpes</i> .
(36) Nephews or nieces, children of predeceased brothers or sisters.	Whole to them equally.
(37) Grandnephews or nieces, children of predeceased brothers' or sisters' deceased children.	Whole to them equally.
(38) Nephews or nieces, and grandnephews or nieces, children of predeceased brothers or sisters, and of their deceased issue.	Whole to nephews and nieces <i>per capita</i> , and to grandnephews and nieces <i>per stirpes</i> .
(39) Brothers or sisters german, and brothers or sisters consanguinean.	Whole to them equally.

RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

H. Husband dying after wife, survived by no descendant; or a man dying unmarried.

<i>If intestate die leaving</i> (40) Brothers or sisters consanguinean and brothers or sisters uterine.	Whole to them equally.
(41) Brothers or sisters consanguinean and uncles or aunts.	Whole to brothers and sisters.
(42) Brothers and sisters uterine and uncles or aunts.	Whole to brothers and sisters.
(43) Father and brothers or sisters consanguinean and uterine.	Whole to father.
(44) Mother and brothers or sisters, consanguinean or uterine.	Whole to mother and brothers and sisters equally.
(45) Father, mother, and uncles or aunts.	Whole to father.
(46) Father and uncles and aunts.	Whole to father.
(47) Mother and uncles and aunts.	Whole to mother.
(48) Mother, uncles, or aunts, and cousins german, children of predeceased uncles or aunts.	Whole to mother.
(49) Father and cousins german.	Whole to father.
(50) Mother and cousins german.	Whole to mother.
(51) Aunt or uncle and cousins.	Whole to aunt or uncle. (Matter of Gooseberry, 52 How. Pr. 310.)
(52) Great-nephews and nieces and cousins german.	Equally.
(53) Cousins german and children and grandchildren of great-great-uncle.	Whole to cousins equally. (Adee v. Campbell, 14 Hun, 551.)
(54) Brothers' grandchildren and brothers or sisters consanguinean.	Whole to brothers and sisters equally.
(55) Cousins german and children of predeceased cousins german.	Whole to cousins german equally. (Adee v. Campbell, 79 N. Y. 52.)

RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

H. Husband dying after wife survived by no descendant; or a man dying unmarried.

<i>If intestate die leaving</i> (56) Paternal uncles or aunts and maternal uncles or aunts.	Whole to them equally. (Hallett v. Hare, 5 Paige, 315.)
(57) Nephews or nieces german and nephews or nieces consanguinean.	Whole to them equally. (Matter of Southworth, 6 Dem. 216 [citing Hallett v. Hare, 5 Paige, 314, and Matter of Suckley, 11 Hun, 344].)
(58) Uncles or aunts and children of great-uncles or aunts.	Whole to uncles and aunts equally.
(59) Uncles or aunts and nieces or nephews.	Whole to them equally. (Hurtin v. Proal, 3 Bradf. 414.)
(60) Great-uncles' or aunts' children and children of cousins german.	The whole to them equally.
(61) Grandfather and uncles or aunts.	The whole to grandfather. (Swezey v. Willis, 1 Bradf. 495.)
(62) Grandfather and uncles or aunts consanguinean.	Whole to grandfather.
(63) Grandfather, grandmother, and great-uncles or aunts.	Whole to grandfather and grandmother equally.
(64) Grandfather, grandmother, and mother.	Whole to mother.
(65) Grandfather or grandmother and brothers or sisters.	Whole to them equally. (Hurtin v. Proal, 3 Bradf. 414. But see <i>contra</i> , Bogert v. Furman, 10 Paige Ch. 496; Matter of Marsh, 5 Misc. 428.)
(66) Great-grandfather and great-uncles' or aunts' children.	Whole to great-grandfather.
(67) Great-grandparents, nephews or nieces and uncles or aunts.	Whole to them equally.
(68) Great-grandfather, great-grandmother, and brothers' or sisters' illegitimate children.	Whole to great-grandfather and great-grandmother equally.
(69) Father's father and mother's mother.	Whole to them equally. (Bogert v. Furman, 10 Paige Ch. 496; Swezey v. Willis, 1 Bradf. 495; Hurtin v. Proal, 3 id. 414; Hill v. Nye, 17 Hun, 457.)
(70) Father's father and mother, and mother's father.	Whole to them equally. (Hill v. Nye, 17 Hun, 457.)

RESIDUE OF PROPERTY IS DISTRIBUTABLE AS FOLLOWS:

J. Wife dying, survived by husband, and a descendant or descendants of one or of both.

<i>If intestate die leaving</i> (71) Husband and children of marriage.	One-third to husband; residue to children. (Co. Civ. Proc., § 2734.)
(72) Husband, children of marriage, and issue of deceased children.	One-third to husband; residue to children <i>per capita</i> , and grandchildren <i>per stirpes</i> .
(73) Husband and grandchildren.	One-third to husband; residue to grandchildren.
(74) Husband and children by the wife's last and a former marriage.	One-third to husband; residue to children.

K. Wife dying, survived by husband, but by no descendants of either or both.

(75) Husband.	Whole to husband. (Matter of Harvey, 3 Redf. 214; Robins v. McClure, 100 N. Y. 328.)
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L. Wife dying after husband, survived by a descendant or descendants of one or both.

(76) Children.	Whole to children equally.
(77) Children and issue of predeceased children.	Whole to children <i>per capita</i> , and to issue of deceased children <i>per stirpes</i> .
(78) Children of husband's last and a former marriage.	Whole to wife's children equally.
(79) Children of husband's former marriage and sisters.	Whole to sisters equally. (Gazlay v. Cornell, 2 Redf. 139.)
(80) Children by two or more marriages of wife.	Whole to children equally.

M. Wife dying after husband, survived by no descendants of either or both; or by woman dying unmarried.

(81) Next of kin.	Property distributable under Statute of Distributions, as that of a single man.
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ARTICLE SECOND.

THE RIGHTS OF HUSBAND AND WIDOW.

§ 821. **Rights of widow.**— Affinity or relationship by marriage, except in the instance of the husband or wife of the intestate, gives no title to a share of the estate.⁴⁰

In any and every event, the widow is entitled to have, to her own use absolutely, one-third of the surplus of the personal estate. She takes in her right as widow, and not as next of kin to her husband.⁴¹ Whether she is entitled to receive any portion of the remaining two-thirds depends upon the contingencies mentioned in the statute:

1. If there be⁴² no children nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin entitled under the statute.

2. If there be no descendant, parent, brother or sister, nephew or niece, she is entitled to the whole surplus.

3. But if there be a brother or sister, nephew or niece, and no descendant or parent, she is entitled to one-half of the surplus, as above, and to the whole, if it does not exceed two thousand dollars; if it exceeds that sum, then she is entitled to the one-half plus two thousand dollars. In other words, in such a case, she

⁴⁰ *Gazlay v. Cornwell*, 2 Redf. 139.

⁴¹ *Murdock v. Ward*, 67 N. Y. 387.

In that case the testator directed his executors to pay the remainder of his estate to his children, in equal shares; and in case the whole principal should not be paid to them, or either of them, during their lives, then the residue to be "equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the State of New York, and as if the same were personal property, and they, or either of them, had died intestate." By another clause, it was provided, that if any of the children should die without issue, his or her share should go to the survivors. One of the sons died before his share had been fully paid, leaving a widow and one child. In an action for an interpretation of the will.—Held, that the widow was not entitled to any portion of the residue, but that the whole thereof belonged to the child. Husband and wife are not next of kin to each other, and,

to extend the meaning of those words, when used in a testamentary gift by either, so as to include the other, such an intention must definitely appear from the context of other portions of the will. The will of R. created a trust in one-fourth part of her residuary estate for the benefit of her grandson B. during his life. Upon his death said one-fourth part was given "to such persons as shall be the heirs-at-law and next of kin" of R., in such parts as they would have been respectively entitled to, in case B. had owned the same and had died intestate. In an action, among other things, to determine who were entitled to such part upon the death of B., who died leaving a widow and two children, him surviving.—Held, that the widow was not entitled to a share therein, but that it went to the children. (*Platt v. Mickle*, 137 N. Y. 106.) See §§ 94, 269, n. 24.

⁴² The words "if there be," in the statute, mean, "if the decedent left." See *Rose v. Clark*, 8 Paige, 574.

has one-half and two thousand dollars besides, *unless* the surplus does not exceed two thousand dollars; in which event she takes the whole.

4. If there be no children, and no representatives of them, and no father, but the mother survives, then the widow is entitled to her moiety — one-half — and the mother, and brothers and sisters, or nephews and nieces, take the remainder in equal shares.

5. If there be no child or descendant, but the father survives, the widow is entitled to one-half, and the father one-half.

§ 822. Widow's dower does not bar her right to distributive share.

— The fact that the widow of the testator has taken her dower in her husband's estate does not prevent her taking, under the statute, her distributive share of lapsed or inoperative legacies which are the proceeds of real estate directed to be converted by the will.⁴³ So a widow to whom her husband devised and bequeathed all his property for life, in lieu of dower, is nevertheless entitled to her distributive share in the remainder of the personalty, which has failed by reason of the incapacity of the legatee.⁴⁴ Her acceptance of a legacy in lieu of dower will not at all affect her right arising under the statute, or from any other source, to the personal property, as dower can only be had of real property.⁴⁵ But a bequest to a widow in lieu of a dower, and *all claims against the estate* as widow, will, if accepted, prevent her taking a distributive share in lapsed legacies.⁴⁶

§ 823. Divorced wife.—A divorced wife, whether the divorce was granted because of the misconduct of herself or her husband, is not entitled on his death, intestate, to administration, nor to a distributive share of his personal estate. The statutory provision, that if the divorce was granted because of the misconduct of the wife, she shall not be entitled “to any distributive share of his personal estate,”⁴⁷ is needless and superfluous, and does not indicate an intention to confer such right in a case where the misconduct was that of the husband.⁴⁸

⁴³ *Parker v. Linden*, 44 Hun. 518; *Matter of Hodgman*, 140 id. 421; 55 Edsall v. Waterbury, 2 Redf. 48. N. Y. Supp. 800.

⁴⁴ *Canfield v. Crandall*, 4 Dem. 111. § 472 R. S. 146, § 48; Co. Civ. Proc., § 1760, subd. 3. See §§ 95, 347, *ante*. As to effect of divorce upon dower, see L. 1896, c. 547, § 176.

⁴⁵ *Hatch v. Bassett*, 52 N. Y. 359; *Matter of Ensign*, 103 N. Y. 284; *Wait v. Wait*, 4 id. 95; *Kade v. Lauber*, 16 Abb. Pr. (N. S.) 288. Com-

⁴⁶ *Matter of Benson*, 96 N. Y. 499; *pare Schiffer v. Pruden*, 64 N. Y. 47;

§ 824. **Rights of widower.**— The husband of a woman dying intestate, and leaving descendants, is entitled to the same distributive share in the personal estate to which a widow is entitled in the personal estate of her husband.⁴⁹ The estates of married women, dying intestate, *without leaving surviving descendants*, are not distributable under the Statute of Distributions, but by the rule of the common law.⁵⁰ By the common law, marriage was an absolute gift to the husband of the goods and chattels and personal property of which the wife was actually possessed, and of such as came to her during coverture. As to such property, the title was vested in the husband, and upon his death, it went to his representatives; if the wife died first, it was his property after, as it was before, her death, and as to it, no administration was or is necessary. These common-law rights of the surviving husband to the personal property of his wife dying intestate without descendants are not taken away or impaired by the various acts relating to married women;⁵¹ and the same is exempted from the operation of the Statute of Distributions, the husband being entitled in preference to the wife's next of kin.⁵² This rule of the common law is recognized by the Revised Statutes.⁵³ The husband's rights cannot be affected by the granting of administration to another person,⁵⁴ nor by the question whether the property, including choses in action of his wife, were reduced to possession or not,⁵⁵ inasmuch as he takes in virtue of his marital right, and not of his right to administration. Hence, in the case of a married woman who had died leaving no descendants and by her will divided her personal property between her husband and her collateral

Schiffer v. Dietz, 83 id. 300; Renwick v. Renwick, 10 Paige, 420. Adultery of wife which has been condoned does not bar her dower. (Pitts v. Pitts, 13 Abb. Pr. [N. S.] 272; 64 Barb. 482; affd., 52 N. Y. 593; 14 Abb. Pr. [N. S.] 97.)

⁴⁹ Co. Civ. Proc., § 2734, as amended 1893, substantially adopting 2 R. S. 98, § 79, as amended L. 1867, c. 782, § 11. See § 346, *ante*.

⁵⁰ Watson v. Bonney, 2 Sandf. 405; McCosker v. Golden, 1 Bradf. 64; Vallance v. Bausch, 28 Barb. 635; L. 1867, c. 782, § 12, and cases *infra*.

⁵¹ L. 1848, c. 200; L. 1849, c. 375; L. 1860, c. 90; L. 1862, c. 172; L. 1867, c. 782.

⁵² Barnes v. Underwood, 47 N. Y. 351; Ransom v. Nichols, 22 id. 110; Ryder v. Hulse, 24 id. 372; Matter of McLeod, 32 Misc. 229; 66 N. Y. Supp.

255; Matter of Klingensmith, 58 id. 375; Fry v. Smith, 10 Abb. N. C. 224; Gilman v. McArdle, 12 id. 414, and cases *infra*. See Foehner v. Huber, 42 App. Div. 439; affd., 166 N. Y. 619. Of course, the intestacy of the wife must be during the husband's life. In case a portion of her estate is not disposed of by operation of her will, at her husband's death, that portion, on the husband's death, goes to her next of kin. (Kearney v. Miss. Soc., 10 Abb. N. C. 274.)

⁵³ 2 R. S. 75, § 29.

⁵⁴ Ransom v. Nichols, 22 N. Y. 111; Robins v. McClure, 100 id. 328, 336. See Foehner v. Huber, *supra*.

⁵⁵ Ryder v. Hulse, 24 N. Y. 372; Gilman v. McArdle, 12 Abb. N. C. 414; Olmsted v. Keyes, 85 N. Y. 602. See Westervelt v. Gregg, 12 id. 210.

relatives, her surviving husband is entitled to the whole of a legacy which had lapsed by the death of a legatee before the testatrix; and letters of administration are not necessary to protect his interest.⁵⁶

§ 825. **Next of kin of husband or wife.**—Under certain circumstances, the next of kin of the husband or wife of an intestate are deemed the next of kin of the decedent. If there be no husband or wife surviving and no children, representatives of a child, or next of kin, then such personal property as may have been received by the deceased from his or her husband or wife, as the case may be, by will or intestacy, shall be distributed equally to the next of kin of such husband or wife.⁵⁷

ARTICLE THIRD.

RIGHTS OF LINEAL KINDRED.

§ 826. **Distributive shares of children.**—The descendants of an intestate take the whole of the surplus of his personal estate, less the widow's share, to the exclusion of all other persons, whether belonging to the ascending line of lineals, or to the collateral line of relations. If there be no widow, they take the whole, absolutely, in equal shares. Relatives, including descendants and next of kin, begotten before the intestate's death, but born thereafter, take in the same manner as if they had been born in the intestate's lifetime, and had survived him.⁵⁸ Children of the half blood, that is, children of the intestate by a different father or mother, take equally with those of the whole blood, that is, those born of the same parents; and the representatives of children of the half blood take in the same manner as representatives of the whole blood.⁵⁹ If any of the intestate's descendants or next of kin died before

⁵⁶ *Robins v. McClure*, 100 N. Y. 328; distinguishing *Barnes v. Underwood*, 47 id. 351. *It seems*, that where the husband, as executor, has control over the property of his deceased wife, for all purposes of administration he occupies the same position as if he were administrator, and he acquires the same rights. (*Ib.*) Where the husband so entitled has taken possession of his deceased wife's assets, the fact that he has taken out letters does not change the nature or source of his title; and although, upon his accounting, a judgment creditor of the husband (or a receiver appointed

in supplementary proceedings on the judgment) is entitled to intervene, yet such judgment creditor or receiver can receive nothing from the administrator *as such*, because all that he has is his own in his right as husband. (*Matter of Gilligan*, 18 St. Rep. 812; 1 Connolly, 137.)

⁵⁷ Co. Civ. Proc., § 2732, subd. 16 (1901).

⁵⁸ Co. Civ. Proc., § 2732, as amended 1893, subd. 14.

⁵⁹ Co. Civ. Proc., § 2732, as amended 1893, subd. 13. See *Matter of Suckley*, 11 Hun, 344, and *ante*, § 805.

him, the equal share of the child so dying goes to the legal representative of such child. Those who take in their own right receive equal shares, and those who take by representation receive the share to which the parent whom they represent, if living, would have been entitled.⁶⁰ A child expressly disinherited by his father's will, as to realty, is not prevented from sharing the personalty under the Statute of Distributions.⁶¹

§ 827. **Shares of illegitimate children.**—By the Revised Statutes,⁶² illegitimate children were not entitled to inherit from either the father or the mother; but this rule is now modified,⁶³ so that, in the case of a mother dying intestate, without lawful issue, her illegitimate children are entitled to inherit from her, as if they were legitimate.

§ 828. **Shares of parents.**—The parents of an intestate are not entitled to share in the surplus, if there are descendants. (1) If there are no descendants, then the share of the parents depends upon whether there is a widow. If there are no descendants and no widow, the *father* takes the whole; but the *mother* takes the whole only in case there are not only no descendants, widow and father, but no brother, sister, or representative of brother or sister. If there are brothers and sisters, the widow takes one-half, and the other half goes to the mother and the brothers and sisters, or their representatives. (2) If there be a widow, but no child or descendant, the father takes one-half and the widow the other half; and the mother takes the same share where the father is dead.

§ 829. **Mother of illegitimate.**—If the intestate is an illegitimate, his mother will take the whole surplus in case there is no child or descendant or widow. Such mother is entitled to letters of administration, in exclusion of all other persons. If the mother do not survive the intestate, then his relatives on the part of the mother take in the same manner as if he had been legitimate, and they are entitled to letters of administration, in the same order.⁶⁴

⁶⁰ Co. Civ. Proc., § 2732, as amended 1893, subd. 11.

⁶¹ Raufuss v. Raufuss, 2 Dem. 271. See Lynes v. Townsend, 33 N. Y. 561; Henriques v. Sterling, 26 App. Div. 30; 49 N. Y. Supp. 1071; Henriques v. Yale University, 28 App. Div. 354; 51 N. Y. Supp. 284; Schweneke v. Hoffner, 18 App. Div. 182; 45 N. Y. Supp. 937; Wood v.

Hubbard, 29 App. Div. 166; 51 N. Y. Supp. 526.

⁶² 1 R. S. 754, § 19.

⁶³ Co. Civ. Proc., § 2732, subd. 15 (1897); L. 1855, c. 547, § 1. See § 816a, *ante*. The illegitimacy of a person will not be presumed but must be proved by those contesting his rights. (Matter of Matthews, 153 N. Y. 443.)

⁶⁴ Co. Civ. Proc., § 2732, as amended 1893, subd. 9. See *ante*, § 804.

§ 830. **Advancements to children.**— “ If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of such surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs. Where there is a surplus of personal property to be distributed, and the advancement consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the Surrogate's Court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.”⁶⁵ The term “ advancement,” used in the statute, is of much narrower signification than the general word “ advances,” which includes any gift or loan.⁶⁶ Not only a child, but

⁶⁵ Co. Civ. Proc., § 2733, as amended 1893; adopting 2 R. S. 97, §§ 76, 77, 78, as amended by L. 1867, c. 782, except the last two sentences, which are new. For the provisions of the Statute of Descents in reference to advancements, see § 811, *ante*. The provisions of the original statute, above, were held to apply in cases of total intestacy. (Thompson v. Carmichael, 3 Sandf. Ch. 127.) But see Hays v. Hibbard, 3 Redf. 28; Matter of Quinn, 2 L. Bul. 59. For the rule where there is real estate, see Hicks v. Gildersleeve, 4 Abb. Pr. 3; Terry v. Dayton, 31 Barb. 524; Parker v. McCluer, 3 Abb. Ct. App. Dec. 454. As to ad-

vances for maintaining and educating child, see Vail v. Vail, 10 Barb. 69; McRae v. McRae, 3 Bradf. 199, and *ante*, § 811. As to distinction between an advancement and a loan, see Bruce v. Griscom, 9 Hun, 280; *affd.*, 70 N. Y. 612. Payment by a parent of the purchase price of a farm, the deed of which is taken in the name of a child, is presumptively an advancement, and the burden is on the child to show that it was a gift and not an advancement. (Sweet v. Northrup, 12 Week. Dig. 377.)

⁶⁶ Chase v. Ewing, 51 Barb. 597, 612.

the descendants of a child of an intestate, who died before him, are entitled, on the final distribution, when it consists exclusively of personal property, to the benefit of advancements made by him in his lifetime to his other children; and such advancements are to be taken into consideration, in determining the distributive shares. The word "children," as used in the statute, includes all the descendants of the intestate entitled to share in his estate.⁶⁷

ARTICLE FOURTH.

RIGHTS OF COLLATERAL KINDRED.

§ 831. **When collaterals take.**— The next of kin, referred to in the statute, are to be ascertained by the rules before mentioned, which are the same as those which determine who are entitled to letters of administration. It has been doubted whether a decree adjudging a person entitled, as of next of kin, to letters of administration, would not be final and conclusive, as to his rights, on the distribution of the estate.⁶⁸ We have already incidentally stated the cases in which the collateral kindred take any share in an intestate's personal estate. The cases in which brothers and sisters and their representatives take less than the whole surplus are stated in the statute as follows:

"3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be *a brother or sister, nephew or niece*, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive, in addition to the one-half, two thousand dollars, and the remainder shall be distributed to the brothers and sisters, and their representatives.

"6. If the deceased leave no children, and no representatives of them, and no father, and leaves a widow and a mother, the one-half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to

⁶⁷ Beebe v. Estabrook, 79 N. Y. 246, where it was said that the provisions of the Statute of Distributions and of the Statute of Descents, on the subject of advancements, are to be taken

and construed together, as the two statutes are *in pari materia*.

⁶⁸ Ferrie v. Public Adm'r, 3 Bradf. 151, 171.

the brothers and sisters, or the representatives of such brothers and sisters."

The brothers and sisters, nephews and nieces, therefore, share, in certain cases, with the widow, or with the widow and mother. If there be no lineal kindred they take the whole surplus. Where the intestate left no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but left first cousins, and the children of deceased first cousins, the first cousins are entitled to take, to the exclusion of said children.⁶⁹

ARTICLE FIFTH.

PROCEEDINGS TO COMPEL PAYMENT OF DISTRIBUTIVE SHARES.

§ 832. **Distributing surplus.**—The last duty of an administrator in the administration of an intestate's estate, is to distribute the surplus to and among the husband or widow and the next of kin. The sum of money which is so to be distributed, and the respective shares of the distributees, cannot usually be exactly determined, except upon a final judicial settlement of the account. If upon such accounting, "any part of the estate remains, and is ready to be distributed, * * * the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights."⁷⁰ Such a decree, and a distribution made thereunder, will not, of course, discharge the accounting party from personal liability for the claims of parties who were not made parties to the proceedings, or whose claim the administrator had knowledge, or ought to have had knowledge, of, before making the distribution. He is bound to ascertain, before making distribution, that there are no unpaid taxes on the general estate,⁷¹ or transfer tax payable upon the individual shares of the next of kin.⁷²

§ 833. **Payment in advance of final accounting.**—The statute contemplates, however, the likelihood that, within one year after the grant of letters, the reduction of the estate to possession, and the ascertaining and payment of claims will have been so far advanced that the court may determine, with some degree of certainty, whether there will be a surplus, and, if so, the amount which may be distributed in advance of the final decree. It, there-

⁶⁹ Adee v. Campbell, 79 N. Y. 52. ⁷¹ McMahon v. Jones, 14 Abb. N. C. See Matter of Davenport, 67 App. Div. 406.

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⁷² See *ante*, § 714.

⁷⁰ Co. Civ. Proc., § 2743.

fore, provides that a person who is entitled to a distributive share may, at any time after one year from the grant of letters, institute a proceeding to compel the payment of his share, or of its just proportional part.⁷³ As in the case of legacies, so a distributive share, or some part of it, may be ordered paid, although a year has not expired, where it is necessary for the support or education of the distributee, upon the filing of a bond,⁷⁴ etc. The statutory remedies, by action⁷⁵ and by special proceeding, for the recovery of distributive shares are so nearly identical with those for the recovery of legacies, which we have already fully detailed, that it will be unnecessary to say more here than to refer to a previous page. The subject will also be necessarily adverted to when we come to consider the proceedings on accounting.

It should be observed, however, that in proceedings by persons claiming to be entitled as widow, or as next of kin, for the payment of their shares, the scope for controversy, as to the rights of the petitioner, is much larger than in cases of application for the payment of legacies. Questions as to the validity of the intestate's marriage with the person claiming to be his widow, and as to the legitimacy and identity of persons claiming to be children of, or next of kin to, the intestate, frequently arise, involving the rights of all the persons interested in the estate. As notice of the application for the advance payment of a share is not required to be given to the other next of kin, the statute wisely provides that where the administrator, by his answer, denies the validity or legality of the claim, even upon information or belief, the peti-

⁷³ Co. Civ. Proc., § 2722, as amended 1893. See § 781, *ante*. Pending proceedings for an accounting and distribution, no other independent proceeding should be allowed to compel even a partial distribution or settlement of the estate or the payment of a distributive share. (*Bruen's Estate*, 3 L. Bul. 88.)

⁷⁴ Co. Civ. Proc., § 2723, as amended 1893 (former § 2719). In *Clock v. Chadeagne* (10 Hun. 97), it was decided that the proceeding to compel the payment of a distributive share must be commenced within the time that an action may be brought. *Wood v. Rusco* (4 Redf. 550), so far as it holds that the time begins to run only from the time the claimant first learns of the appointment of the administrator, under the principle of Co. Civ. Proc., § 410, subd. 1, is over-

ruled. (*Matter of Dunham*, 1 Conolly. 323.) See *ante*, § 787.

⁷⁵ An action at law is not sustainable for a distributive share of an intestate's property, to which plaintiff is entitled as one of the next of kin, unless there be evidence that he holds the money, not as executor, but in his individual character. (*Fischer v. Fischer*, 50 N. Y. Super. [J. & S.] 74.) A foreign administrator, to be liable here for a distributive share, must be shown to be in possession of assets within this State. (*Vermilya v. Beatty*, 6 Barb. 429.) An action cannot be maintained by one of the next of kin of an intestate against the others to recover his distributive share of the personal estate in their hands, but an administrator should be appointed to make distribution. (*Palmer v. Green*, 63 Hun. 6; 17 N. Y. Supp. 441.)

tion must be dismissed without further hearing.⁷⁶ It is a general principle that there can be no legal distribution without administration. The share of a deceased distributee cannot be paid to his next of kin, but only to his personal representative.⁷⁷ Without the direction of the surrogate, the share of a minor cannot be paid, even to his general guardian.⁷⁸

⁷⁶ Co. Civ. Proc., § 2722, as amended 1893. See *ante*, § 784. Proc., § 2743.) See *Clock v. Chadeagne*, 10 Hun, 97.

⁷⁷ *Matter of Black*, 1 Tuck. 145. It may be paid to an assignee. (Co. Civ. Proc., § 2746; *ante*, § 792.

⁷⁸ *Willeox v. Smith*, 26 Barb. 316; *Rose v. Clark*, 8 Paige, 574. See Co. Civ. Proc., § 2746; *ante*, § 792.

CHAPTER XVIII.

DISPOSITION OF REAL ESTATE TO PAY DECEDENT'S DEBTS.

TITLE FIRST.

NATURE AND JURISDICTION OF THE PROCEEDING.

§ 834. **Liability of real estate for debts.**—The primary fund for the payment of debts and legacies is the personal estate, and the land cannot be resorted to for that purpose, until the personalty is exhausted in the ordinary course of administration, and under authority of the statute.¹ Besides the remedy given to creditors of a decedent against his heirs and devisees for the recovery of the debts, to the extent of the lands descended or devised, provided the personal estate is insufficient or has been exhausted,²

¹ Kingsland v. Murray, 133 N. Y. 170; 44 St. Rep. 515. In Hogan v. Kavanaugh (138 N. Y. 417), it was held, that an action to have a legacy declared to be a charge upon the testator's real estate was not a suitable and appropriate proceeding for ascertaining who were creditors, and the amounts of their claims, or to close up the estate, without administration or a resort to the procedure prescribed by statute for the proof of debts and payment thereof from the personalty, or, if insufficient, the sale of the realty for that purpose. It appearing in such an action that no executors were appointed, and no administration, with the will annexed or otherwise, had been applied for, and that the judgment therein, after adjudging the legacies to be a charge, provided for the sale of the land for the payment out of the proceeds, first, of the debts of the testator, and then of the legacies if the surplus was sufficient; if not, to apply it *pro rata*.—Held, that so much of the judgment as provided for a sale for the payment of the debts was error; also, that the legacies

could not be enforced by sale without the presence of the administrator of the deceased.

² See Co. Civ. Proc., § 1843; Parsons v. Bowne, 7 Paige, 354; Wambaugh v. Gates, 1 How. App. Cas. 247; 11 Paige, 505; Schermerhorn v. Barhydt, 9 id. 28; Whitaker v. Young, 2 Cow. 569; Jewett v. Keenholts, 16 Barb. 193; Ferguson v. Broome, 1 Bradf. 11; Herkimer v. Rice, 27 N. Y. 163; Lockwood v. Fawcett, 17 Hun, 146; Rogers v. Patterson, 79 id. 483; Adams v. Fassett, 149 N. Y. 61; Brater v. Hopper, 77 id. 244; De Crano v. Moore, 50 App. Div. 361; Cunningham v. Parker, 146 N. Y. 29; Matteson v. Palser, 56 App. Div. 91; Deyo v. Morss, 30 id. 56. Prior to the Code the heirs took, subject to the payment of the debt of their ancestor, to the extent of any deficiency of his personalty applicable thereto. The right of creditors to assert and establish their claims against the heirs was not created by the Revised Statutes: their provisions relating thereto (2 R. S. 452, §§ 32, 33) simply changed somewhat the manner of enforcing

the statute furnishes a remedy by a special proceeding, in a Surrogate's Court, for the sale of the real estate and the application of the proceeds to pay the decedent's debts and funeral expenses, if the personalty is not sufficient for that purpose,³ at the instance either of a creditor or of the executor or administrator.

§ 835. **Object and construction of the statute.**—As the title to real property vests instantly in the heir or devisee upon the death of the owner, the proceedings by creditors, or by the executor or administrator, to reach it are, in their nature, an attack upon a vested title, for the purpose of diverting the property from its apparent owner, to satisfy demands which, perhaps, were previously unliquidated or undisclosed. The statute which authorizes these proceedings and regulates the method of procedure is, therefore, framed with many safeguards, which are intended chiefly to secure the following objects: 1. A convenient remedy for the satisfaction of creditors *pro rata*.⁴ 2. A just protection to the title of the heir or devisee, or those claiming under them, and a reasonable limit to the period during which that title may be thus attacked. The complexity of the statutory provisions, which were framed with a view to these purposes, made it difficult to conduct such proceedings without leaving ground afterward to question their precise conformity to those provisions. In consequence of the doubt cast upon many titles thereby, an act was passed in 1850,⁵ which was subsequently amended and extended, declaring that all sales made by virtue of these proceedings should be deemed as valid as if made by a court of original general jurisdiction, thus authoritatively recognizing a third element to be considered in the construction of the statute, namely, the certainty of titles and the protection of purchasers at such sales.⁶

As the statutory authority given by this statute is in derogation of the common law,⁷ it must be strictly pursued; every requisite of the statute having the semblance of benefit to the owner must be strictly complied with.⁸

that right. (Read v. Patterson, 134 N. Y. 128.) See Allen v. Sandford, 28 St. Rep. 510; 8 N. Y. Supp. 182.

³ See Kingsland v. Murray, *supra*; Hogan v. Kavanaugh, *supra*. An action should not be brought in the Supreme Court for the purpose of selling a decedent's real estate to pay debts. (Letson v. Evans, 33 Misc. 437; 68 N. Y. Supp. 421.)

⁴ See Matter of Fox, 92 N. Y. 96;

Bennett v. Crain, 4 St. Rep. 158; Kowing v. Moran, 5 Dem. 56.

⁵ L. 1850, c. 82; L. 1857, c. 82, § 3; L. 1869, c. 260.

⁶ For a history of this remedy, see Ferguson v. Broome, 1 Bradf. 10; Moore v. Moore, 14 Barb. 28.

⁷ See Matter of Bellesheim, 17 St. Rep. 10; 1 N. Y. Supp. 276.

⁸ Corwin v. Merritt, 3 Barb. 341; Ackley v. Dygert, 33 id. 176; Bloom

§ 836. **History of the statute.**—In the original statute,⁹ the executor or administrator was authorized, on discovering or suspecting that the personal assets would be insufficient to pay the debts, to present, as soon as conveniently might be, a just and true account to the judge of probate, and to request his aid in the premises.¹⁰ The statute, prior to the revision of 1830, contained no express limit of the time within which such application should be made; but it was held that the application must be made with due diligence and in a reasonable time (one year being considered as a proper limit in ordinary cases); and that, if the application was not so made, the judge or surrogate had, from the nature of his judicial trust, a discretion to reject the application, for such a secret and hidden lien ought not to be encouraged.¹¹ In the revision of 1830, the right to apply was limited to three years after the granting of letters. In harmony with this limitation, creditors were restrained during the same period from bringing suits against the heirs or devisees to recover, from them, debts of the decedent, by reason of their having shared in his property. By the original statute, also, creditors were not allowed to proceed in this way, but the statute simply gave authority to the executor or administrator to do so. The Revised Statutes authorized the creditors to initiate the proceedings, if, after the executor or administrator had rendered an account, it appeared that there were not sufficient assets.¹² With this general view of the principal changes that have been made, we pass to the consideration of the matters upon which the jurisdiction of the court depends, and the method of procedure.

§ 837. **Nature of proceedings.**—This remedy, under the present Code, is clearly a special proceeding as distinguished from an action;¹³ but it is not a proceeding *in rem*, within the rule which would make the adjudication therein conclusive upon all the world.¹⁴ Neither is it a suit against the heirs or devisees, within the meaning of the statute,¹⁵ which requires that such a suit, to

v. Burdick, 1 Hill, 131, and cases *infra*.

⁹ 1 Greenl. Laws, 237; Act of April 4, 1786.

¹⁰ See the substance of the statute stated in *Mooers v. White*, 6 Johns. Ch. 376.

¹¹ See *Mooers v. White*, *supra*.

¹² 2 R. S. 108, § 48; superseded afterward by L. 1837, c. 460, § 72, as

amended by L. 1843, c. 172; L. 1847, c. 298; L. 1869, c. 845; L. 1873, c. 211.

¹³ And the same rule formerly obtained. See *Skidmore v. Romaine*, 2 Bradf. 122.

¹⁴ *Schneider v. McFarland*, 2 N. Y. 459.

¹⁵ 2 R. S. 109, § 53; Co. Civ. Proc., § 1844.

charge the defendants with the debts of the decedent, must be brought within three years from the time of granting letters.¹⁶

§ 838. **Jurisdictional facts.**— The existence of the jurisdictional facts specified by the statute have always been treated by the courts as essential to the validity of the sale.¹⁷ If, however, the surrogate once acquires jurisdiction, irregularity or error in the subsequent proceedings does not, in general, render his decree void, nor afford ground for impeaching it collaterally; the remedy is an appeal.¹⁸ In the application of these principles under the existing statute, some conflict has arisen in determining what matters are jurisdictional, and what are not; and, on the whole, the courts have, with great strictness, applied, to titles derived under these sales, the familiar rule, that to divest a person of his property by a special statutory proceeding, every direction of the statute must be strictly complied with. Numerous cases in the books indicate the inconvenience and hardship, and the uncertainty of titles, which have necessarily resulted, to an extent far beyond the substantial protection of the interests of heirs and devisees, which it is the only object of that rule to maintain.¹⁹

§ 839. **What surrogate has jurisdiction.**— The application for a sale, etc., of the property must be made to the Surrogate's Court from which letters were issued;²⁰ and, as has already appeared, the mere existence of property of a nonresident decedent, liable to be so disposed of, situated in the surrogate's county, confers jurisdiction to grant letters.²¹ Such Surrogate's Court has jurisdiction to decree the disposition of the property wherever the same may be situated, within the limits of the State, and is not confined to that found within its own county.²²

¹⁶ Mead v. Jenkins, 4 Redf. 369.

¹⁷ Ackley v. Dygert, 33 Barb. 177; Rigney v. Coles, 6 Bosw. 479; Van Deusen v. Sweet, 51 N. Y. 378.

¹⁸ Atkins v. Kinnaird, 20 Wend. 241; Farrington v. King, 1 Bradf. 182, and cases cited *infra*.

¹⁹ The Act of 1850 (c. 82), and its amendments (L. 1869, c. 260; L. 1872, c. 92; L. 1878, c. 129), now replaced by Co. Civ. Proc., §§ 2784, 2785, were intended to obviate these inconveniences, by declaring that sales made under the statute should be as effectual as if made by order of a court having original general jurisdiction. But none of these statutes cure *jurisdictional defects*. (Stilwell v. Swarthout, 81 N. Y. 109.) As to the effect of changes in the statutes on pending

proceedings, and the retrospective effect of the acts confirming titles, see Fox v. Lipe, 24 Wend. 164; Jackson v. Irwin, 10 Wend. 441; Chandler v. Northrop, 24 Barb. 129; Forbes v. Halsey, 26 N. Y. 53.

²⁰ Co. Civ. Proc., § 2750. The Supreme Court has no jurisdiction to entertain this proceeding. (Hoey v. Kinney, 10 Abb. Pr. 400; Letson v. Evans, 33 Misc. 437; 68 N. Y. Supp. 421.) See Little Falls Nat. Bank v. King, 53 App. Div. 541; 65 N. Y. Supp. 1010.

²¹ See Co. Civ. Proc., § 2476; *ante*, § 144. The rule was otherwise under the Revised Statutes. See Hollister v. Hollister, 10 How. Pr. 532; Hart v. Coltraine, 19 Wend. 378.

²² Long v. Olmsted, 3 Dem. 581.

§ 840. **What property liable to be applied.**—The property which is subject to such a disposition is either (1) real property, of which a decedent died seized,²³ or (2) the interest of a decedent in real property, held by him under a contract for the purchase thereof, made either with him, or with a person from whom he derived his interest; but this does not include either (a) property which is devised, expressly charged with the payment of debts or funeral expenses,²⁴ or (b) which is exempted from levy and sale by virtue of an execution,²⁵ or (c) which is, by the terms of decedent's will, "subject to a valid power of sale" for the payment of debts or funeral expenses.²⁶ Real property *not* so expressly charged, or which is *not* made subject to a valid power of sale for that purpose, or is *not* exempt as aforesaid, is subject to the operation of the statute.

§ 841. **Decedent's interest.**—Under the Statute of 1786, only legal estates could be sold;²⁷ an equitable interest not being within that, as it is within the present, statute. A vendee's interest in a contract for purchase, even in a parol contract, if taken out of the operation of the Statute of Frauds by part performance, is, therefore, subject to sale under the statute.²⁸ Where, however, the contract was rescinded after the purchaser's death, for failure to pay the purchase money, and the purchaser's heir, who was

²³ If the decedent was seized at the time of his death, it is immaterial that a contest was pending as to his title. (*Hewitt v. Hewitt*, 3 Bradf. 265.)

²⁴ While a specific creditor whose claim is, by the will, charged upon land, cannot maintain the proceeding, other unsecured creditors may do so. (*Little Falls Nat. Bank v. King*, 53 App. Div. 541; 65 N. Y. Supp. 1010; *Matter of Richmond*, 168 N. Y. 385.)

²⁵ Co. Civ. Proc., § 2749.

²⁶ Co. Civ. Proc., § 2759, subd. 4.

²⁷ *Livingston v. Livingston*, 3 Johns. Ch. 148.

²⁸ *Richmond v. Foote*, 3 Lans. 244. In *Matter of Chipman* (26 St. Rep. 797; 7 N. Y. Supp. 372; affg. s. c., *sub nom. Matter of Rider*, 6 Dem. 473), testator agreed that, if contestants would go on his farm and take care of him for life, they should have all his property. They performed the condition and he devised the property to them. In a proceeding to sell the farm to pay debts, Held, on appeal, that a finding of the jury that he died seized of the title

to his farm was not erroneous. But it seems that such fact is not material in determining the contestant's rights, as the agreement gave them equitable interests in the farm, which they were entitled to have protected. (Ib.) In *Matter of Williams* (1 Misc. 35; 22 N. Y. Supp. 906), a lessor agreed to pay his lessee for building a barn on the leased premises, and that if he died, during the term, the lessee "shall have a legal claim against my estate for the reasonable value of said barn." At the time of making the agreement the lessor had no personality, and he died during the term without paying for the barn. Held, that the contract was not an equitable mortgage on the land, but an admission of an indebtedness which the lessee could enforce by a proceeding to sell the deceased lessor's land for payment of debts. A husband's right of curtesy, which still exists (*Arrowsmith v. Arrowsmith*, 8 Hun. 606), does not prevent the sale, etc., of his intestate wife's lands; but he will acquire the same interest in the surplus as he had in the land itself. (Ib.)

in possession, was ousted under a judgment in ejectment, the land cannot be reached by these proceedings to pay the deceased purchaser's debts, although the heir had acquired complete title by a deed from the seller.²⁹

§ 842. **Where there is a power of sale.**— The question which most frequently arises, under the clause of the section referred to, is as to whether the will contains a valid power of sale of the decedent's real property for the payment of his debts, etc. The principle which governs this class of cases is this: That "whenever a power or authority to sell is given by will to the executor without limitation, and not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative, and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt, and his intention cannot otherwise be carried out."³⁰ In such a case, the remedy of this proceeding cannot be resorted to.³¹ But where the power of sale is

²⁹ *Goodwin v. Nelin*, 2 Abb. Ct. App. Dec. 258.

³⁰ *Matter of Gantert*, 136 N. Y. 106; 48 St. Rep. 889. In that case, testator gave all his property, real and personal, to executors and trustees, upon certain specified trusts with "full power and authority to sell and convey any and all" the real estate. Held, that the power to sell was imperative, and the exercise of it might be compelled by the creditor; and that, as the debtor had thus provided another remedy equally prompt and effective in its operation, the statutory remedy could not be resorted to. The court said: "We are referred to many other cases where it has been held that a power of sale is not available for the payment of debts, but they are all cases where the power was either discretionary, or limited to some other specific purpose, or where it could not be exercised without breaking up and destroying the scheme of the will and frustrating the intention of the testator;" citing *Kinnier v. Rogers*, 42 N. Y. 531; *Scholle v. Scholle*, 113 id. 261; *Matter of McComb*, 117 id. 378; *Matter of Bingham*, 127 id. 296. See also *Chamberlain v. Taylor*, 105 id. 194; *Hobson v. Hale*, 95 id. 598. In *O'Flynn v. Powers* (136 N. Y. 412), the will devised the residuary estate to the execu-

tor in trust and authorized him "at any time before the final division and settlement" of the estate, for any purpose "which, in his discretion, may render it advisable so to do," to sell any part or portion of the real estate. Held, that the power of sale given the executor could be lawfully exercised for the payment of an honest debt, in no way invalid or outlawed, owing to himself.

³¹ An implied power of sale, if actual and valid, is sufficient to prevent this proceeding. (*Coogan v. Ockershausen*, 55 N. Y. Super. [J. & S.] 286; s. c., 11 Civ. Proc. Rep. 315; aff'd., 18 St. Rep. 366.) To the same effect, *Matter of Hesdra* (2 Connoly, 514; 20 N. Y. Supp. 79), where the will, after directing that testator's lawful debts be paid, and giving certain legacies, provided that "the real and personal estate, wherever found, shall be disposed of as deemed best by my executor." Held, that this latter provision gave the executor a valid power of sale to pay debts, which defeated the proceeding. A will which, "after my lawful debts and those of my brother are paid," gave the estate to executors and directed them to convert it and distribute the proceeds in a manner prescribed.—Held, not to confer a power to sell real estate to pay debts, and that the proceeding was maintain-

not imperative, but rests in the discretion of the executor whether he will exercise it or not, a sale may be forced by creditors by this proceeding.³²

§ 843. Where lands are charged with payment of debts.—An intention to charge the payment of debts upon a devise of real estate will not be construed from the use by testator of formal words, or commonly employed phrases. Thus, the opening words of the will —“ after all my lawful and just debts are paid, I give,” etc.—do not amount to an expression or declaration of the mode in which the testator intended his debts to be paid; and they do not charge the real estate with their payment;³³ they merely provide for what the law required, if there had been no such clause, to wit, that the debts should be a charge on the property of the testator.³⁴ To justify a finding of an intent on the testator's part to make the debts a charge on his real estate, such intent

able. (Matter of Karge, 45 St. Rep. 916; 18 N. Y. Supp. 724.) So, too, where property was given to executors to “ dispose of the same as though I died intestate,” accompanied with a power of sale. (Parker v. Beer, 65 App. Div. 598; 72 N. Y. Supp. 955.) In Matter of Davids (5 Dem. 14), the estate consisted wholly of real property. The will, after certain bequests, directed the payment of testator's debts and funeral expenses, and provided that his entire estate should be sold and turned into cash as soon after his death as should be deemed advisable. Held, that the real property was “ subject to a valid power of sale for the payment of debts.” Russell v. Russell (36 N. Y. 581) was distinguished on the ground that in that case the power of sale was for the sole benefit of legatees, and not generally. See Dennis v. Jones, 1 Dem. 80; Matter of Rosenfield, 10 Civ. Proc. Rep. 201; 5 St. Rep. 339; 5 Dem. 251; Matter of Coutant, 24 Misc. 350; 53 N. Y. Supp. 713.

³² Matter of Johnson, 18 App. Div. 371; 46 N. Y. Supp. 53; Matter of Heroy, 67 Hun. 13; *sub nom.* Matter of Campbell, 21 N. Y. Supp. 685. In that case, testator, whose will contained no mention of his debts nor direction for their payment, after giving certain legacies, devised the residue of his estate to his executors, in trust, to receive the rents and profits during the lifetime of his wife, and apply them to the support of his fam-

ily, and after her death he devised the remainder to his children. By a subsequent clause he empowered his executors, if they should deem it to be for the best interests of his estate, to sell any of his real estate. Held, on appeal from an order of the surrogate denying the application of certain creditors for a sale of his real estate, that the application should not have been refused; that the real estate of the decedent was not *expressly* charged with the payment of his debts, and, therefore, the creditors were entitled to take proceedings for its sale, and that the power of sale given to the executors was discretionary and not imperative, and, unless imperative, the creditors could maintain the proceedings.

³³ Matter of City of Rochester, 110 N. Y. 159; s. e. as City of Rochester v. Smith, 17 St. Rep. 146; Cunningham v. Parker, 146 N. Y. 29; 65 St. Rep. 774; Matter of Van Vleck, 32 Misc. 419; Matter of O'Brien, 39 App. Div. 321; 56 N. Y. Supp. 925; Matter of McKay, 24 Misc. 255; 53 N. Y. Supp. 563; Matter of Grottrian, 30 Misc. 23; 63 N. Y. Supp. 996. The mere inadequacy of the personal property to pay the debts is not a circumstance from which an intention to charge the real property therewith can be inferred. (Ib.) To the same effect, see Cliff v. Moses, 116 N. Y. 144; Matter of Bingham, 127 id. 296.

³⁴ Smith v. Soper, 32 Hun. 46.

must appear from express direction or be clearly gathered from the provisions of the will.³⁵ "Debts and legacies stand upon a different basis, and, consequently, words that would indicate an intention to charge one on real estate might not convey any such intention as to the other."³⁶

§ 844. Lands exempt.— The statute exempts, from its operation, property which is exempted from levy and sale by virtue of an execution. Thus a seat or pew occupied in a place of public worship;³⁷ and land set apart as a family or private burying-ground, properly designated by recording, etc., and not exceeding in extent one-fourth of an acre, etc., are exempt;³⁸ and so are cemeteries.³⁹ A lot of land with one or more buildings, not exceeding \$1,000 in value, owned and occupied by a householder having a family, as a residence, properly designated, is exempt from execution, and consequently from disposition under this proceeding to pay debts.⁴⁰

§ 845. For what purpose a sale, etc., may be had.— The statute permits the proceeding to be taken only for the payment of the decedent's debts or funeral expenses.⁴¹ The latter are not strictly debts due from the decedent, though they are a charge against the estate; and they were not, until recently, within the statute. But the statute does not authorize the proceeding where there are no debts except those incurred in the administration of the estate,⁴² but the proceeding is authorized though there are no

³⁵ *Clift v. Moses*, 116 N. Y. 144. Compare *Matter of Fox*, 52 id. 530; *White v. Kane* (51 N. Y. Super. [J. & S.] 295; 7 Civ. Proc. Rep. 267), where it was held, that a devise to testator's wife, "after all my lawful debts are paid and discharged," charged the debts upon the devise. In *Smith v. Coup* (6 Dem. 45), the disposing clause of the will commenced with the words "after all my just debts are paid," and then gave specific devises. Held, that this brought the case within the exceptions, and the court had no jurisdiction to dispose of the property. Where there is a general direction to satisfy mortgages on real estate out of income, without specifying the method by which such purpose is to be effectuated, *query*, whether the court has power to carry out the same by a sale for a term of years? (*Matter of Fisher*, 4 Misc. 46.)

³⁶ *Per Haight, J.*, in *Clift v. Moses*, *supra*.

³⁷ Co. Civ. Proc., § 1390.

³⁸ Co. Civ. Proc., §§ 1395, 1396.

³⁹ L. 1877, c. 31.

⁴⁰ Co. Civ. Proc., §§ 1397, 1398. See also as to homesteads, §§ 1399, 1400–1404. Real estate bought with the pension money of the decedent may be sold in a proceeding for the purpose of the payment of his debts, the exemption from debts not extending beyond the decease of the pensioner. (*Matter of Liddle*, 35 Misc. 173; 71 N. Y. Supp. 474.)

⁴¹ Co. Civ. Proc., § 2750; not legacies. (*Matter of Connor*, 1 L. Bul. 8.) "Funeral expenses" will include a reasonable charge for a suitable headstone. But an expenditure of \$500 for a headstone will not be allowed when the estate does not exceed \$8,000. (*Owens v. Bloomer*, 14 Hun, 296.) See *ante*, § 549.

⁴² *Matter of Cornwall*, 1 Tuck, 250; *Smith v. Meakim*, 2 Dem. 129; s. c. as *Matter of Meakim*, 5 Civ. Proc.

claims against the estate except expenses of the decedent's funeral.⁴³ Claims against the estate which were not debts of the decedent cannot be made the basis of these proceedings, such as costs awarded against the estate since decedent's death;⁴⁴ nor costs in an action against the surviving partner of decedent upon a firm debt;⁴⁵ nor can the claim of the widow, and administratrix, against her husband's estate for maintaining their infant children;⁴⁶ nor the claim of the husband and executor for medical attendance paid for by him, since he is primarily liable therefor;⁴⁷ nor can the claim of the representative to be reimbursed for debts paid, and for his disbursements and commissions.⁴⁸ But claims incurred in legal proceedings instituted by the committee of a decedent who was a lunatic, and allowed by the Supreme Court and adjudged valid claims against the legal representatives in the same manner as if they had been debts contracted by the lunatic in his lifetime, are valid claims which may be allowed by the surrogate.⁴⁹ So taxes accruing subsequent to the date of decedent's death are chargeable upon the land, and an administrator who has redeemed the property sold for unpaid taxes, is subrogated to the right of the State against the property, and may institute this proceeding;⁵⁰ but where the executor is also the life tenant, he cannot be allowed for taxes, or for the principal and interest of mortgages paid by him.⁵¹

Rep. 421; Matter of Quatlander, 29 Misc. 566; 61 N. Y. Supp. 1064. But see Shute v. Shute, 5 Dem. 1. During pendency of an action against an executor for misappropriation, he died, and his executor was substituted; judgment was recovered with costs, both of which defendant was directed to pay out of the estate.—Held, that the judgment creditor was not entitled to a preference, but only to a *pro rata* share, and that the costs were properly disallowed as a claim payable out of the proceeds of a sale of the real estate. (Matter of Fox, 92 N. Y. 93.)

⁴³ Matter of King, 10 Civ. Proc. Rep. 175.

⁴⁴ Matter of Foley, 39 App. Div. 248; 57 N. Y. Supp. 131.

⁴⁵ Matter of Stowell, 15 Misc. 533; 37 N. Y. Supp. 1127.

⁴⁶ Woodruff v. Cook, 2 Edw. 259.

⁴⁷ Matter of Very, 24 Misc. 139; 53 N. Y. Supp. 389.

⁴⁸ Ball v. Miller, 17 How. Pr. 300; Gilchrist v. Rea, 9 Paige, 66. See

Fitch v. Witbeck, 2 Barb. Ch. 161. In Shute v. Shute (5 Dem. 1), a balance found due the administrator on his prior accounting was directed to be paid out of the proceeds of sale, although it represented sums paid by the administrator for expenses of administration, and not upon a debt of the intestate.

⁴⁹ Kowing v. Moran, 5 Dem. 56. But a claim of counsel for services rendered to such committee in excess of the amount allowed by the court is against the committee personally, and cannot be allowed as a debt of the decedent. (Ib.) In Skidmore v. Romaine (2 Bradf. 122), a debt incurred for necessities furnished to a person of weak and impaired mind was allowed as a debt against his estate.

⁵⁰ Jones v. LeBaron, 3 Dem. 37. Compare Ball v. Miller, 17 How. Pr. 300; Livingston v. Newkirk, 3 Johns. Ch. 312.

⁵¹ Matter of Very, 24 Misc. 139; 53 N. Y. Supp. 389.

Under the statute, debts of a testator, for which, after the lapse of three years, the sole devisee is liable, may be allowed, in proceedings to sell the latter's real property.⁵²

TITLE SECOND.

PROCUREMENT OF DECREE.

§ 846. **When application to be made.**—In order to fix a certain period after which *bona fide* purchasers⁵³ will be protected, and actions may be maintained against heirs and devisees personally,⁵⁴ the statute prescribes⁵⁵ that the application may be made to the proper surrogate at any time within three years after letters were first duly granted in this State; that is, three years from the date of the original grant of letters, and *not* (in case of a change of administration) from the time letters were granted to the administrator who made the sale.⁵⁶ As the law stood prior to the Repealing Act of 1880, a creditor could not commence the proceeding until after the representative had rendered his account, and, consequently, the proceeding was stayed by a "statutory prohibition" within the meaning of that term as used in section 406 of the Code, providing that the time of the continuance of such a stay is not to be taken as a part of the time limited for the commencement of an action.⁵⁷ But under the present

⁵² Matter of Fielding, 30 Misc. 700; 64 N. Y. Supp. 569.

⁵³ See Mead v. Jenkins, 95 N. Y. 31.

⁵⁴ Slocum v. English, 62 N. Y. 494; Parkinson v. Jacobson, 18 Hun. 353; Smith v. Soper, 32 id. 46; Jewett v. Keenholts, 16 Barb. 193.

⁵⁵ Co. Civ. Proc., § 2750.

⁵⁶ Slocum v. English, *supra*. See Fonda v. Chapman, 23 Hun. 119; U. S. L. Ins. Co. v. Jordan, 5 Redf. 207. If the petition is filed and the citations issued within three years after the granting of letters, the proceeding is timely, although the citation is returnable after the expiration of that period. (Matter of Topping, 18 Civ. Proc. Rep. 115; 29 St. Rep. 211; Olyphant v. Phyfe, 48 App. Div. 1; 62 N. Y. Supp. 688; *affd.*, 166 N. Y. 630. So, too, where the petition was filed within the three years, but the citation not issued for four years thereafter. (Matter of Van Vleck, 32 Misc. 419.)

⁵⁷ Mead v. Jenkins, 95 N. Y. 31. The rights of creditors of decedents who died, and upon whose estates letters had been granted more than three

years prior to September 1, 1880, when the eighteenth chapter of the Code went into effect, were not cut off by the three years' limitation of this section, but, as they existed at that time, were saved by the provision (§ 3352) which enacts that nothing contained in any provision of that portion of the Code (save as excepted) renders ineffectual or impairs any right accrued or established before the provision takes effect, and that, for the purpose of enforcing such a right, the statutes in force on the day before the provision takes effect, are deemed to remain in force. (O'Flynn v. Powers, 136 N. Y. 412.) This, in effect, overrules U. S. Trust Co. v. Jordan (5 Redf. 207), where it was held, that section 2750 applied to a case where letters were issued more than three years before September 1, 1880; and also Carman v. Brown (4 Dem. 96). In the last-named case, the decedent died October 1, 1868, indebted to C. on simple contract for a sum which had become due on April 1, 1868, leaving a will which was admitted to probate and letters issued

Code, a creditor may institute the proceeding at any time after letters granted, and no previous accounting is required. It is the intention of the present statute to restrict the right of the creditor or representative to the three years, and not to extend the period of limitation indefinitely, so as to give a creditor three years after the grant of letters, regardless of the term or period which may have elapsed before such letters were issued.⁵⁸

During this period of three years, the creditors have a kind of statutory lien upon the deceased debtor's real estate;⁵⁹ after the expiration of three years, the debts may be enforced against the heirs and devisees, and they then cease to be a lien or charge upon the real estate,⁶⁰ except as against the heirs or devisees.⁶¹ During this period of three years, the heirs and devisees may sell and convey, but purchasers take title at their peril, and the land in their hands is subject to the same liability to be thus reached, in case the assets prove deficient, as it would have been in the hands of the heir or devisee;⁶² and, on the same grounds, a sale in partition between the heirs will not preclude a subsequent sale for payment of debts.⁶³ Where more than three years have

on October 19, 1868. In June, 1871, a judgment for the amount of the claim was recovered against the executors, who, in July, 1880, voluntarily rendered their account, showing insufficient assets to pay debts. On May 17, 1886, C. instituted a special proceeding for the sale of the real property of decedent for the payment of his debts. Held, that as C.'s claim was barred by the Statute of Limitations, the application should be denied.

⁵⁸ Church v. Olendorf, 49 Hun, 439.

⁵⁹ Platt v. Platt, 105 N. Y. 488; Fonda v. Chapman, 23 Hun, 119; Hyde v. Tanner, 1 Barb. 75; Wilson v. Wilson, 13 id. 252; Waring v. Waring, 3 Abb. Pr. 246.

⁶⁰ Platt v. Platt, *supra*; White v. Kane, 51 N. Y. Super. (J. & S.) 295; 1 How. Pr. (N. S.) 382; 7 Civ. Proc. Rep. 267.

⁶¹ Hence, when there is a deficiency in the personal estate, decedent's debts and funeral expenses are entitled to be paid out of surplus moneys arising from foreclosure sales of his real estate, paid into the Surrogate's Court under section 2798 of the Code, although the three years from the date of issuance of the original letters upon the decedent's estate, within which, by force of section 2750, creditors can apply to the Surrogate's Court for the sale of the decedent's real es-

tate to pay debts, may have expired. Section 2750 does not discharge the land from liability for debts after the expiration of such time, so long as it remains in the legatees or heirs-at-law, since such limitation is intended only for the protection of *bona fide* purchasers after the lapse of such time. (Matter of Callaghan, 69 Hun, 161; 23 N. Y. Supp. 378.)

⁶² Where, after the proceeding has been dismissed, but before the time to appeal has expired, one takes a mortgage on the property, he does so at the risk of a reversal of the decree. (Olyphant v. Phyfe, 48 App. Div. 1; 62 N. Y. Supp. 688; *affd.*, 166 N. Y. 630. See Cunningham v. Whitford, 74 Hun, 273; 26 N. Y. Supp. 575. In Hyde v. Tanner, (1 Barb. 75), where the mortgagee of the decedent relinquished his mortgage, without payment, and took a new one from the heir, it was held, that it should be deemed to have been done under mistake of fact as to the existence or amount of debts, and as to insufficiency of personal assets, and that the mortgagee must be protected.

⁶³ Hall v. Partridge, 10 How. Pr. 188; Mead v. Jenkins, 29 Hun, 253; 95 N. Y. 31. See Matter of Dusenbury, 34 Misc. 666; 70 N. Y. Supp. 725.

elapsed after the granting of letters, the premises are not liable to a sale in such proceedings, where they have once vested in a purchaser for value and in good faith, although subsequently, and at the time of the commencement of the proceedings, they have re-vested in the devisee under the decedent's will.⁶⁴

§ 848. **Creditor's time extended, if claim in litigation.**— The time during which an action is pending in a court of record, between a creditor and an executor or administrator of the estate, is not a part of the time limited "for presenting a petition, founded upon a debt, which was in controversy in the action; if the creditor has, before the expiration of the time so limited, filed, in the clerk's office of the county where the real property is situated, a notice of the pendency of the action; specifying the names of the parties, the object of the action, and, if the creditor's debt is made the foundation of a counterclaim, the nature of the counterclaim; containing a description of the property in that county to be affected thereby; and stating that it will be held as security for any judgment obtained in the action."⁶⁵ Where no evidence is given that the cause of action alleged was contested, except proof of the bringing of the action, and that it had been pending six months at the time of filing the petition, it will be presumed that the claim was disputed and that the alleged debt was in controversy in the action.⁶⁶

The statute also provides that "whenever an executor, administrator, or creditor of a deceased person shall have commenced, or shall hereafter commence, an action in any court of competent jurisdiction of this State, for the purpose of setting aside any fraudulent conveyance of, or incumbrance upon, any real estate of such deceased person, and such action shall have been decided in favor of such executor, administrator, or creditor, such executor, administrator, or creditor, may, at any time within three years after the final determination of such action, have and maintain an action or proceeding against the proper parties, in any court of competent jurisdiction of this State, for a sale of such

⁶⁴ Matter of Dodge, 105 N. Y. 585.

⁶⁵ Co. Civ. Proc., § 2751. The original statute did not extend to a case where the creditor had interposed a counterclaim. (L. 1873, c. 211.) A notice so filed must be recorded and indexed, and may be canceled, as prescribed in the Code (§§ 1670-1674), with respect to the notice of pendency of an action affecting the title to real property; and "it may also be can-

canceled in like manner, or a specified portion of the property affected thereby may be discharged from the lien thereof, by the order of the court in which the action is pending, made upon the application of a person having an interest in the real property, upon notice to the creditor, and upon such terms as justice requires." (Ib.)

⁶⁶ Matter of Bingham, 127 N. Y. 296; 38 St. Rep. 765.

real estate, and for a distribution of the proceeds of such real estate among the creditors of such deceased person, and other persons entitled to the same, as may be directed by the judgment in such action."⁶⁷

§ 849. **Who may make the application.**—The application⁶⁸ may be made by "an executor or administrator, whether sole or joined in the letters with another,"⁶⁹ other than a temporary administrator;"⁷⁰ or it may be made by any person "holding a judgment lien upon decedent's real property at the time of his death, or any other creditor of the decedent, other than a creditor by a mortgage, which is a lien upon the decedent's real property." Doubtless it can be made by one having a claim for funeral expenses, as he is now deemed a creditor of the decedent.⁷¹ The words "executor or administrator" do not include an ancillary executor or administrator.⁷² A creditor whose original claim is barred, cannot maintain this proceeding. It does not alter the case that he obtained a judgment on the claim, against the executor, before it was barred, as the judgment is not conclusive evidence of the indebtedness, which must be established in this proceeding.⁷³ A creditor who has assigned his debt to another cannot present the petition, but the assignee, as the real creditor, may do so.⁷⁴ It is sufficient if the creditor states in the petition any one item of indebtedness, the amount, and to whom it is owing,⁷⁵ even though

⁶⁷ Co. Civ. Proc., § 2751, as amended 1887. *It seems* that, for the purpose of preserving a claim from the three years' limitation, a *lis pendens* may be filed in proceedings upon a reference of the claim against the executors under the statute. (Matter of Bingham, 127 N. Y. 296; 38 St. Rep. 765.)

⁶⁸ Co. Civ. Proc., § 2750, as amended 1894 (L. 1894, c. 735).

⁶⁹ Where the widow and executrix paid out of her individual estate the debts and funeral expenses, which the personal property was insufficient to meet.—Held, that she was entitled to be subrogated to the rights of such creditors and to institute proceedings for the sale of real estate. (Matter of O'Brien, 39 App. Div. 321; 56 N. Y. Supp. 925.) The provision, as to the joinder of representatives, settles a question left in doubt by Fitch v. Witbeck, 2 Barb. Ch. 161; Jackson v. Robinson, 4 Wend. 436; Sanford v.

Granger, 12 Barb. 392; Wood v. McChesney, 40 id. 417.

⁷⁰ As to a temporary administrator's power, see Co. Civ. Proc., § 2675; § 412, *ante*. As to an ancillary executor or administrator, see Co. Civ. Proc., § 2702; § 318, *ante*.

⁷¹ See Co. Civ. Proc., § 2514, subd. 3, as amended 1900. Previous to that amendment it was held otherwise. (Matter of Corwin, 10 Misc. 196; 31 N. Y. Supp. 426.)

⁷² Matter of Ladd, 5 Civ. Proc. Rep. 50. See Co. Civ. Proc., § 2702. As to a proceeding by an administrator *de bonis non*, where it appears that the personal property in the hands of a former administrator was sufficient to pay debts, see Matter of Kingsland, 60 Hun. 116; 38 St. Rep. 590; *affd.*, 133 N. Y. 170; 44 St. Rep. 515.

⁷³ Raynor v. Gordon, 23 Hun. 264. See *post*, §§ 856, 861.

⁷⁴ Butler v. Emmett, 8 Paige, 12.

⁷⁵ Matter of German Bank, 39 Hun. 181.

it appears that the devisees have released their interests to the petitioner.⁷⁶

§ 850. **Requisites of the petition.**—The petition, which must be verified,⁷⁷ must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:⁷⁸

1. The unpaid debts of the decedent, and the name of each creditor, or person claiming to be a creditor;⁷⁹ and the name of each person holding, or claiming to hold, a lien by judgment docketed against decedent before his decease, and also the several dates of docket of all or any of such judgment liens, and whether such judgment lien or liens affect the whole or part of the decedent's real property; and the amount of the unpaid funeral expenses of the decedent, if any, and the name of each person to whom any sum is due by reason thereof.

2. A general description of all the decedent's real property, and interest in real property, within the State, which may be disposed of by the proceeding;⁸⁰ a statement of the value of each distinct parcel;⁸¹ whether it is improved or not; whether it is occupied or not; and, if occupied, the name of each occupant; whether it is incumbered by a mortgage lien or liens, together with a statement of the amount due or claimed to be due thereon. Where the petition describes an interest in a contract for the purchase of real property, the value of the interest must be stated, and also the value of, and the other particulars, specified in this subdivision, relating to, the real property to which the interest attaches.

⁷⁶ Matter of Howard, 11 Misc. 224.

⁷⁷ Co. Civ. Proc., § 842. See *Richmond v. Foot*, 3 Lans. 244; *Matter of Hotchkiss*, 17 Misc. 670.

⁷⁸ Co. Civ. Proc., § 2752, as amended 1894.

⁷⁹ *Dennis v. Jones*, 1 Dem. 81.

⁸⁰ As to the necessity of such a description, see *Mead v. Sherwood*, 4 Redf. 352. In *Matter of Igglesden* (3 Redf. 375), it was held, that the petition should give *all* the land of which the decedent died seized.

⁸¹ "A distinct parcel of real property is a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein." (Co. Civ. Proc., § 3343, subd. 16.) In *Matter of German Bank* (39 Hun, 181), the petition described fully several parcels of real estate, and alleged, upon information and belief, that they were all the real estate within this State of

which the decedent died seized. Held, that the allegation was sufficient; that it was not necessary that it should be made positively and in unqualified terms. The omission from the petition of a parcel of real estate owned by the decedent, and which might have been ascertained by diligent inquiry, will not invalidate the proceeding, but will entitle a party interested in another parcel which is included, to an abatement of the proportionate amount which would have been chargeable against the omitted parcel. (*Matter of Bingham*, 127 N. Y. 296; 38 St. Rep. 765.) It is not a violation of the section that one valuation is given of several lots, which lie together and form but a single parcel. (*Matter of McGee*, 5 App. Div. 527; 38 N. Y. Supp. 1062; *Matter of Georgi*, 35 Misc. 685; 72 N. Y. Supp. 431.)

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also of every other person claiming under them, or either of them, stating who, if any, are infants; the age of each infant, and the name of his general guardian, if any; and also, if the petition is presented by a creditor, or a judgment lienor, the name of each executor or administrator.

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his co-executors or co-administrators, if any; the application thereof, and the amount which may yet be realized therefrom.⁸²

These allegations are of jurisdictional facts; if the petition omits to set forth any one of such facts, the court does not acquire jurisdiction, and no valid decree for a sale can be entered. A petition which fails to state a material jurisdictional fact cannot afterward, in the course of the proceedings, be amended so as to supply the omission.⁸³ But the petition need not contain negative averments, such as, that there are no unpaid funeral expenses,⁸⁴ or that the property is "not subject to a valid power of sale for the payment of debts," etc.⁸⁵ But a petition which

⁸² Under the original statutes the presentation of an account, or information substantially equivalent to an account of the personal estate and debts, was held essential to the surrogate's jurisdiction, where the application was made by the personal representatives. (*Corwin v. Merritt*, 3 Barb. 341; *Jackson v. Robinson*, 4 Wend. 436; *Jackson v. Crawfords*, 12 id. 533.) But if the application was made at about the time of filing the inventory, the latter, if it gave all the information required, was a sufficient account for the purpose of the statute. (*Bloom v. Burdick*, 1 Hill, 130.) In other words, the statement of the assets and debts which was required by the statute was not an account in the technical sense. A specification of the names of creditors and the consideration of the debts was not requisite. (*Forbes v. Halsey*, 26 N. Y. 53.) But a statement of the total of the inventory and the total of the debts was held insufficient. (*Van Nostrand v. Wright*, Hill & D. Supp. 260. And see *Atkins v. Kinnan*, 20 Wend. 241.) The fact that the account presented to the surrogate was false did not affect his jurisdiction. (*Woodruff v. Cook*,

2 Edw. 259.) See *Richmond v. Foote* (3 Lans. 244); *Matter of Williams* (1 Misc. 35), for what is a sufficient statement of "the amount of personal property" which has come to the representative's hands, and of "the application thereof."

⁸³ *Dennis v. Jones*, 1 Dem. 80; *Mead v. Jenkins*, 4 Redf. 369; *Ackley v. Dygert*, 33 Barb. 176. The jurisdiction of the court depends upon the petition and not upon extrinsic facts. (*Wood v. McChesney*, 40 Barb. 417.) Compare *Matter of Laird*, 42 Hun, 136; *Forbes v. Halsey*, 26 N. Y. 53. In other respects, an amendment will be allowed, *c. g.*, so as to add the name of an omitted mortgagee (*Matter of Ibert*, 48 App. Div. 510; 62 N. Y. Supp. 1051), or to correct errors in names of parties cited and insert the value of different parcels. (*Matter of Georgi*, 35 Misc. 685.) See *Matter of Miller*, 2 App. Div. 615; 37 N. Y. Supp. 447.

⁸⁴ *Matter of German Bank*, 39 Hun, 181. If no reference is made to funeral expenses, it will be presumed that none existed. (*Ib.*)

⁸⁵ *Matter of Haig*, 6 Dem. 454; 17 St. Rep. 827; 13 N. Y. Supp. 285.

fails to mention the name of the heir,⁸⁶ or to state the nature of the land and the names of the occupants, or of "a person claiming an interest,"⁸⁷ or the ages of the heirs,⁸⁸ is fatally defective. A creditor's petition need not give the date of the grant of letters, if it avers such grant generally and states facts showing that the proceeding was commenced within three years thereafter;⁸⁹ and in a proceeding not commenced within three years after the issue of letters, though maintainable by reason of the debt having been in controversy, and a *lis pendens* duly filed, it is not necessary for the petition to state that the debt was "founded upon a debt which was in controversy in the action," as that requirement may be effectually supplied by proof.⁹⁰ The petition may refer to a former petition filed in the same matter for a statement of the necessary facts, and two or more petitions may be taken together as part of the same proceeding;⁹¹ and under the Revised Statutes, it was held that papers on file in the surrogate's office taken in conjunction with the petition, although not referred to therein, might be sufficient to confer jurisdiction.⁹² If upon the "diligent inquiry" mentioned in the section, any of the material facts required to be set forth cannot be ascertained, such inability must be shown to the court's satisfaction; and the surrogate must thereupon inquire into the matter, as prescribed in a case where a petitioner cannot ascertain the name of a person to be cited.⁹³

§ 851. **The prayer of the petition.**—The petition must pray for a decree directing the disposition of the decedent's real property, or interest in a contract for the purchase of real property, or so much thereof as is necessary, for the payment of his debts or funeral expenses; and that the necessary parties may be cited to

⁸⁶ Jenkins v. Young, 35 Hun, 569, and cases cited; Matter of Slater, 17 Misc. 474; 41 N. Y. Supp. 534. A statement in the petition that certain persons named are the heirs, is equivalent to a statement that such persons are all the heirs. (Greenblatt v. Hermann, 144 N. Y. 13; 62 St. Rep. 859.)

⁸⁷ Kammerrer v. Ziegler, 1 Dem. 177. See Matter of Bingham, *infra*.

⁸⁸ Mead v. Sherwood, 4 Redf. 352.

⁸⁹ Matter of Haig, *supra*.

⁹⁰ Matter of Bingham, 127 N. Y. 296; 38 St. Rep. 765. It was also held, in that case, that the omission to name a mortgagee in the original petition or citation did not invalidate the proceeding where afterward an

affidavit that certain persons, not including such mortgagee, had or claimed an interest, was filed, and citations were issued to them and to such mortgagee, whereupon the latter appeared, filed an answer and entered upon a trial of the merits, thus subjecting himself to the jurisdiction of the court in the proceedings.

⁹¹ Richmond v. Foote, 3 Lans. 244.

⁹² Forbes v. Halsey, 26 N. Y. 53. It is extremely doubtful whether this would suffice under the present statute.

⁹³ Co. Civ. Proc., § 2753. For the proceedings upon the inquiry referred to, see Co. Civ. Proc., § 2518; *ante*, § 75.

show cause why such a decree should not be made.⁹⁴ Where the petition states facts showing that an attempt to mortgage or lease would be idle because of heavy incumbrances on the property, and the inadequate income derived therefrom, it is proper to pray simply for a sale.⁹⁵

§ 852. **Accounting by representative may be required.**—Under the Revised Statutes, on the representative's petition, it was essential to jurisdiction that an account of the personal estate should accompany the petition;⁹⁶ and the proceeding could not be instituted by a creditor until after the representative had accounted, which could not be compelled until after eighteen months from the grant of letters.⁹⁷ But under the present Code, a settlement of the representative's accounts is not a prerequisite to granting a citation on the petition.⁹⁸ If the condition of the personal estate is unknown to the petitioning creditor, that is one of the matters for inquiry, above referred to. For the purpose of such inquiry, "if the petition is presented by a creditor, or judgment lienor, the surrogate may, by order, require the executor or administrator to render such an account or other statement as he deems necessary."⁹⁹

§ 853. **Jurisdiction of the person of parties.**—As this proceeding is hostile to the heirs, devisees, and others interested in the real property, the surrogate must acquire jurisdiction of their persons, or the sale will be void.¹ Although the statute does not expressly require the representative to be cited, it is the obvious

⁹⁴ Co. Civ. Proc., § 2750. The Code says, "and that the necessary parties, as prescribed in the subsequent sections of this title, may be cited," etc. It is not very clear who must be named; but it seems that the necessary parties are (1) those named in the petition, and (2) those whom the surrogate may add, under Co. Civ. Proc., § 2754. See *Kammerer v. Ziegler*, 1 Dem. 177.

⁹⁵ *Matter of Dolan*, 88 N. Y. 309; revg. 26 Hun. 46, and affg. 2 Dem. 611. In *Sibley v. Waffle* (16 N. Y. 180), it was held competent for the applicant to petition for the sale of real property, without asking for authority to mortgage or lease, and for the surrogate to act on such petition, and order a sale, if it appeared by the order that he inquired whether a sale would be more beneficial than a mortgage or lease, and determined that it would.

⁹⁶ *Bloom v. Burdick*, 1 Hill, 131; *Van Nostrand v. Wright*, Hill & D. Supp. 260. See *ante*, § 850, n. 82. By L. 1896, c. 993, it was provided that no sale made under any of the provisions of 2 R. S., tit. 4, c. 6, should be invalidated for the failure of the representative to file an inventory before presenting the petition for the sale, if such petition substantially showed that he had not been able to obtain possession of any personal estate of the decedent.

⁹⁷ *Skidmore v. Romaine*, 2 Bradf. 122; *Sanford v. Granger*, 12 Barb. 392.

⁹⁸ *Shute v. Shute*, 5 Dem. 1; *Matter of Plopper*, 15 Misc. 202; 37 N. Y. Supp. 33.

⁹⁹ Co. Civ. Proc., § 2753, as amended 1894.

¹ *Schneider v. McFarland*, 2 N. Y. 459; *Matter of John*, 21 Civ. Proc. Rep. 326; 18 N. Y. Supp. 172.

intention that he should be made a party to a creditor's proceeding.² A remainderman, whether his interest in the decedent's property is vested or contingent, is a necessary party.³ Holders of mortgage are not necessary parties, since any disposition made of the property under the decree will be subject to such liens;⁴ nor were judgment lienors required to be served, prior to the amendment of 1894.

§ 854. **Infant parties.**—If any of the parties are infants, they should be represented by a duly appointed guardian *ad litem*; otherwise the whole proceeding will be void, the court being without jurisdiction.⁵ If the infant is regularly served with the citation, an appointment of a guardian at a later stage of the proceeding may, it seems, cure the omission to appoint one at the outset.⁶

² Kammerrer v. Ziegler, 1 Dem. 177; Turner v. Amsdell, 3 id. 19.

³ Wilson v. White, 109 N. Y. 59. In that case, testator devised the land to his son for life, remainder to the son's children "should he leave any, but should there be no issue or descendants, him surviving, then to be equally divided among my brothers' and sisters' children, or issue." Held, that although the son had living children, the children of testator's brothers and sisters had a contingent remainder in the property and were necessary parties to the proceeding.

⁴ Matter of Haig, 6 Dem. 454. As to necessity of serving legatees and devisees, see Matter of Dolan, 88 N. Y. 309.

⁵ Bloom v. Burdick, 1 Hill, 131; Schneider v. McFarland, 2 N. Y. 459; Corwin v. Merritt, 3 Barb. 341.

⁶ Dennis v. Jones, 1 Dem. 81. See Ackley v. Dygert, 33 Barb. 176; Pinckney v. Smith, 26 Hun. 524. In Price v. Fenn (3 Dem. 341; s. c. as Estate of Fenn, 8 Civ. Proc. Rep. 206), the citation having been duly served upon certain infants, interested in the estate, and a special guardian having been, before the hearing, appointed for each, upon his parent's application, without the notice to the infant required by section 2531, the purchasers at the sale under the surrogate's decree objected to the title upon the ground of the omission of such notice. Held, under section 2784, subdivision 1, that the omission in question was not of such a character as that it "would affect the title of a purchaser at a

sale made pursuant to the directions contained in a judgment rendered by the Supreme Court in an action," and the objection taken was overruled. In Matter of Mahoney (34 Hun. 501), on appeal from an order directing a purchaser to complete, it was objected that the guardian of certain infant heirs had not been appointed in accordance with the provisions of the Code and that there was no publication of the citation. The surrogate, after the sale, issued a supplemental citation, and made a supplemental decree amending the defects *nunc pro tunc*, and thereupon made an order requiring the appellant to complete his purchase. Held, that the defects were substantial, and, therefore, not amendable, the steps in question being absolute prerequisites to the sale. The purchaser had a right to a title beyond reasonable doubt, and free from dangerous uncertainties. In Jenkins v. Young (43 Hun. 194), the citation was personally served upon an infant over fourteen, as required by the act. Held, that the failure of the surrogate to appoint a special guardian to care for such infant's interests upon the return of the order, did not deprive the Surrogate's Court of jurisdiction of the proceedings or render the sale made thereunder liable to be attacked, in a subsequent action of ejectment brought by such infant's heir. In Stilwell v. Swarthout (81 N. Y. 109), a guardian *ad litem* was appointed, but it did not appear that he had consented to become such, or that he acted as such, or was notified of his

§ 855. **Citation, when to issue; its contents.**—When the surrogate is satisfied that all the facts required to be set forth in the petition “have been ascertained, as far as they can be, upon diligent inquiry, and it appears to him that the debts, judgment liens, and funeral expenses, or either, cannot be paid, without resorting to the real property, or interest in real property, he must issue a citation according to the prayer of the petition. If, upon the inquiry, it appears to the surrogate that any heir or devisee, or person claiming an interest in the property under an heir or devisee, is not named in the petition, the citation must also be directed to him.⁷ Unless the executor or administrator has caused to be published, as prescribed by law, a notice requiring creditors to present their claims,⁸ and the time for the presentation thereof, pursuant to the notice, has elapsed, the citation must be directed, generally, to all other creditors of the decedent, as well as to the creditors named.”⁹ Like every other citation it must be made returnable on a day certain, designated therein, not more than four months from the date thereof.¹⁰ Under the former statute, the citation (order to show cause) was required to be returnable *not less* than six weeks from the time of making it: hence, when made returnable in less than that time, the surrogate acquired no jurisdiction, and all proceedings founded thereon were void.¹¹

§ 856. **Hearing upon return of citation.**—“Upon the return of the citation, the surrogate must proceed to hear the allegations and proofs of the parties. A creditor of the decedent, or a judgment lienor, or a person having a claim for unpaid funeral expenses, although not named in the citation, may present and

appointment, but it appeared affirmatively that he acted as counsel for the claimant. Held, that even if his appearance for the infant was a waiver of a jurisdictional defect in the citation, his consent at least was essential. As to irregularities in appointing a special guardian which are not fatal to proceedings, see *Matter of Luce*, 17 Week. Dig. 35.

⁷ In a creditor's proceeding, one who has purchased the property at a referee's sale in partition among the heirs, is a “person claiming an interest” in the property under an heir, and a necessary party, and so is the executor or administrator (*Kammerer v. Ziegler*, 1 Dem. 177), and also legatees where the legacies are charged upon real estate. (*Matter of Dolan*, 26 Hun, 46.) As to bringing in the

heirs, on appeal, see *Patterson v. Hamilton*, id. 665.

⁸ § 636, *ante*.

⁹ Co. Civ. Proc., § 2754. The manner and proof of service of the citation are governed by the general regulations detailed in c. III, *ante*. Where no advertisement for creditors has been published, a citation directed to the creditors therein named and to all other creditors, must be published in accordance with Code Civ. Proc., § 2523. (*Matter of Georgi*, 44 App. Div. 180; 60 N. Y. Supp. 772; *affd.*, without opinion, in 162 N. Y. 660; *Matter of Slater*, 17 Misc. 474; 41 N. Y. Supp. 534.)

¹⁰ Co. Civ. Proc., § 2519; *ante*, § 74.

¹¹ *Stilwell v. Swarthout*, 81 N. Y. 109; *Havens v. Sherman*, 42 Barb. 636.

prove his debt or lien and thus make himself a party to the special proceeding. A creditor of the decedent, whose claim is not yet due, may present and prove his debt and have the same established, upon a rebate of legal interest, and thus make himself a party to the special proceeding. An heir or devisee, or a person claiming under an heir or devisee, of the property in question, although not named in the citation, may contest the necessity of applying the property to the payment of debts, judgment liens, or funeral expenses, or the validity of a debt due or unpaid, or of any judgment lien, represented as existing against the decedent, or the reasonableness of the funeral expenses;¹² may interpose any defense to the whole or any part thereof; and for that purpose may make himself a party to the special proceeding."¹³

§ 557. **Who may oppose application.**—It has always been held, under each successive change in the statute, that the heirs and devisees might oppose claims of creditors, and make the same defense thereto before the surrogate as there could be made by them in any other tribunal;¹⁴ and so may a purchaser,¹⁵ or another creditor,¹⁶ or a judgment creditor of a devisee.¹⁷ But an administrator will not be allowed to set up, in objection to a creditor's petition, that the property in question has been sold in partition proceedings, as he does not represent either the heirs

¹² The subject of the reasonableness of funeral expenses, including the outlay for burial plot and monument, has been considered, and the cases bearing on it given, *ante*, § 546 *et seq.*

¹³ Co. Civ. Proc., § 2755, as amended 1894. Reopening proceedings for the admission of new evidence before the surrogate, without notice to the devisees.—Held, error, as impairing their rights under this section. (Matter of Hearman, 34 St. Rep. 231; 20 Civ. Proc. Rep. 8.) A sale cannot be decreed without proof of the statutory facts, although the application is not opposed. (Matter of Lichtenstein, 16 Misc. 667; 39 N. Y. Supp. 174.) But the mere fact that improper evidence has been admitted is not fatal to the proceeding where other competent evidence is given which sustains the decree. (Matter of McGee, 5 App. Div. 527; 38 N. Y. Supp. 1062.)

¹⁴ O'Flynn v. Powers, 136 N. Y. 412; Ferguson v. Broome, 1 Bradf. 11; Bennett v. Crain, 4 St. Rep. 158; Butler v. Johnson, 4 id. 151. But where

the widow is entitled to the entire income of the estate during her life, the rights of legatees cannot be determined, they not becoming due until her death. (Matter of Grotrian, 35 Misc. 257; 71 N. Y. Supp. 842.)

¹⁵ Mooers v. White, 6 Johns. Ch. 360.

¹⁶ They are not permitted to interpose an answer for the purpose of contesting the necessity of the proceeding or making a defense to them. (Matter of Campbell, 66 App. Div. 478; 73 N. Y. Supp. 290.) And a creditor whose claim is, by stipulation, to be paid in full, cannot even contest the claims of other creditors. (Matter of Logan, 19 Week. Dig. 148.) Where the claim of a creditor against the estate is submitted to arbitration with the consent of the administrator and heirs-at-law, the award is final and precludes them from further litigating the claim. (Ib.)

¹⁷ Raynor v. Gordon, 23 Hun. 264. See Adams v. Westbrook, 61 How. Pr. 138.

or the purchaser of the property.¹⁸ The heirs are not restricted to legal defenses.¹⁹ If only one of the heirs objects to the allowance of a claim, and his objection is sustained, the claim is rejected as to all the heirs.²⁰ Where decedent's discharge in bankruptcy is set up in opposition to a proceeding instituted by a creditor, it may be attacked and declared void as against the creditor as to whom it was fraudulently procured.²¹

§ 858. **Determining disputed claims.**—With the exception of certain cases upon an accounting, this is the only proceeding in which Surrogates' Courts have jurisdiction to pass upon a disputed claim of a creditor against an estate.²² It is here made the duty of the surrogate, upon the return of the citation, to take proof of the claims of all who appear as creditors of the decedent, including those which have been presented to the executor or administrator, and rejected, or not allowed, by him. Actual creditors and those claiming to be such, have the same right to appear and establish their demands.²³ Before the amendment of section 1822,²⁴ the surrogate had jurisdiction to determine the validity of the petitioner's claim, although it had been presented to and rejected by the executor or administrator, and although no action upon it had been commenced within six months after such rejection, where no notice to creditors had been published.²⁵ But since that amendment, the Short Statute of Limitations applies to claims presented either before or after publication of the notice to creditors, unless the parties consent that the surrogate may determine the same upon the accounting.²⁶

§ 859. **Determining insufficiency of assets.**—The insufficiency of the personal property to pay the debts is a jurisdictional fact of the first importance. In determining that question, only the personal property which has actually come into the hands of the representative is to be considered. Uncollected and litigated demands in favor of the estate, which may or may not be realized on, are not to be regarded.²⁷ Before the surrogate can make

¹⁸ Richardson v. Judah, 2 Bradf. 157. See Olmsted v. Long, 4 Dem. 44.

¹⁹ Campbell v. Renwick, 2 Bradf. 80. See Jennings v. Jones, 2 Redf. 95.

²⁰ Renwick v. Renwick, 1 Bradf. 234.

²¹ Jones v. Le Baron, 3 Dem. 37.

²² See Matter of Leslie, 3 Redf. 280; Garvey v. McCue, id. 313; Leviness v. Cassebeer, id. 491; Cooper v. Felter, 6 Lans. 485; Tucker v. Tucker, 4 Keyes, 136; Bevan v. Cooper, 72 N. Y. 317; Shakespeare v. Markham, id. 400; Hopkins v. Van Valkenburgh, 16

Hun. 3. All these cases were decided previous to the amendment of section 2743 of the Code, permitting the surrogate, with the consent of the parties, to determine the claim upon the representative's accounting. See *ante*, § 49.

²³ Turner v. Amsdell, 3 Dem. 19.

²⁴ See *ante*, § 646.

²⁵ Matter of Haxtun, 102 N. Y. 157.

²⁶ Co. Civ. Proc., § 1822, as amended 1895 (L. 1895, c. 595).

²⁷ Bridge v. Swain, 3 Redf. 487. Compare Moore v. Moore, 14 Barb. 27.

a decree in this proceeding, the petitioner must establish that all the personal property which could have been applied to the payment of debts and funeral expenses has been so applied, or that the personal representatives have proceeded with reasonable diligence in converting the personal property into money and so applying it, and that it is insufficient, though it has not all yet been so applied.²⁸ Having taken evidence on the question of the sufficiency of assets, the surrogate's decision thereon, and his order giving leave to sell, are conclusive upon the parties on that question; and where the representative, by virtue of such order, mortgaged the estate, and subsequently became purchaser of the mortgage, the heir cannot resist foreclosure by proving that the representative concealed assets and purchased the mortgage with them.²⁹

§ 860. Admissions of representative as against heirs, etc.—The rule formerly was that the admissions of the representative would in no way bind the heir or devisee nor benefit the creditor. The heir might contest the validity of the admitted claim,³⁰—the only effect of the admission being, it would seem, that the burden of disproving the claim is put on the party making objection thereto.³¹ It is now provided, however, that “the admission or allowance by the executor or administrator of a claim or debt of any creditor, against the decedent, shall, for the purpose of such proceeding, be deemed an establishment thereof, unless objection be made thereto by a party to the special proceeding.”³² But

²⁸ Kingsland v. Murray, 133 N. Y. 170; 44 St. Rep. 515; affg. Matter of Kingsland, 60 Hun. 116; 38 St. Rep. 590; s. c. as Matter of Topping, 20 Civ. Proc. Rep. 357; 14 N. Y. Supp. 495. If the decedent left sufficient personal property which could have been applied to the payment of his debts and funeral expenses, in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statute for the sale of his real estate for the payment of his debts. If the personal representative had wasted or squandered the personal property so that it becomes insufficient for the payment of the debts, the only resort of the creditors is to sue such representatives to enforce their personal responsibility. (Ib.; Matter of Meaglev, 39 App. Div. 83; 56 N. Y. Supp. 503; Matter of Georgi, 21 Misc. 419; Matter of Very, 24 id. 139; 53 N. Y.

Supp. 389.) See Moyer v. Moyer, 17 Misc. 648; 40 N. Y. Supp. 772. Compare Matter of Bingham (127 N. Y. 296), where it was held that the fact that a large amount of personal estate which could have been applied to the payment of the debts had been squandered and misappropriated by the executor would not defeat the proceeding, by a creditor who had not been guilty of laches. *It seems* that it is no answer to the application that some of the personal assets have been misappropriated, if, independently of this, a deficiency of assets exists. (Corwin v. Merriitt, 3 Barb. 341.)

²⁹ Graham v. Linden, 50 N. Y. 547.

³⁰ Matter of Haxtun, 102 N. Y. 157.

³¹ Jones v. LeBaron, 3 Dem. 37.

³² Co. Civ. Proc., § 2755, as amended 1893. Compare Matter of Pfohl, 20 Misc. 627; 46 N. Y. Supp. 1086. The validity and existence of the debts are open to contest in the proceeding, by

though the claim is admitted by the representative, and is not objected to by the heir, devisee, or other creditor, the vouchers presented in support of each debt must be "filed and remain in the surrogate's office."³³ Express provision is also made that "where a defense arises under the Statute of Limitations, an act or admission by an executor or administrator does not prevent the running of the statute, or revive the debt so as to affect in any manner the real property, or interest in real property, in question."³⁴

§ 861. Effect of a judgment as evidence of debt.—The validity of a judgment obtained against the representative for a debt of the decedent may be contested like any other claim.³⁵ Such a judgment is "deemed a debt of the decedent to the same extent, and to be established in the same manner, and subject to the same defenses, as if an action had been brought thereon;"³⁶ provided, however, that (1) "the debt, for which the judgment was rendered, cannot be allowed, as against the property in question, at any greater sum than the amount recovered, exclusive of costs;"³⁷ and provided that (2) "an heir or devisee of any of the property in question, or a party claiming under an heir or devisee, may interpose in reduction of the amount claimed to be due upon a judgment or decree against the decedent, or against the executor or administrator, any payment or counterclaim which might be allowed to him, or to the person under whom he claims, in an action founded upon the debt."³⁸ A judgment must be proved by the record,³⁹ and must have been a lien on the land at the time the proceeding was taken;⁴⁰ it must have been rendered upon "a trial upon the merits." A judgment entered upon an offer is not such a judgment;⁴¹ but an inquest is a trial upon the merits.⁴²

the heirs or devisees, and the decree of the surrogate on the accounting of the executor or administrator does not conclude them. (*O'Flynn v. Powers*, 136 N. Y. 412.) The declarations of one who afterward became executor are not admissible as admissions in support of a claim against the estate. (*Niskern v. Haydock*, 23 App. Div. 175; 48 N. Y. Supp. 895.)

³³ Co. Civ. Proc., § 2758.

³⁴ Co. Civ. Proc., § 2755, last clause.

³⁵ *Colson v. Brainard*, 1 Redf. 324; *Raynor v. Gordon*, 23 Hun. 264; *Matter of Rosenfield*, 10 Civ. Proc. Rep. 201; 5 Dem. 251; *Mayer v. Gilligan*, 2 St. Rep. 702.

³⁶ Co. Civ. Proc., § 2756. "But a

judgment or decree rendered upon the trial upon the merits is presumptive evidence of the debt upon the hearing before the surrogate." (*Ib.*)

³⁷ Referee's fees and disbursements cannot be included. (*Matter of Summers*, 37 Misc. 575; 75 N. Y. Supp. 1050.)

³⁸ Co. Civ. Proc., § 2757. It was otherwise before the Code. See *Cleveland v. Whiton*, 31 Barb. 544.

³⁹ *Sanford v. Granger*, 12 Barb. 392; *Turner v. Amsdell*, 3 Dem. 19; *Matter of Gardner*, 5 Redf. 14.

⁴⁰ *Matter of McGee*, 65 App. Div. 460.

⁴¹ *Kavanagh v. Wilson*, 5 Redf. 43.

⁴² *Matter of Rosenfield*, *supra*.

§ 862. **Costs excluded.**—It will sometimes be difficult, as in the case of a judgment for a deficiency on a foreclosure and sale, to determine how much of the amount of the judgment consists of costs, which are not allowed to be proved in this proceeding.⁴³ The presumption is that, if the proceeds of sale were sufficient to pay the costs and expenses of the foreclosure proceedings, they were applied to that purpose, and that the judgment for deficiency does not include any costs, but only the amount remaining due on the bond and mortgage; such a claim, therefore, is a debt due from the deceased in his lifetime.⁴⁴

§ 863. **Trial of controverted question of fact.**—In this, as in other special proceedings, except probate proceedings, the court may refer it to a referee to take and report the testimony, the report being subject to the surrogate's confirmation or modification;⁴⁵ or the surrogate may, in his discretion, make an order, directing the trial by a jury, at a Trial Term of the Supreme Court, to be held within the county, or in the County Court of the county, of any controverted question of fact, arising in such a special proceeding.⁴⁶ The order must state, distinctly and plainly, each question of fact to be tried; and it is the only authority necessary for the trial.⁴⁷

§ 864. **Motion for new jury trial.**—A trial by a jury, pursuant to such an order, can be reviewed, in the first instance, only upon a motion for a new trial. "A new trial may be granted by the surrogate, or the court in which the trial took place, or, if it took place at a Trial Term of the Supreme Court, by the Supreme Court, in a case where a new trial of specific questions of fact, tried by a jury, pursuant to an order for such trial, made in an action, would be granted. The verdict of the jury must be certified to the Surrogate's Court by the clerk of the court in which the trial took place."⁴⁸

§ 865. **Appeal from order for new jury trial.**—An appeal may be taken from an order, made upon a motion for a new trial, by a

⁴³ See *Wood v. Byington*, 2 Barb. Ch. 387; *Sanford v. Granger*, 12 Barb. 392; *Smith v. Meakim*, 2 Dem. 129; *Burnham v. Harrison*, 3 Redf. 345; *Matter of Wilcox*, 11 Civ. Proc. Rep. 115.

⁴⁴ *East River Bank v. McCaffrey*, 3 Redf. 97. See *Hurd v. Callahan*, 5 id. 393; *Kavanagh v. Wilson*, id. 43.

⁴⁵ *Co. Civ. Proc.*, § 2546; *ante*, § 117.

⁴⁶ *Co. Civ. Proc.*, § 2547, as amended 1895; see *ante*, § 121. The power to direct a jury trial being discretionary, the order will be denied where it would entail needless delay and expense. (*Mead v. Jenkins*, 4 Redf. 369.)

⁴⁷ *Co. Civ. Proc.*, § 2547.

⁴⁸ *Co. Civ. Proc.*, § 2548, as amended 1895. For the regulations as to a motion for a new trial of specific ques-

jury, as if the order had been made in an action, and with like effect. Costs of such an appeal may be awarded by the appellate court, as if the appeal was from an order or decree of the Surrogate's Court.⁴⁹

§ 866. Suspending proceeding and staying sale.—If, in answer to a creditor's petition, an insufficiency of assets is denied, the proceeding should be delayed until the termination of a pending accounting in which that fact may be ascertained.⁵⁰ So, where it appears that the property has already been sold on a judgment in foreclosure of an alleged invalid mortgage, the creditor's petition need not be dismissed, but the proceeding may be suspended until the petitioner has had a reasonable opportunity to attack the foreclosure and sale in another court.⁵¹ Express provision is made that "where it appears that any of the real property, of which the decedent died seized, cannot be sold, without manifest prejudice to the persons interested therein, by reason of a controversy respecting the decedent's title thereto, or interest therein, the decree may direct that the execution thereof, with respect to that property, be postponed, until the special direction of the surrogate. In that case, a party may apply at any time afterward, upon notice to the others who appeared, for an order directing the execution of the decree, with respect to the property so reserved."⁵²

§ 867. Discontinuing proceeding.—The proceeding having been instituted, and jurisdiction of the parties obtained, it is to be treated as an action in which the parties have been served with process: it cannot be abandoned or dismissed without an order on notice.⁵³ The creditors have the right to insist that a proceeding instituted by the representative shall be prosecuted, and may move for reviving or expediting it.⁵⁴ Where the claims of creditors established in the proceeding are paid, together with the costs of the proceeding, the heir or owner of the land is entitled to an order of discontinuance or dismissal.⁵⁵

tions of fact in an action, see Co. Civ. Proc., § 1003. As to costs, see § 2558.

⁴⁹ Co. Civ. Proc., § 2549.

⁵⁰ Matter of Rosenfield, 10 Civ. Proc. Rep. 201; 5 St. Rep. 339; 5 Dem. 251.

⁵¹ Knickerbocker v. Decker, 4 Dem. 128.

⁵² Co. Civ. Proc., § 2762. See Hewitt v. Hewitt, 3 Bradf. 265. In Breevort v. M'Jimsey (1 Edw. 551), an administrator applying for leave to sell real property, where a decree of foreclosure and sale of the same

premises had been had, and existed in force, was perpetually enjoined from continuing the proceeding. In Matter of Braker (48 App. Div. 443; 62 N. Y. Supp. 859), where the prosecution was delayed for ten years, the premises having, in the meantime, been sold in partition, and the purchaser refused to take title, the proceeding was dismissed.

⁵³ Farrington v. King, 1 Bradf. 182.

⁵⁴ Raven v. Norton, 2 Dem. 110.

⁵⁵ Kowing v. Moran, 5 Dem. 56.

§ 868. **Proof necessary for decree.**—"A decree, directing the disposition of real property, or of an interest in real property, can be made only where, after due examination, the following facts have been established to the satisfaction of the surrogate:

" 1. That the proceedings have been in conformity to [title five of chapter eighteen of the Code].

" 2. That the debts, or liens, or both, for the payment of which the decree is made, are the debts of the decedent, or are just and reasonable charges for his funeral expenses, or are liens by judgment existing at his death upon his real property, or upon some portion thereof; and are justly due.

" 3. That they are not secured by a mortgage, or expressly charged by the will upon the decedent's real property, or interest in real property; or, if a debt is so secured or charged upon a portion of the real property, or interest in real property, that the remedies of the creditor, by virtue of that charge or security, have been exhausted.

" 4. That the property directed to be disposed of, was not effectually devised, expressly charged with the payment of debts or funeral expenses, and is not subject to a valid power of sale for the payment thereof; or, if so devised or subject, that it is not practicable to enforce the charge, or to execute the power, and that the creditor has effectually relinquished the same.

" 5. That all the personal property of the decedent, which could have been applied to payment of the decedent's debts and funeral expenses, has been so applied; or that the executors or administrators have proceeded with reasonable diligence, in converting the personal property into money, and applying it to the payment of those debts and funeral expenses; and that it is insufficient for the payment of the same, as established by the decree."⁵⁶

§ 869. **General requisites of decree; filing vouchers.**—"The decree must determine and specify the amount of each debt established before the surrogate as a valid and subsisting debt against the decedent's estate, and must determine and specify the amount of each judgment lien established before the surrogate as a valid and subsisting lien existing upon the decedent's land, or some part thereof, at the time of his death. And the decree may also determine the amount due or remaining unpaid upon any mortgage or mortgages, existing at decedent's death upon his real property, or any portion thereof, or as a just and reasonable charge for

⁵⁶ Co. Civ. Proc., § 2759, as amended 1894.

funeral expenses; and the decree must, in like manner, specify what demands presented have been rejected. The vouchers presented before the surrogate, in support of each debt or lien established, must be filed and remain in the surrogate's office."⁵⁷ Where the decree directs that real property be mortgaged, leased, or sold, or that an interest in real property be sold, it "must describe it with common certainty; and must direct that a mortgage, lease, or sale thereof, for the purpose of paying the debts, judgment liens ordered to be paid, or funeral expenses, established by the decree, be made by the executor or administrator, upon his giving the bond prescribed by law; or, in case of his failure so to do, by a freeholder, to be appointed by the surrogate, as prescribed by law."⁵⁸

§ 870. Disposition to be by mortgage or lease, if feasible.— If the facts necessary for a decree "are satisfactorily established, the surrogate must inquire whether sufficient money can be raised, advantageously to the persons interested in the real property, by a mortgage or lease of the real property of which the decedent died seized, or of a part thereof." To that end, he shall appoint three competent disinterested persons to examine and appraise each parcel of such real property, and its rental value at its just and fair market value; they shall forthwith appraise the same, make a report thereof, signed and verified by at least two of them, describing each parcel, and stating its value and rental value, and file the same in the surrogate's office. "If he ascertains that the money can be so raised, the decree must direct the execution of one or more mortgages or leases accordingly." "But a lease shall not be made for a longer time than until the youngest person interested in the property leased attains full age. A mortgage or

⁵⁷ Co. Civ. Proc., § 2758, as amended 1894.

⁵⁸ Co. Civ. Proc., § 2765, as amended 1894. Although the order must specify the land to be sold, it need not describe it by metes and bounds; and an order specifying the land as that of which the decedent was seized,—being ninety-one acres out of the southwest corner of lot No. 11, in the town of, etc.—has been held to sufficiently describe the premises. (Bloom v. Burdick, 1 Hill, 130.) And so a description of the property as "so much of the 100 acres on lot No. 4, as is known and distinguished by the town plot called the village of J.,"

is sufficient. (Jackson v. Irwin, 10 Wend. 441.) Lands omitted in a first order, by reason of a mistake in the boundaries, may be sold by virtue of a second order, made on the petition of the administrator showing the mistake, without any new order to show cause. (Sheldon v. Wright, 7 Barb. 39.) But where the proceedings in regard to the first order have been conducted without any irregularity, the surrogate should leave the administrator free to act according to it, and should not attempt to control his discretion by a second order. (Matter of Lawrence, 6 N. Y. Leg. Obs. 247.)

lease, executed pursuant to such decree, has the same effect as if it had been made by the decedent immediately before his death.”⁵⁹

§ 871. Decree for sale, where mortgage or lease is disadvantageous.

— Where it appears to the surrogate, upon such inquiry, that sufficient money cannot be raised, advantageously to the persons interested in the real property, by mortgage or lease, the decree must direct a sale of the real property, or interest in real property, or of so much thereof as is necessary, in order to pay the debts, judgment liens thereon, and funeral expenses of the decedent, as established in the decree, at public or private sale. Such decree, however, may provide, if it appear to be for the best interest of all persons interested, that the said sale be made subject to all or any specified liens by judgment existing at decedent's death on said real property or any portion thereof, which shall have been established, and the amount thereof determined by the said decree. Where a sale of all the real property, or interest in real property, is not necessary for that purpose, but enough of either cannot be sold without manifest prejudice to the persons interested, the decree may direct a sale of all the real property, or all the interest in real property, or both, or of such a part of either as the surrogate thinks proper, at public or private sale.⁶⁰

§ 872. Impeaching decree.— Only the heirs and devisees, and those claiming under them, can question the regularity of an order of sale, and this only by appeal.⁶¹ The recitals in the order are no more than a statement by the surrogate that he had acquired jurisdiction, and are of no effect if they do not show an adjudication that he found from evidence the facts upon which his jurisdiction depended.⁶² Ordinarily the decree cannot be impeached collaterally, even for fraud. The court's adjudication of insufficiency of personal assets is conclusive, and can be questioned

⁵⁹ Co. Civ. Proc., § 2760, as amended 1885. The jurisdiction of a surrogate to order a mortgage of the real estate of the decedent can only be exercised in the manner and by the procedure prescribed in the statute. An order, therefore, made in probate proceedings, on consent of the attorneys, authorizing the temporary administrator to mortgage the real property for the purpose of paying the costs allowed in the proceeding, is without jurisdiction, and such mortgage is not effectual as against parties who have not

estopped themselves from objecting by such consent. (*Duryea v. Mackey*, 151 N. Y. 204; 45 N. E. Rep. 458.)

⁶⁰ Co. Civ. Proc., § 2761, as amended 1894. As to power of the court to amend the decree which omitted mention of a portion of the land, see *Sheldon v. Wright*, 5 N. Y. 497. As to the effect of the decree as a lien, see *Matter of Wileox*, 11 Civ. Proc. Rep. 115.

⁶¹ *Matter of Dolan*, 88 N. Y. 309, 319.

⁶² *Sibley v. Waffle*, 16 N. Y. 180.

on appeal only.⁶³ An heir-at-law may appeal from the order allowing a disputed creditor's claim.⁶⁴

§ 873. Defects and irregularities not affecting title.—The title of a purchaser in good faith, at a sale pursuant to a decree made as heretofore described, is not, nor is the validity of a mortgage or lease made as so described, in any way affected by any of the following omissions, errors, defects, or irregularities, except so far as the same would affect the title of a purchaser at a sale, made pursuant to the directions contained in a judgment rendered by the Supreme Court in an action:

1. Where a petition was presented, and the proper persons were duly cited, and a decree directing a mortgage or lease, or a decree for sale, and an order directing the execution thereof, were made as heretofore described; and the decree, and the order, if any, were duly recorded, as prescribed in the eighteenth chapter of the Code;⁶⁵ “by any omission, error, defect, or irregularity, occurring between the return of the citation and the making of the decree, or the order directing the execution of the decree.”

“2. Where an order, confirming a sale and directing a conveyance, has been made, upon proof, satisfactory to the surrogate, that all the acts have been done, which are required by law to be done, after the order directing the execution of the decree, to authorize the surrogate to make such an order of confirmation by the actual omission to do such an act, or by any error, defect, or irregularity in the same, or by any omission in the recitals of the conveyance.”⁶⁶

TITLE THIRD.

EXECUTION OF DECREE FOR SALE.

§ 874. By whom decree to be executed.—“A decree directing that real property be mortgaged, leased, or sold, or that an interest in real property be sold, as prescribed in this title, must describe it with common certainty; and must direct that a mortgage, lease or sale thereof, for the purpose of paying the debts, judgment liens ordered to be paid, or funeral expenses, established by the

⁶³ *Graham v. Linden*, 50 N. Y. 547; *id.*, §§ 2473, 2474; *ante*, § 43. See *Atkins v. Kinnan*, 20 Wend. 241; *Wilson v. White*, 109 N. Y. 59. The surrogate may disregard errors or defects that go to the form and not to the substance, but he has no authority to dispense with any absolute prerequisite. (*Matter of Mahoney*, 34

⁶⁴ *Owens v. Bloomer*, 14 Hun. 296.

⁶⁵ Art. 1, tit. 1, thereof.

⁶⁶ Co. Civ. Proc., § 2784. And see *Hun*, 501.) See § 838. *ante*.

decree, be made by the executor or administrator, upon his giving the bond prescribed by law, or in case of his failure so to do, by a freeholder, to be appointed by the surrogate as prescribed by law; and in case a sale thereof be directed, may authorize the same to be made at private sale, at a price not less than the value thereof, as appraised pursuant to the provisions of section 2760.”⁶⁷

§ 875. **In case of death of representative or freeholder.**—“The death, removal, or disqualification, before the complete execution of a decree, of all the executors or administrators, who have been directed to execute it, or of a freeholder appointed for the purpose, does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessor might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.”⁶⁸

§ 876. **Bond of representative on selling.**—“Before an executor or administrator can execute a decree directing that property be mortgaged, leased, or sold, he must execute, and file with the surrogate, his bond, with two or more sureties, to the people of the State, in a penalty, fixed by the surrogate, not less than twice the sum to be raised, if the decree directs a mortgage; or, if it directs a lease, in such a penalty as the surrogate thinks proper; or, if it directs a sale, in a penalty not less than twice the value of the real property, or interest in real property, directed to be sold. The bond must be conditioned for the faithful performance of the duties imposed upon the principal by the decree; for the payment into the Surrogate’s Court, within twenty days after the receipt thereof, by the principal, of all money arising from the mortgage, lease, or sale; for the delivery to the surrogate, within the same time, of all the securities taken thereupon; and for the accounting by the principal, for all money received by him, whenever he is required so to do by a court of competent jurisdiction.”⁶⁹

⁶⁷ Co. Civ. Proc., § 2765. Having ordered the sale, the surrogate should leave the representative free to act under it, and not attempt to limit his discretion by a second order. (Matter of Lawrence, 6 N. Y. Leg. Obs. 274.) See Sheldon v. Wright, 5 N. Y. 497. An administrator, admittedly insolvent, may, nevertheless, make the sale,

provided he gives the necessary bond. (Matter of Georgi, 21 Misc. 419.)

⁶⁸ Co. Civ. Proc., § 2770. See *id.*, §§ 766, 1828.

⁶⁹ Co. Civ. Proc., § 2766: Jackson v. Holladay, 3 Redf. 37. Under the Act of 1813, filing the bond several days after the date of the mortgage was held sufficient. (Fox v. Lipe, 24 Wend. 164.)

§ 877. **Appointment of freeholder.**— But if a sole executor or administrator, or all the executors or administrators, so fail, the surrogate must make an order appointing a disinterested freeholder to execute the decree. He may vacate such an appointment, and make a new appointment, from time to time, as the case requires. A person so appointed must give a bond, in all respects like that required from an executor or administrator. “In making such an appointment, the surrogate must give a preference to a competent person nominated by the creditors, whose debts have been established, or a majority of them in number and amount.”⁷⁰

§ 878. **Order directing execution of decree.**— Where an executor or administrator, or a freeholder so appointed, has given the requisite bond, an order must be made, reciting the fact, and directing him to proceed to execute the decree. The order may direct the execution of the decree, with respect to all or any part of the real property, or any of the interests in real property, specified in the decree. Where it directs the execution of the decree with respect to part only, an order to execute it, with respect to any other part or parts, may be made from time to time, as the case requires.⁷¹

§ 879. **Order of sale of parcels, where heir, etc., has aliened.**— “Where the decree directs the sale of two or more distinct parcels of real property, of which the decedent died seized; or his interest under two or more contracts for the purchase of distinct parcels of real property; the decree may direct the sale to be made in the order which the surrogate deems just, unless it appears that one or more distinct parcels, of which the decedent died seized, have been devised by him, or sold by his heirs; in which case, the several distinct parcels must be sold in the following order:

“1. Property which descended to the decedent's heirs, and has not been sold by them.

“2. Property so descended, which has been sold by them.

“3. Property which has been devised, and has not been sold⁷² by the devisee.

⁷⁰ Co. Civ. Proc., § 2767.

⁷¹ Co. Civ. Proc., § 2768.

⁷² See *Eddy v. Traver*, 6 Paige, 521.

The property referred to, is that remaining unsold of the particular devisee, who may have conveyed only a portion of the estate devised to him, and not that of the other devisees who have not conveyed the property devised to them. (Matter of Law-

rence, 79 Hun. 176; 29 N. Y. Suppl. 726.) Where the debt arose from the relation of the testator as accommodation indorser for one of the devisees, the property devised to such devisee should be primarily charged with the debt, in a proceeding to sell real estate for the payment thereof. (Ib.)

"4. Property so devised, which has been sold by the devisee." ⁷³

Where one of several devisees of undivided interests in two pieces of property has mortgaged his interest in one, which interest was afterward sold under foreclosure, the property in which his interest remains should first be sold for the payment of the debts of the estate, and the interest of all the devisees therein should be sold in order (the property not being of sufficient value to pay the debts) to prevent a disproportionate part of the debts from falling upon the interest of the purchaser at the foreclosure sale.⁷⁴

§ 880. Sale where undivided share or precedent estate devised or aliened.—"Where the decedent's will devises an undivided interest in real property, but not the whole of his estate therein; or creates a precedent estate in real property; or where an heir of the decedent has sold an undivided interest, or created a precedent estate, in real property which descended to him, the entire property, to which the undivided interest or precedent estate attaches, must be sold. But, in applying the proceeds to the payment of debts and funeral expenses, the application of the proportion of the proceeds, belonging to the devisee or grantee of the undivided interest, or of the precedent estate, must be postponed to the application of the residue, in the order prescribed in the last section, in like manner as if that undivided interest or precedent estate was a distinct parcel of the property." ⁷⁵

§ 881. Sale of part of distinct parcels, pending appeal relating to debt.—"Where the only question, upon an appeal taken from a decree directing a sale of real property, or of an interest in real property, or both, relates to the validity or amount of a debt or judgment lien established by the decree; and the real property di-

⁷³ Co. Civ. Proc., § 2763. Under the corresponding provisions of the Revised Statutes—which required that if any lands devised or descended had been sold by the heirs or devisees, then the lands remaining in their hands unsold should be first sold to satisfy the debts of the decedent's estate—it was not a sufficient answer to a petition by a mortgagee of a devisee for the prior sale of lands of the estate in which the devisee had an interest, other than those mortgaged, and in which his interest remained unsold, that the lands so unsold would not *probably* bring enough to pay the debts, though the opinion that they would not was founded upon inquiry; but an actual sale must be made be-

fore resorting to those so mortgaged. (Matter of Clark, 3 Redf. 225.)

⁷⁴ Matter of Clark, *supra*.

⁷⁵ Co. Civ. Proc., § 2764. Before this section of the Code took effect, it was held that, in directing the sale, the surrogate was bound to decree the sale of the entire title to so much as was sold at all; and that he had no authority to protect a life estate created by the will of the decedent by selling the remainder first, however equitable such an arrangement might be; nor could he set apart from the proceeds of the sale the estimated value of such life estate, before applying them to the payment of debts. (Pelletreau v. Smith, 30 Barb. 494.)

rected to be sold, or to which the interest directed to be sold attaches, consists of two or more distinct parcels, the sale of, or with respect to, one or more of which will suffice to pay all the other debts and liens so established and directed to be paid, leaving enough real property, or interest in real property, unsold, to satisfy the claim drawn in question upon the appeal; the appellate court may, upon the motion of any party to the special proceeding in the Surrogate's Court, made upon notice to all parties to the appeal, direct the Surrogate's Court to cause the decree to be executed, with respect to the distinct parcels of real property, which will suffice to pay the debts and judgment liens ordered paid, not in controversy; and the proceeds of a sale, made pursuant thereto, to be distributed, in like manner, as if the decree related only to those parcels and those debts or liens; except that any surplus, which may remain for distribution after payment of those debts or liens, or so much thereof as will suffice to pay the demand in controversy, must be paid into the Surrogate's Court and retained by the county treasurer, subject to the order of the surrogate, to abide the event of the appeal."⁷⁶

§ 882. **Terms of credit allowed on sale.**—"The surrogate may, in the order directing the execution of the decree, or in a separate order made before the sale, allow a sale to be made upon a credit, not exceeding three years, for not more than three-fourths of the purchase money, to be secured by the purchaser's bond, and his mortgage on the property sold, except where the sale is that of an interest under a contract; in which case the order may prescribe the security to be given."⁷⁷ The representatives are not obliged to sell on credit, and in the absence of any direction by the surrogate, or any assent on the part of the creditors, may decline to do so.⁷⁸

§ 883. **Manner and notice of public sale.**—Where the property is to be sold *at public sale*, and it consists of one or more distinct parcels, each parcel must be separately exposed for sale, unless otherwise directed in the decree, or in the order to execute the same, or in an order subsequently made by the surrogate.⁷⁹ Each

⁷⁶ Co. Civ. Proc., § 2769, as amended 1894. This section also contains the following, as the concluding sentence: "But this section does not authorize a sale of any distinct parcel, otherwise than in the order prescribed for that purpose, in sections 2764 and 2765 of this act." The reference is not very clear, as the latter section con-

tains no provisions concerning the sale of distinct parcels. It may be conjectured that the intent was to refer to sections 2763, 2764.

⁷⁷ Co. Civ. Proc., § 2771.

⁷⁸ *Maples v. Howe*, 3 Barb. Ch. 611.

⁷⁹ Co. Civ. Proc., § 2773, which confirms *Delaplaine v. Lawrence*, 3 N. Y. 301, where it was held, that the exec-

distinct parcel must be sold in the county where it, or a part of it, is situated.⁸⁰ The Code further provides in effect, that the sale, if at public auction, must be between nine o'clock in the morning and sunset; that six weeks' notice must be given, by posting and publication; that the property must be described, in such notice, with common certainty; that disturbing a posted notice, or selling without notice, etc., subjects the offender to a forfeiture; and that the validity of a sale is not affected by an official omission, or by the fact that all the property advertised is not sold.⁸¹

§ 884. Private sale.—By an amendment made in 1885, the sale may be made at public or at private sale.⁸² "A private sale of real property, or of an interest in real property, must be made by contract in writing, subject to the approval of the surrogate." An administrator's agreement, previous to obtaining the order, and in anticipation of sale, to convey the property is void, because the administrator has no interest.⁸³

§ 885. Purchase by certain persons forbidden or restricted.—"An executor or administrator upon the estate, a freeholder appointed to execute a decree, or a general or special guardian of an infant, who has an interest in any of the real property to be sold, shall not, directly or indirectly, purchase, or be, or at any time before confirmation, become interested in a purchase at the sale, except that a guardian may, when authorized so to do by the order of the surrogate, purchase, in his name of office, for the benefit of his ward. A violation of this section renders the purchase void."⁸⁴ Where the statute is violated, or there has been fraud in the sale, the relief is not confined to an application to the sur-

utor or administrator, or other person making the sale, might, if he deemed it beneficial to the estate, sell in separate lots, although the order of sale described the property as a single parcel; that the statute contemplated proceedings similar to those which take place on other judicial sales, and in all such sales it was the duty of the officer conducting them to sell the property in such parcels as would be best calculated to secure the greatest aggregate amount.

⁸⁰ Co. Civ. Proc., § 2772.

⁸¹ *Ib.* The following are the words of the Code, to the above effect: "The provisions of sections 1384, 1385, 1386, 1434, 1435, and 1436, of this act, apply to a *public* sale of real property, or of an interest in real property, as

prescribed in this title. In making the application, each provision relating to the sheriff is deemed to apply to the person making the sale, pursuant to the decree, and the order directing the execution thereof." As to posting notice of sale, see *Jennings v. Jones*, 2 Redf. 95; *Matter of McFeeley*, *id.* 541.

⁸² Co. Civ. Proc., § 2772. This was the rule under the Act of 1801. (*Jackson v. Irwin*, 10 Wend. 441.)

⁸³ *Bolt v. Rogers*, 3 Paige, 154; *Bridgewater v. Brookfield*, 3 Cow. 299. As to penalty for making a fraudulent sale, see 2 R. S. 110, § 58.

⁸⁴ Co. Civ. Proc., § 2774. Under the corresponding provision of the Revised Statutes, a purchase by one acting as

rogate, to set the sale aside, but it may be attacked by a direct proceeding in the Supreme Court.⁸⁵

§ 886. **Order to vacate sale; resale.**—"The person making the sale must with all convenient speed file with the surrogate a report of the sale. The surrogate must upon notice, given in such manner and for such a length of time as he thinks proper, to each party who has appeared, inquire into the proceedings; and he may take oral testimony respecting the same. If he is of opinion that the proceedings were unfair; or that the sum bid for the whole, or for a distinct parcel of real property separately sold, or in case of a private sale of the same, that the sum at which it is agreed to be sold was less than the value thereof at the time of sale, and that a sum exceeding that bid, or in case of a private sale, exceeding that at which it is agreed to be sold at least ten per centum, exclusive of the expenses of a new sale, may be obtained upon a resale,—he must make an order vacating the sale, either wholly or with respect to the distinct parcel affected, and directing another sale, and whether it shall be at public or private sale, notice of which, in case of a public sale thereof, must be given, and the sale must be conducted as in this title prescribed for a public or private sale as may be applicable."⁸⁶ The fact that several lots were sold together, being

the agent, or for the benefit, of the administrator, etc., was void. (*Forbes v. Halsey*, 26 N. Y. 53.) And if the administrator, etc., after the property was struck off, but before confirmation of the sale, became himself interested in a purchase made by one employed by him to act as auctioneer, the sale was void (*Terwilliger v. Brown*, 59 Barb. 9; *affd.*, 44 N. Y. 237):—a principle now expressly embodied in the statute. The facts that the fair value of the premises was bidden, and the sale was afterward confirmed *ex parte*, would not give it validity; nor was it material that the agreement by which the executor became interested might be void under the Statute of Frauds. (*Ib.*) And a residuary devisee might come into a court of equity, and have the sale set aside, and the property resold. (*Ib.*) A purchase by the testamentary trustee of an infant devisee is not void, but is voidable at the election of the ward. (*Bostwick v. Atkins*, 3 N. Y. 53.)

⁸⁵ *Woodruff v. Cook*, 2 Edw. 259. And see *Terwilliger v. Brown*, *supra*.

⁸⁶ *Co. Civ. Proc.*, § 2775. If the sale was not illegally made or unfairly conducted, the surrogate is imperatively required to confirm it, unless a sum exceeding the bid by 10 per cent. exclusive of expenses, can be obtained. (*Horton v. Horton*, 2 Bradf. 200.) But it was formerly held, that he could not vacate it and order a resale merely because such new bid could be obtained. Even if a larger bid could be obtained, yet if the sum bid was, at the time, an adequate price, the sale should not be disturbed, unless the proceedings were unfair. (*Kain v. Masterton*, 16 N. Y. 174.) The provision, as to partial vacation, conforms to *Delaplaine v. Lawrence* (3 N. Y. 301), holding that where any parcel has been fairly sold, and for an adequate price, the sale should be confirmed, but that if another parcel has been sold for an inadequate price, and the surrogate is satisfied that, upon a resale, 10 per cent. more can be realized, it is his duty to vacate the sale of such parcel, whatever else may be done in respect to the other property sold.

described together in the petition and order of sale, is not ground for vacating the sale, unless it appears that they would have brought more if sold separately.⁸⁷ The surrogate has authority to entertain a proceeding for the repayment of moneys deposited by a purchaser at the sale, and, in a proper case, to grant the relief prayed for.⁸⁸

§ 887. **Confirming sale; executing conveyances.**—"Where a sale is not vacated, the surrogate must make an order confirming it; and where it is vacated as to a part only of the property sold, he must make an order confirming it as to the residue. An order, confirming a sale, must direct the person making the sale to execute the proper conveyances, upon compliance, on the part of the purchaser or purchasers, with the terms of the sale. The necessary conveyances must be executed by that person accordingly, and must briefly refer to the decree, the order to execute it, and the order of confirmation."⁸⁹ He should not confirm a sale, if the petition on which it was ordered is defective in any of the statute requirements going to the jurisdiction.⁹⁰

§ 888. **Compelling purchaser to take.**—The power to confirm the sale, which is conferred on the surrogate, does not include the power to compel payment of the bid and the taking of a conveyance, and the surrogate cannot exercise that power over a

⁸⁷ Horton v. Horton, 2 Bradf. 200. See Olmstead v. Long, 4 Dem. 44.

⁸⁸ Matter of Lynch, 33 Hun. 309; Matter of Campbell, 1 Tuck. 240.

⁸⁹ Co. Civ. Proc., § 2776. This section revises 2 R. S. 105, § 30; which was amended by L. 1880, c. 231; but the amendment was short-lived, owing to L. 1880, c. 245 (§§ 2, 4, and 5), which repealed the section of the Revised Statutes, with its amendments, down to September 1, 1880. Under the former statute, the conveyances, instead of containing a brief reference to the proceedings, were required to set them forth at large; and it was held, that a conveyance which omitted to recite at large the order of sale was void at law, though it might be confirmed by the Supreme Court. (Atkins v. Kinnan, 20 Wend. 241.) But an error in the recital of the order of sale might be disregarded, where the discrepancy appeared on the face of the deed. (Sheldon v. Wright, 5 N. Y. 497; affg. 7 Barb. 39.) And if the deed were inoperative by reason of

defective recitals, the defects might be healed by a second deed, which may be treated as relating back. (Sheldon v. Wright, 7 Barb. 39.) By L. 1895, c. 525, all titles of purchasers under deeds theretofore made, which failed to set forth at large the decree directing the sale, were cured. Under the Act of 1819, a sale was void as against the heirs, unless an order of confirmation was obtained previously to the conveyance to the purchaser, although the sale was *bona fide*, and the proceeds were applied to the debts of the intestate. (Rea v. McEachron, 13 Wend. 465.) See Fox v. Lipe, 24 id. 164; Stilwell v. Swarthout, 81 N. Y. 109.

⁹⁰ Matter of Kelley, 1 Abb. N. C. 102. The Act of 1850, and its amendments,—curing defects in titles under such sales (see § 835, *ante*),—applied only where the sale was collaterally questioned, not in the proceedings to confirm the sale in the Surrogate's Court. (1b.)

purchaser for the reason that he is in nowise a party to the proceeding.⁹¹

§ 889. **Limited effect of conveyance.**—Such a conveyance “does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a Surrogate’s Court having jurisdiction to grant them, upon a petition therefor, presented within four years after his death;”⁹² but, with this exception, the conveyance “vests in the grantee all the estate, right, and interest of the decedent in the real property so conveyed, at the time of his death, free from any claim of his widow for dower, which has not been assigned to her; but subject to all subsisting charges thereon by judgment, mortgage, or otherwise, which existed at the time of his death, unless the said real property is decreed to be sold free and clear from the lien of any judgment or judgments established by the decree and ordered to be paid as far as possible from the proceeds of such sale, as provided for in sections 2791 and 2793 of this act, in which event such lien or liens shall be transferred by such sale from the land sold to the proceeds thereof. Where the dower has been assigned to the widow, the grantee takes the part of the property to which her estate in dower attaches, subject thereto.”⁹³ The conveyance has priority, under the Recording Acts, over one executed before, but not recorded until afterward.⁹⁴ The pur-

⁹¹ *Cromwell v. Phipps*, 6 Dem. 61; *Matter of Bellesheim*, 1 N. Y. Supp. 276. In both of these cases *Wolfe v. Lynch* (2 Dem. 610) was followed, the decision of the General Term reversing it (*Matter of Lynch*, 33 Hun. 309; 67 How. Pr. 436), being distinguished. In that case, the purchaser applied to the surrogate by petition on discovering a defect of title, for an order to be relieved from the purchase, and a direction that the portion of the purchase money already paid be returned. Held, that power to grant the relief asked for is given to the surrogate under Co. Civ. Proc., § 2472, subd. 5, and § 2481. Nor has the surrogate express or implied authority to put a purchaser in possession. (*Matter of Georgi*, 37 Misc. 242; 75 N. Y. Supp. 256.)

⁹² Co. Civ. Proc., § 2777. See *Hall v. Partridge*, 10 How. Pr. 188; *Hyde v. Tanner*, 1 Barb. 75; *Sears v. Mack*,

2 Bradf. 394; *Barto v. Tompkins County Bank*, 15 Hun. 11.

⁹³ Co. Civ. Proc., § 2778, as amended 1894. It was held in *Maples v. Howe* (3 Barb. Ch. 611), that where the land in which the widow’s dower has been assigned to her is ordered to be sold for the payment of the decedent’s debts, and the whole is probably insufficient to pay them, the third assigned to the widow may be sold, subject to her life estate. And see *Lawrence v. Miller*, 2 N. Y. 245; *Lawrence v. Brown*, 5 id. 394.

⁹⁴ *Barto v. Tompkins County Nat. Bank*, 15 Hun. 11. In that case, it appeared that, in 1855, N. executed a deed of conveyance of a lot to W., the deed being left with a third person, to be delivered on payment of the price; the price was paid and the deed delivered in January, 1865, and the deed was recorded May 3, 1876. In September, 1873, a judgment was docketed

chaser of land at a sale under the statute takes the growing crops. A tenant occupying under the heir or devisee, within the three years, sows his crops at the risk of losing them, in case of a sale before he can remove them.⁹⁵

§ 890. Sale of interest in land contract, subject to payments.—

“Where any of the property to be sold consists of an interest, under a contract for the purchase of real property, and any payment is yet to be made upon the contract, the sale must be made subject to all payments thereafter to become due thereupon; and it may, also, if the decree, or the order to execute the decree, so directs, be made subject to all payments, previously due thereupon. If the sale is subject to any payment, the terms of sale must specify the penalty and the number of sureties, required in the bond to be given by the purchaser,” and must state to what payments the sale is subject.⁹⁶ The bond is for the benefit and indemnity of the obligee and his successors, and, also, the persons entitled to the interest of the decedent in the lands contracted for, and must be in a penalty at least twice the amount of all the payments, subject to which the sale is made.⁹⁷ But where the decree or the order directs a sale of the decedent’s interest in a part only of the property, if, in the opinion of the surrogate, a sale can be made advantageously to the estate, and so that the purchase money of the part sold will satisfy and discharge all the payments, to be made for all the property contracted for, according to the contract, the purchaser is not required to execute a bond.⁹⁸

§ 891. Effect of conveyance of entire contract interest.—“A conveyance of the decedent’s interest in all the real property, held by him under a contract for the purchase thereof, operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title, and interest of all the

against W., under which an execution was issued in September, 1876, and the lot sold in December, 1876, a deed being delivered in April, 1878. In November, 1875, the lot was sold under proceedings had in the Surrogate’s Court for the sale of the real estate of N., to pay debts. W., who was one of the executors, joining with the others in the petition. T., who held a note against the estate of N. for \$30,000, purchased the lot at the

surrogate’s sale, and paid the whole purchase price into the Surrogate’s Court, receiving a deed which was recorded in November, 1875. Held that the title acquired by him was superior to that acquired by the purchaser at the sheriff’s sale.

⁹⁵ *Jewett v. Keenholts*, 16 Barb. 193.

⁹⁶ Co. Civ. Proc., § 2779.

⁹⁷ Co. Civ. Proc., § 2780.

⁹⁸ Co. Civ. Proc., § 2781.

persons entitled, at the time of the sale, in and to the decedent's interest in the real property." ⁹⁹

§ 892. **Same; conveyance of partial contract interest.**—"A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title; and interest in and to the part so sold; and all rights which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he was living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the person entitled to the decedent's interest; subject to the dower of the widow, if any." ¹

TITLE FOURTH.

DISTRIBUTION OF PROCEEDS.

§ 893. **Payment of proceeds into court.**—The proceeds arising from the mortgage, lease, or sale must be paid into the Surrogate's Court by the executor, administrator, or freeholder receiving the same. For that purpose, he must pay them to the county treasurer, to the credit of the special proceeding, to be retained by him as prescribed in the Code with respect to other moneys paid into that court.² Upon payment being so made, the heirs and devisees of the decedent, and their assigns, and all the decedent's remaining real property, and interest in real property, held under a contract, for the purchase thereof, are exonerated from the debts and liens established by the decree and ordered to be paid, or established and ordered to be paid subsequently,³ as far as the proceeds so paid over are sufficient, after deducting the costs and expenses allowed by the surrogate, to satisfy those debts or liens.⁴ Immediately after the payment into court of the proceeds of a

⁹⁹ Co. Civ. Proc., § 2782.

¹ Co. Civ. Proc., § 2783.

² Co. Civ. Proc., § 2786. See *id.*

§ 2537; § 66, *ante*.

³ See Co. Civ. Proc., § 2788; *Kenyon*

v. Talbot, 2 Dem. 548.

⁴ Co. Civ. Proc., § 2786.

mortgage, lease, or sale, "the surrogate must cause notice of the time and place of making the distribution to be published at least once in each of the six weeks immediately preceding the same, in a newspaper published in the county of the surrogate."⁵

§ 894. New hearing as to debts, etc., on return of notice of distribution.—At the time and place designated in the notice, or at the time and place to which the hearing is adjourned, the surrogate must hear the allegations and proofs of the creditors or lienors, and of the persons interested in the estate, or in the application of the proceeds, respecting any demands against the decedent, or for his funeral expenses, then presented, which had not been established or rejected before making the decree. The provisions above recited, relating to contesting and establishing debts, or judgment liens, and as to payment of judgment liens, and preserving the evidence thereof, before making the decree, apply to the proceedings respecting any demand so presented. A debt or judgment lien which was established by the decree may be again controverted, upon the discovery of new evidence impeaching the same, and upon notice to the claimant as the surrogate directs, but not otherwise.⁶

§ 895. When further sale to be had.—Where the decree was executed with respect to a part only of the real property, or interests in real property, specified therein, and the proceeds of the sale are insufficient, after paying the costs and expenses thereof, to satisfy all the debts established by the decree, and all judgment liens established and decreed to be paid therefrom, together with the demands subsequently established, and all other sums payable out of the same, the surrogate must make an order,⁷ directing the execution of the decree, with respect to the remainder, or so much thereof as is necessary.⁸ The proceedings thereupon and subsequent thereto are the same, as upon and subsequent to the first order for the execution of the decree.⁹ Upon the further hearing

⁵ Co. Civ. Proc., § 2787. And see id., § 3340. In the county of New York publication of notice of the time and place of distribution in the *New York Law Journal* alone, without a publication in an additional journal, to be designated by the surrogate, is insufficient. (Matter of Lesourd, 27 Misc. 414; 59 N. Y. Supp. 371.)

⁶ Co. Civ. Proc., § 2788, as amended 1894.

⁷ As prescribed in Co. Civ. Proc., § 2768; ante, § 878.

⁸ Co. Civ. Proc., § 2789, as amended 1894.

⁹ *Ib.* This section supersedes *Ackley v. Dygert* (33 Barb. 176), which held, that the statute did not authorize an order directing the sale of the intestate's property on the ground merely that, after the distribution of the proceeds of the former sale, there was a deficiency in the sum remaining for the payment of debts: but that in such a case, new proceedings must be instituted.

above mentioned, or upon the hearing after the further execution of the decree, "the surrogate must also hear the allegations and proofs of any person who claims a right to the surplus money, or any part thereof. A claim so made may be contested by any other person making a like claim."¹⁰

§ 896. Supplementary decree awarding proceeds; appeal.—The surrogate must, by a supplementary decree, determine the rights of the creditors, judgment lienors, and other persons interested, to share in the proceeds, and direct distribution accordingly. Where the rights of creditors, or judgment lienors are established and their claims decreed to be paid, and there is a surplus, respecting the distribution of which a contest arises, he may make a supplementary decree providing for the payment of the creditors and judgment lienors only, and reserving all questions, as to the distribution of the surplus, to be settled by a second supplementary decree. "An appeal may be taken from either of the supplementary decrees, by any person aggrieved thereby, as from the first decree; except that it is not necessary or proper to make any creditor or judgment lienor a party to an appeal from the second supplementary decree."¹¹

§ 897. Fixing payments and investments.—Each supplementary decree must fix the sums to be paid or invested, as hereafter mentioned, as far as they can be then fixed. If any sum cannot be then fixed, it may be fixed by the order of the surrogate subsequently made. The surrogate must cause a certified copy of each supplementary decree, and of each order, to be delivered to the county treasurer, who must distribute, pay over, or invest the proceeds in his hands as directed.¹²

§ 898. Securities to be in county treasurer's name.—Except as otherwise specially prescribed in the Code,¹³ "a security taken or an investment made, pursuant to any provision mentioned in this chapter, must be taken or made in the name of the county treasurer, adding his official title, and his successors in office. Each security so taken, and all the papers connected therewith, or with such an investment, and each lease so taken, must be immediately delivered to the surrogate for his approval; and, when approved by him, must be delivered to the county treasurer, who must,

¹⁰ Co. Civ. Proc., § 2790. See Davis 1894; Higbie v. Westlake, 14 N. Y. v. Davis, 4 Redf. 355. 281.

¹¹ Co. Civ. Proc., § 2791, as amended ¹² Co. Civ. Proc., § 2792.

¹³ In tit. 5 of c. 18.

from time to time, collect the money due thereupon, and apply it, under the direction of the surrogate, as prescribed by law for that purpose, or for the application of the money represented by the security." ¹⁴

§ 899. Investment of dower fund.— The surrogate must cause a sum so set apart for a widow's dower, "to be invested by the county treasurer, under the direction of the surrogate, in the public securities of the State, or of the United States, or in permanent mortgage securities, bearing interest payable annually, or oftener. The interest, or other income, must be paid by the county treasurer to the widow, during her life. After her death, the county treasurer, under the direction of the Surrogate's Court, manifested in an order duly entered, must sell the public securities, or collect the sums loaned upon mortgage, and distribute the proceeds, less the costs and expenses," as above described in respect to the distribution of the remainder of the money, after satisfying the claim for dower. ¹⁵

§ 900. Investment or deposit of infant's surplus.—"Where surplus money is distributable to an infant; or where the interest in the property, represented by it, consisted of a precedent estate, and a remainder or reversion; the decree must provide, as the judgment of the Supreme Court would provide, in an analogous case, for the investment of the money in the public securities of the State, or of the United States; or for the loan thereof, secured by bond, and by mortgage upon unincumbered real property within the State, worth at least, exclusive of buildings thereupon, twice the sum lent; and for the payment of the income, until the majority of the infant or the determination of the temporary interest; and then, for the payment of the principal, to the person or persons entitled thereto. Or where surplus money is distributable to an infant, the decree may, in the discretion of the surrogate, direct that the same be paid to his general guardian upon the latter giving such additional security, if any, as the surrogate directs, or if it is one hundred dollars or less, that it be deposited by the county treasurer in a savings bank or trust company,

¹⁴ Co. Civ. Proc., § 2800.

¹⁵ Co. Civ. Proc., § 2795. Although the surrogate has power to direct the investment of surplus, upon the application of a deceased married woman's property to payment of her debts, on the ground that the husband is entitled to an estate for life therein, he

has no power to direct that such property be applied in payment of the debts of the husband. He can pass upon the claims of creditors of the intestate, but not upon those of creditors of the husband. (*Arrowsmith v. Arrowsmith*, 8 Hun. 606.) Compare *Zahrt v. Zahrt*, 1 Dem. 444.

designated by the surrogate, and that the interest or income thereof be applied to the use of the infant until its majority.”¹⁶

§ 901. **Order and mode of distribution.**—The Code provides¹⁷ that the money,¹⁸ having been paid into court, must be distributed by the supplementary decree in the following order:

“1. The charges and expenses of the mortgage, lease, or sale, and of the publication of the notice of distribution, and the other actual disbursements attending the distribution, must first be paid.

“2. Where an interest under a contract for the purchase of real property was sold, all sums of money, which were due at the time of the sale, pursuant to the contract, and were not assumed by the purchaser, must next be paid out of the proceeds of the sale of that interest.

“3. Out of the remainder of the money, arising upon a sale, the claim of dower, of the decedent's wife, if any, which has not been assigned to her, must be satisfied, by setting apart for investment one-third of the gross proceeds of the property, to which her right of dower attaches; unless, within such time, and upon such notice to her, as the surrogate deems reasonable, she presents an instrument under seal, acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, whereby she consents to accept, in lieu of her dower, a sum, to be ascertained by the surrogate, equal to the value of her right of dower in the gross proceeds, according to the principles applicable to life annuities; and, if she presents such an instrument, by paying to her such a sum. If it shall appear to the surrogate that the decedent's widow is an infant, lunatic, or otherwise incompetent, and that a general guardian or committee has been appointed, upon proof that it will be for the best interest and advantage of the estate of such infant, lunatic, or incompetent widow, the surrogate must authorize and direct such guardian or committee, in the name of such infant, lunatic, or incompetent widow, having such dower right, to execute an instrument under seal, acknowledged or proved and certified in like manner as a deed to be recorded in the county, whereby such guardian or committee shall consent to accept in lieu of dower a sum to be ascertained by the surrogate as above

¹⁶ Co. Civ. Proc., § 2796, as amended 1882: revising L. 1850, c. 150, §§ 1, 2. The first section of the Act of 1850 was amended by L. 1879, c. 389, which has not been expressly repealed.

¹⁷ Co. Civ. Proc., § 2793, as amended 1894.

¹⁸ Where, pending the proceeding, the premises were destroyed by fire, held, that the proceeds of a fire insurance policy upon said premises made payable to the estate should be applied to the payment of the debts. (*Matter of O'Connell*, 1 Misc. 50.)

provided, according to the principles applicable to life annuities; and upon presentation of such an instrument to the surrogate, the value of the right of dower so ascertained by him shall be paid to such guardian or committee. Such instrument shall have the same force and effect as a deed or instrument executed and acknowledged by a competent person.¹⁹

“ 4. Out of the remainder of the money, arising upon a mortgage, lease, or sale, must be paid the costs of the special proceeding, awarded to the petitioner in the decree.

“ 5. Out of the remainder of the money must be paid in full or to such extent as the money applicable thereto will pay the same, and according to their respective priorities, all judgment liens established and ordered paid by the decree, upon either the first or second hearing, and which were not disallowed or held invalid by either of such decrees. But no part of such moneys arising from the disposition of any real property of decedent, or any portion thereof, shall be applied toward the payment of any judgment lien established by the decree, except where such proceeds have arisen from the disposition of such real property, or a portion thereof, upon which said judgment lien is established by decree as existing at the decedent's death.

“ 6. Out of the remainder of the money, must be paid the sum, if any, which has been found to be due to the executor or administrator, upon a judicial settlement of his account, after applying thereupon the proceeds of the personal property. But this subdivision does not authorize the repayment, to an executor or administrator, of any sum paid by him to a creditor of the decedent, exceeding the proportion which that creditor would be entitled to receive from the estate of the decedent, upon the distribution of all the assets of the decedent, and the proceeds of property disposed of ” as above described.²⁰

“ 7. Out of the remainder of the money, must be paid, in full, the reasonable funeral expenses of the decedent, to the persons

¹⁹ Co. Civ. Proc., § 2793. The claim of dower of the decedent's wife, in real property held by the decedent, under a contract for the purchase thereof, which must be satisfied as prescribed in this subdivision, “ extends only to the annual interest, during her life, upon one-third of the balance remaining, after deducting from the money arising upon the sale, all sums due from the decedent, at the time of the sale, for the real property so contracted and sold.” (Co. Civ. Proc.,

§ 2794.) See *Hawley v. James*, 5 Paige, 318; *Hicks v. Stebbins*, 3 Lans. 39.

²⁰ See *Shute v. Shute*, 5 Dem. 1. Under this subdivision, the representative is not entitled to be paid fees and legal expenses which he contracted in regard to the estate, as the fund is applicable only to the amount due him for payment of debts and funeral expenses of the decedent. (*Matter of Summers*, 37 Misc. 575; 75 N. Y. Supp. 1050.)

whose claims therefor were established and recited as debts, in the first decree, and were not rejected upon the second hearing.

" 8. Out of the remainder of the money, must be paid, in full, the other debts, which were established and recited in the first decree, and were not rejected upon the second hearing; or, if there is not enough for that purpose, they, or so much thereof as the money applicable thereto will pay, must be paid in the order prescribed by law for payment of a decedent's debts by an executor or administrator out of the personal assets, without giving preference to rent, or to a specialty, or to any demand on account of an action pending thereupon; and paying debts not yet due, upon a rebate of legal interest.²¹

" 9. Out of the remainder of the money, must be paid, in like manner, the debts first established by the supplementary decree, or so much thereof as the remainder will pay.²²

" 10. If any surplus remains, it must be distributed among the heirs and devisees of the decedent, or the persons claiming under them, and among those persons who have presented and proved liens upon the interests of those heirs or devisees, or persons claiming under them, which were cut off by the sale; according to their respective rights and priorities, as established in the supplementary decree. But if the proceeds of any of the property sold have been, or were to be, converted into personal property, pursuant to a direction contained in the decedent's will, the surplus proceeds of that part of the property must be paid to the person entitled thereto, by the terms of the will. Any person having a right of tenancy by the curtesy in such surplus may, if he so elects, receive therefrom a gross sum in satisfaction of such right."²³

²¹ For the interpretation of this subdivision, see *Cook v. Woodard*, 5 Dem. 97; s. c. as *Matter of Wilcox*, 11 Civ. Proc. Rep. 115; s. c. as *Matter of Woodard*, 13 St. Rep. 161. In the disposition of the proceeds, regard may be had to the fact that some of those debts are also entitled to be partially or fully paid out of funds arising from the sale of other real estate in another State. (*Lawrence v. Elmendorf*, 5 Barb. 73.) As to the rights of the assignee or receiver of a creditor to receive the latter's share, see *Swartout v. Schwerter*, 5 Redf. 497.

²² See *Kenyon v. Talbot*, 2 Dem. 548.

²³ The last sentence of this subdivision was added by amendment of 1893. The surrogate may admit claims by

lien on the land against the heirs, as a valid charge against their interest in the surplus. (*Sears v. Mack*, 2 Bradf. 394.) Thus, where the heir conveys a part of the inheritance with warranty, and the land was subsequently sold by order of the surrogate, for the decedent's debts, it was held, that though the grantor was a married woman, the grantee had an equitable lien upon the residue of the inheritance, to the extent of her proportion of the proceeds of the sale. (*Eddy v. Traver*, 6 Paige, 521.) Where, after the sale of a decedent's real estate and conveyance thereof to the purchaser, the sheriff, on the day of distribution of the proceeds of the sale, exhibited to the surrogate an ex-

§ 902. **Proceedings, how affected by others, taken against the property.**— The commencement or pendency of an action or special proceeding, having for its object the sale, either absolutely or contingently, of property liable to be disposed of as heretofore described; or the foreclosure by advertisement, of a mortgage thereupon; or any proceeding to sell such property, taken pursuant to a judgment, or by virtue of an execution, does not affect any of the proceedings taken as heretofore described, unless the surrogate so directs. "After making a decree directing a mortgage, lease, or sale, the surrogate may, and, in a proper case, he must, stay the order to execute the decree, with respect to the property affected by the action, or special proceeding, or by the proceedings then pending, until the determination thereof, or the further order of the surrogate with respect thereto. If, in the course thereof, a sale of any of the property has been made, before making the decree in the Surrogate's Court, the decree must provide for the application of the surplus proceeds belonging to the decedent's estate. If such a sale is made afterward, the directions contained in the decree, relating to the property sold, are deemed to relate to those proceeds." ²⁴

§ 903. **Surplus in other proceedings payable to surrogate.**— Where real property, or an interest in real property, liable to be disposed of as heretofore described, is sold, in an action or a special proceeding, specified in the last paragraph, "to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime; and letters testamentary or letters of administra-

tion against one who was entitled to a share of such proceeds, and asked that such share be applied on the execution, the judgment not having been docketed in the county of the surrogate, until the day of distribution, and, upon the refusal of the surrogate, an order was obtained from the county judge for the examination of the surrogate, and forbidding him to make any disposition of the fund.— Held, that while the county judge could order such examination, he had no power to restrain the disposal of the fund: that the judgment not being a lien at the time of the sale of the premises, payment of the share must be made to the heir, or to such person as might be appointed in supplementary proceedings to receive it. (*Davis v. Davis*, 4 Redf. 355.) After the sale of some of decedent's real estate to pay certain debts, upon an order of the surrogate,

and the entry of an order for their payment and for the distribution of the surplus, and after such payment and a partial distribution had been made thereunder, a judgment construing decedent's will was rendered by the Supreme Court, in an action previously brought for the purpose, and thereupon an order was granted by a judge of that court, directing the surrogate to pay out of the surplus an allowance and costs to the attorney who conducted the action in the Supreme Court.— Held, that the attorney should have applied to the surrogate at the time the order for distribution was made, and that the judge of the Supreme Court had no jurisdiction to make the order directing such payment from the surplus. (*Clocke v. Igglesden*, 3 Redf. 339.)

²⁴ Co. Civ. Proc., § 2797. See *Harvey v. McDonnell*, 1 N. Y. Supp. 86.

tion, upon the decedent's estate, were, within four years before the sale, issued from a Surrogate's Court of the State having jurisdiction to grant them; the surplus money must be paid into the Surrogate's Court from which the letters issued, pursuant to the provisions of section 2537, and the receipt of the county treasurer shall be a sufficient discharge to the person paying such money. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus, exceeding the lien to satisfy which the property was sold, and the costs and expenses must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money."²⁵ Where surplus money is so paid into a Surrogate's Court, and a petition for the disposition of property, as heretofore described, "is pending before him; or is presented at any time before the distribution of the money; the money must be distributed as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree directing the distribution of the money among the persons entitled thereto, may be presented by any of those persons. Each person, who would be entitled to share in the distribution of the proceeds of a sale, must be cited to show cause, why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated" as prescribed in the Code,²⁶ at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs, and devisees of the decedent, and also upon every other person claiming under them, or either of them, who resides in this State. Upon the return of the citation, the rights and priorities of the persons interested must be established, and a decree for distribution must be made, as if it was the proceeds of real property sold.²⁷

²⁵ Co. Civ. Proc., § 2798, as amended 1893. See § 66, *ante*; Matter of Gedney, 30 Misc. 18; 62 N. Y. Supp. 1023; Matter of Dusenbury, 33 Misc. 166; 68 N. Y. Supp. 372.

²⁶ In art. 1, tit. 2, c. 18. See § 79, *ante*.

²⁷ Co. Civ. Proc., § 2799; German Sav. Bank v. Sharer, 25 Hun. 409. Creditors are "interested persons," and are entitled to participate in the surplus, though no application for a sale of lands had been made within the three years. (Matter of Callaghan, 23 N. Y. Supp. 378.)

TITLE FIFTH.

MISCELLANEOUS PROVISIONS.

§ 904. **Costs and expenses of the proceeding.**—The executor, administrator, or freeholder, disposing of the property, will be allowed his expenses out of the proceeds of the sale brought into court; and a reasonable sum for his own services, not exceeding five dollars for each day, actually and necessarily occupied by him in disposing of the property, and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.²⁸ An allowance which exhausts the fund is not “reasonable.”²⁹

The costs and allowances of the parties can only be fixed and adjusted at the time of the entry of the supplementary decree, after the deposit of the proceeds of the sale with the county treasurer.³⁰ Under section 2563, costs or allowances cannot be granted to a petitioning creditor, the right to an award thereof being confined, by that section, to the executor or administrator, and a free-

²⁸ Co. Civ. Proc., § 2563, which changes the limit of the fee from two to five dollars per day, and abrogates the former fee for a deed. The present provision conforms to *Higbie v. Westlake*, 14 N. Y. 281, and *Matter of Lamberson*, 63 Barb. 297. The former case held, that a reasonable allowance for professional advice and assistance was a necessary expense, but that where there was no contest, charges such as allowed by the chancery fee-bill, for services in litigated cases, would be excessive; also that the *per diem* allowance could only be granted for the time necessarily and actually occupied in the business, and that the statute did not warrant an allowance as a salary during the conduct of the business. In the latter, it was held, that there could be no lien upon such money, even for the fees and disbursements upon the application for the sale; that the entire fund must be brought intact into the office of the surrogate, and the attorney could then apply to that officer, whose duty it would be, before making the general distribution, to award and pay him a reasonable fee for his services in the matter of the sale, together with his necessary outlay thereon; also that, for services rendered to the administratrix, apart from the matter of the

sale of the real estate, there was not only no lien, but no right to priority of payment, such priority being confined to the “charges and expenses of the sale.” And apart from the statute, in any case where moneys are realized or received under the orders of a court competent to deal equitably with the fund, there can be no lien upon the same for any services rendered; but such services must be paid for, if it be sought to charge the fund, by the order of the court where the matter is pending. (Ib.) See *Rose v. Rose Assn.*, 28 N. Y. 184. A freeholder appointed to sell the real estate of a decedent may, under sections 2563 and 2786 of the Code of Civil Procedure, be allowed his expenses, counsel fees, etc., by the surrogate upon rendering his account of the sale, and is not obliged to pay over to the county treasurer the gross proceeds of the sale and wait for such payment until the final distribution under section 2793 of the Code of Civil Procedure. (*Matter of McGee*, 65 App. Div. 460.)

²⁹ *Matter of Matthewson*, 1 Connolly, 254.

³⁰ *Long v. Olmsted*, 3 Dem. 581; *Matter of Laird*, 42 Hun, 136; *Matter of Lamberson*, 63 Barb. 297; *Matter of Mace*, 4 Redf. 325.

holder appointed to execute the decree.³¹ Under section 2750, the surrogate may, in his discretion, give costs to a petitioning creditor. These costs are governed by section 2561, and the creditor is not entitled to a *per diem* allowance.³² But a creditor other than the petitioner, whose claim has been contested and allowed, cannot be awarded costs under section 2561, notwithstanding the general character of that section, inasmuch as no provision for the payment of such an award is made by section 2793; after compliance with the directions of which section, the entire proceeds of the disposition will have been exhausted.³³

§ 905. Compelling account by executor, etc.—The surrogate may compel the judicial settlement of the account of an executor or administrator, where a decree for the disposition of real property, or of an interest in real property, has been made as mentioned in this chapter, and the property, or a part thereof, has been disposed of by him pursuant to the decree.³⁴

§ 906. Evidence of appointment of special guardians.—“Where the records of the Surrogate's Court have been heretofore, or are hereafter, removed from one place to another, in either the same or another county, and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property [as heretofore described], the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.”³⁵

§ 907. Reimbursement of heir, etc.—Where a decree has been made for the application of the proceeds of real property to the payment of the decedent's debts or funeral expenses, or judgment liens established and ordered paid, as heretofore described, “and assets, which should have been applied thereto, are afterward dis-

³¹ Long v. Olmsted, 3 Dem. 581.

³² Matter of Matthewson, 1 Connoly, 157; 19 St. Rep. 208. Under section 2561, the allowance which the surrogate is authorized to make to a special guardian of an infant devisee in this proceeding is limited to \$70. (Matter of Dodge, 40 Hun. 443; *revd.*, on other points, 105 N. Y. 585).

³³ Long v. Olmsted, 3 Dem. 581; Cook v. Woodard, 5 id. 97.

³⁴ Co. Civ. Proc., § 2726, subd. 3. A freeholder appointed to sell, etc., must also account. (§ 2726.) Under 1 R. L. of 1813, § 452, the executors

were held responsible to the surrogate, as trustees, and the proceeds were equitable and not legal assets. (Tapen v. Kain, 12 Johns. 120.) And see Willoughby v. McCluer, 2 Wend. 608; Peek v. Mead, *id.* 470.

³⁵ Co. Civ. Proc., § 2785. The former method of serving minors and appointing guardians in these proceedings, which the reader who is concerned in the validity of past proceedings should refer to, will be found in 1 R. S. 100, §§ 3, 4; L. 1837, c. 460, §§ 38, 39; Sheldon v. Wright, 7 Barb. 39; 5 N. Y. Supp. 497.

covered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the executor, administrator, legatee, or next of kin; the heir, devisee, or other person aggrieved, may maintain an action to procure reimbursement therefrom.”³⁶ Although ordinarily where accrued taxes have been paid out of the proceeds of a sale of the land on foreclosure, and a surplus is realized for the executor, as trustee of the land, it is his duty to reimburse the trust fund to the amount of such taxes out of the personal estate, yet where there are unsecured creditors of the estate whose claims exceed the amount of the personal property, such reimbursement will not be directed, as its omission will avoid circuity of action, the trust fund being ultimately liable for the debts.³⁷

³⁶ Co. Civ. Proc., § 2801, as amended 1894: conforming to *Couch v. Delaplaine* (2 N. Y. 397), holding that where the personal estate was insufficient, and the land was sold for the payment of the debts under a surrogate's order, and assets were subsequently discovered, the devisees were

entitled to be reimbursed out of such subsequently discovered assets. See also *Graham v. Dickinson*, 3 Barb. Ch. 169.

³⁷ *Smith v. Cornell*, 113 N. Y. 320; distinguishing *Smith v. Cornell*, 111 id. 554.

CHAPTER XIX.

ACCOUNTINGS.

TITLE FIRST.

ACTION FOR AN ACCOUNTING.

§ 908. **Jurisdiction of the Supreme Court.**— The Supreme Court, by virtue of its powers as a court of equity, and as the successor of the late Court of Chancery, has a general jurisdiction over trusts and trustees.¹ As a court of equity, in the exercise of this power, it regards executors and administrators as trustees — which, indeed, is now their character at law — and will accordingly compel them to render an account of their proceedings, disclosing the assets and the manner of the application thereof, and will require the due performance of their duty. Such a court may thus, upon a bill filed by a party in interest, direct a general account of the estate and debts, and decree payment and distribution in the regular course of administration. But a court of equity will not take cognizance of an action, for the settlement of an estate, disconnected with the enforcement of a special and express trust, unless special reasons are assigned, and facts stated, to show that complete justice cannot be done in the Surrogate's Court.² There are, however, many cases in which, by reason of

¹ As to the powers of superior city courts, in this regard, prior to their abolition, see *Christy v. Libby*, 5 Abb. Pr. (N. S.) 192; 2 Daly, 418; *Landers v. Staten Island R. Co.*, 53 N. Y. 450; *Skidmore v. Collier*, 8 Hun, 50; *Van Sinderen v. Lawrence*, 50 id. 272; § 62, *ante*, and cases *infra*.

² *Chipman v. Montgomery*, 62 N. Y. 221. *Hard v. Ashley* (117 id. 606; 28 St. Rep. 601) was an action brought in the Supreme Court to obtain an accounting by the executor and a distribution of the estate in his hands, and incidentally to obtain a construction of the will. The court, on appeal, Gray, J., said: "There

was no reason for resorting to another forum than that established by the statute for the final settlement of an executor's accounts. No objection appears to have been taken on the record. If it had been, a grave jurisdictional question would have been presented. We do not wish to be understood, however, as assenting to this procedure. These proceedings belong, by law, to Surrogates' Courts, which were constituted to take jurisdiction of them, and the powers of which are appropriate and adequate for that purpose." To the same effect, *West-erfield v. Rogers*, 63 App. Div. 18; 71 N. Y. Supp. 401; *Borrowe v. Corbin*,

the necessity of comprehensive relief by injunction, or in consequence of a dissension between co-executors,³ or because questions of individual right,⁴ or questions which the surrogate is not authorized to determine,⁵ are inseparably connected with and involved in the controversy, or because the estate or executor is foreign,⁶ a clear case of necessity for the interposition of a court of equity is presented.⁷ The surrogate, however, so far as he has jurisdiction, has a jurisdiction concurrent with that of a court of equity; and a court of equity will not, without some special ground, interfere to supersede the exercise of the surrogate's powers.⁸ The power given to a surrogate to compel an accounting by an executor or administrator is not exclusive, but concurrent with that of the Supreme Court, and an action for that purpose, and to prevent the wasting of the trust estate on be-

31 App. Div. 172; 52 N. Y. Supp. 741; aff'd., 165 N. Y. 634; *Arkenburgh v. Wiggins*, 13 App. Div. 96; 43 N. Y. Supp. 294; aff'd., 162 N. Y. 596; *Matthews v. Studley*, 17 App. Div. 203; 45 N. Y. Supp. 201; *Delabarre v. McAlpin*, 71 App. Div. 591. Compare *Ludwig v. Bungart*, 48 App. Div. 613; *Meeks v. Meeks*, 34 Misc. 465 (Second Dept.), where it is said that the Supreme Court should refuse to take jurisdiction only where that of the Surrogate's Court has already been invoked.

³ *Simpson v. Simpson*, 44 App. Div. 492. See *Wood v. Brown*, 34 N. Y. 337; *Stevens v. Stevens*, 69 Hun, 332; *Smith v. Lawrence*, 11 Paige, 206; *Decker v. Miller*, 2 id. 149; *Wurtz v. Jenkins*, 11 Barb. 546; § 525, *ante*.

⁴ *Simpson v. Simpson*, *supra*. See *Day v. Stone*, 15 Abb. Pr. (N. S.) 137.

⁵ *Forman v. Lawrence*, 6 Sup. Ct. (T. & C.) 640; *Steinway v. Von Bernuth*, 59 App. Div. 261; 69 N. Y. Supp. 1146; appeal dismissed, 167 N. Y. 498. It is not enough to allege the special facts which would oust the surrogate of jurisdiction, but they must be true, and must be established by sufficient evidence. (*Blake v. Barnes*, 28 Abb. N. C. 401; 45 St. Rep. 130.) In that case, the evidence showed that by reason of an adjustment between the partnership and the estate of a deceased partner, to which the legatees had assented, the estate had no claim against the firm, and the firm had no claim against the estate,

— Held, that a legatee could not support an action for an accounting against the executors and surviving partners of the testator in the Supreme Court on the ground that it could not be left to the executors to compel the partnership to account, by reason of the fact that they were themselves surviving partners; and that the legatee was not entitled to pass over the Surrogate's Court and ask for settlement of the executor's account in the Supreme Court.

⁶ See *McNamara v. Dwyer*, 7 Paige, 239; *Lawrence v. Elmendorf*, 5 Barb. 73; *Montalvan v. Clover*, 32 id. 190; *Gulick v. Gulick*, 33 id. 92. A foreign administrator bringing assets into this State may be sued here for an accounting. (*Marshall v. Bresler*, 1 How. Pr. [N. S.] 217.) To sustain an action against a foreign executor, there must be an allegation of such facts and circumstances as constitute the action one in equity, as distinguished from an action at law simply for the recovery of money. (*Metcalf v. Clark*, 41 Barb. 45, and cases cited.) See *ante*, § 518.

⁷ So also, by c. 654, L. 1881, provision is made for the relief of sureties of any trustee, committee, or guardian appointed by, or accountable to, the Supreme Court or a County Court, on petition of the surety. See Co. Civ. Proc., § 812, amended 1892.

⁸ *Seymour v. Seymour*, 4 Johns. Ch. 409; *Moffat v. Moffat*, 3 How. Pr. (N. S.) 156.

half of those interested therein, is maintainable.⁹ Such a case is where, besides calling upon the executor, administrator, or trustee to render an account of his acts and proceedings, a *devastavit* is alleged, and the fund or property is sought to be reclaimed from a third party. It is a familiar principle of equity jurisprudence that "as between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature, or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust."¹⁰ The plaintiff has an election in such a case to proceed against the trustee alone, or to join a third person who is claimed to have fraudulently acquired from the trustee any part of the trust estate.¹¹ The latter is regarded as constructively a trustee with the former, and the liability of the one is not different or distinct from that of the other.¹² It is well settled that a

⁹ Haddow v. Lundy, 59 N. Y. 320. If the representative colludes with the decedent's fraudulent vendee, or after reasonable request, refuses to take proceedings to impeach his title and reach the property in his hands, a creditor may maintain an action against the representative and the vendee, for that purpose. (Bate v. Graham, 11 N. Y. 237.) See § 543, *ante*. In an action in the Court of Common Pleas, by the heirs, to set aside an agreement relinquishing plaintiff's share in the estate, upon the ground of fraud and mistake, where the complaint asked that defendant "be held to account and to pay" to one of the plaintiffs "his distributive share of the estate."—Held, that the accounting should be taken in that court, it having jurisdiction, instead of requiring defendant to account, as administratrix, before the surrogate. (Busch v. Busch, 12 Daly, 476.) An heir or next of kin may maintain an action against the executor to establish his right to property not accounted for before the surrogate. (Guibert v. Saunders, 10 St. Rep. 43.) See Foote v. Bruggerhof, 66 Hun, 406; 21 N. Y. Supp. 509.

¹⁰ Pennell v. Duffell, 4 De Gex, M. & G. 372; Cooper v. Weston, 16 St. Rep. 937, citing Weetjen v. Vibbard, 5 Hun, 265; Brinckerhoff v. Bostwick, 88 N. Y. 52, 56.

¹¹ Bailey v. Inglee, 2 Paige, 278.

¹² Brown v. Henck, 41 Hun, 16; Randel v. Dyett, 38 id. 347; Zimmerman v. Kinkle, 108 N. Y. 282. "If a trustee fraudulently alienates trust property so that the alienation is *ipso facto* void by reason of fraud; and a third party is implicated in that fraudulent and void transaction, thereby acquiring for his own benefit the possession of the trust property under circumstances which can give neither right nor title to it, a party so circumstanced cannot require that the *cestui que trust* who is defrauded shall treat the liability of the stranger as distinct from that of the trustee. The fraud by the supposition is one and indivisible: in equity the transaction is null and void, and the party claiming the benefit of it is a mere claimant." (Lund v. Blanshard, 4 Hare, 29.) See Perry on Trusts, § 877. The doctrine is stated by Lord Chancellor Selborne as follows: "The responsibilities of a trustee may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions, perhaps, which a court

person who takes title from an executor in payment of the executor's personal debt is not a purchaser in good faith, and acquires no rights over the prior title or equities of other persons.¹³

TITLE SECOND.

ACCOUNTING IN THE SURROGATE'S COURT.

ARTICLE FIRST.

SURROGATE'S JURISDICTION.

§ 909. **Concurrent jurisdiction.**— The Surrogates' Courts have a power to compel an accounting, which is, to a great extent, concurrent with that of courts of equity, and is less formal and expensive; and hence, in ordinary cases of domestic administration, and where the powers of the surrogate are adequate to the settlement of the estate, a court of equity may well decline to interfere. Although surrogates have not the power of a court of equity, they have a more summary and convenient power of examining and passing on the accounts, of marshaling the assets, and directing the manner of their application. But it is not in every case that this jurisdiction will be entertained, and where an action or proceeding is pending in a court of equity for the accounting of the representative, and a distribution of the estate, the Surrogate's Court may properly refuse to pass upon an application for similar relief.¹⁴

§ 910. **Locality of the jurisdiction.**— The Surrogate's Court, to which application should be made for an accounting on the part of an executor or administrator, is the one from which the letters

of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge of a dishonest and fraudulent design on the part of trustees." (Barnes v. Addy, L. R., 9 Ch. 244.)

¹³White v. Price, 39 Hun. 394. In Pendleton v. Fay (2 Paige, 205), where an executor assigned a mortgage showing on its face that he was acting as executor, the chancellor said: "This was sufficient to put them (the assignees) on inquiry, and they ought not to have taken the assignment and paid the money until they had ascertained that he was not committing a fraud upon the estate. If a trustee applies the trust property to pay his private debt to the pur-

chaser, the latter is bound to ascertain that the trustee is not thereby misapplying the fund and violating his duty, especially when the trustee is insolvent."

¹⁴Matter of De Pierris, 79 Hun, 279; 29 N. Y. Supp. 360; Matter of Ayrault, 81 Hun, 107; 30 N. Y. Supp. 654. Where the Supreme Court has obtained jurisdiction of an action in which a part of the relief sought is an accounting by executors, and the judgment finally entered in the action provided that the accounting of the executors be made therein, precludes the surrogate proceeding with the accounting in his court. (Matter of Bruce, N. Y. Law J., June 19, 1893.) See § 931, *post*.

of the representative issued.¹⁵ And the same rule, doubtless, prevails with respect to a testamentary trustee acting under letters issuing from such a court. The surrogate who appointed a deceased executor has jurisdiction over the latter's representative, although appointed by the surrogate of another county, but so far only as the estate of the testator of such deceased executor is concerned.¹⁶

ARTICLE SECOND.

THE DIFFERENT KINDS OF ACCOUNTING.

§ 911. **Forms of accounting distinguished.**— There are several modes in which an accounting, on the part of an executor, administrator, or testamentary trustee, may be brought about, and the effect of an accounting differs according to the mode or nature of the proceeding. If the representative, of his own motion merely, files an account of his proceedings, this is a distinct admission by him of the matters therein stated, and may serve to inform those interested of what he has done. If he fails to disclose his proceedings, the statute, which we shall presently explain in detail, provides means by which he may be compelled to do so. But the mere rendering of an account, whether voluntary or upon compulsory process, is not in itself a settlement of the matters contained therein. The account rendered and filed may inform those interested, but it does not bind them, and is not necessarily conclusive, even upon the representative who renders it. To make it final and conclusive, there must be an adjudication upon it; and to secure this, the parties must either appear and be heard, or there must be due notice to them that an adjudication and settlement

¹⁵ See *Foster v. Wilber*, 1 Paige, 537; *Dakin v. Hudson*, 6 Cow. 221. So, where a decedent died intestate in Connecticut, and letters of administration were issued to the same parties to whom letters were subsequently issued by the surrogate of New York county, and an account was filed with the surrogate here, showing \$7,600 to have come into their hands in New York county; but the account being contested, it was referred, and, pending the reference, they were cited by the Connecticut court to appear before it and account, which they did, and a decree was made allowing the same.—Held, on an application before the surrogate here, to vacate the order of reference and dismiss all proceedings,

on the ground of want of jurisdiction and of *res adjudicata*, that the surrogate had authority to pass upon the administrator's accounts, and that the proceedings in Connecticut did not divest him of that authority. (*Duffy v. Smith*, 1 Dem. 202; Co. Civ. Proc., § 2476, subd. 3.) Notwithstanding an executor has removed from the State, and refuses to give bail, after being required by the surrogate to do so, he may settle his accounts before the surrogate; and if all parties entitled to notice voluntarily appear, the surrogate has jurisdiction; and his decree for a final settlement thus made is final, unless appealed from. (*Everts v. Everts*, 62 Barb. 577.)

¹⁶ *Popham v. Spencer*, 4 Redf. 399.

of the account will be had. An account which, upon appearance or due notice, is thus examined and settled by an adjudication of the surrogate, concludes the parties in interest to a certain extent, as a judgment of a court of record would, as hereafter explained; and such a proceeding is termed, in the Code, the judicial settlement of an account.

§ 912. "Final accounting" explained.—In the former statutes, it was called a "final accounting," but the words "final accounting," as thus used, did not imply the rendering of the *last* account, which finally settled the estate and discharged the representative. That might, in a proper sense, be called the final account, but a "final accounting," as those words were used in respect to the administration of estates, meant an account,—first, intermediate, or last,—which had been made conclusive, and, in that sense, "final," by an adjudication or decree of the surrogate, on notice to or hearing of the parties. Hence there might be several successive "final accountings" on the same estate.¹⁷ The phrase was not, indeed, uniformly used in this sense; but was to be so understood wherever it occurred in the statute, unless the context indicated a different intent. All ambiguity, in this particular, is removed by the present Code, which uniformly terms an account, other than an adjudicated one, an intermediate account, the filing of which may be voluntary or compelled, and designates the surrogate's adjudication upon an account the judicial settlement thereof, which may be had at the instance of the accounting party; or of a creditor or person interested in the estate or fund, etc.¹⁸

¹⁷ *Glover v. Holley*, 2 Bradf. 291. Under the Revised Statutes, there were two modes in which the account of the executor or administrator might be settled; one on the motion of an adverse party applying for the payment of his claim, or for leave to issue execution; the other on the application of the representative himself, on notice to all parties. The first settlement was conclusive on the parties only, and the second was conclusive on all the parties interested, and, therefore, final. (*Campbell v. Bruen*, 1 Bradf. 224.) See also *Guild v. Peck*, 11 Paige, 475; *Westervelt v. Gregg*, 1 Barb. Ch. 469. A final accounting was a voluntary proceeding—a submission on the part of the executor or administrator of all questions connected with the distribution of the estate. (*Marre v. Ginochio*, 2 Bradf.

165.) If the executor or administrator neglected to cite the parties in interest to attend the settlement of his account, and they did not voluntarily appear, the accounting would not be final. (*Stone v. Morgan*, 10 Paige, 615; *Bronson v. Ward*, 3 id. 189; *Hallett v. Hare*, 5 id. 315.) The final accounting might be had, although the time had not arrived when, by the provisions of the will, a final adjudication as to the rights of all the beneficiaries could be had. (*Bogart v. Van Velsor*, 4 Edw. 718.) In an accounting, not final, on the petition of a creditor or legatee, the decree was entered, finding the state of the account to the time when it was rendered. (*Tucker v. McDermott*, 2 Redf. 317.)

¹⁸ "The expression 'judicial settlement,' where it is applied to an ac-

In any case, however, it should be observed that the object of the statutes relating to accounting is to insure the speedy administration of estates, to give an adequate remedy to those who desire an exhibition of the condition of the estate, and adequate protection to the representative; and that it is no part of its purpose to determine the rights of different claimants as between themselves, or create a new bar to debts.¹⁹ With these general explanations, we will pass to the consideration of the provisions of the statute regulating the right and mode of procedure in each kind of accounting by an executor, administrator, or testamentary trustee, the accounting of guardians being treated in a separate chapter concerning those officers.

ARTICLE THIRD.

INTERMEDIATE ACCOUNTINGS.

§ 913. Voluntary filing of intermediate account.—The expression, “intermediate accounting,” as used in the Code, “denotes an account filed in the surrogate’s office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.”²⁰ “An executor or administrator may, at any time, voluntarily file in the surrogate’s office an intermediate account, and the vouchers in support of the same.”²¹ So a testamentary trustee may, at any time, file an intermediate account, and may also annually render and finally judicially settle his accounts.²²

§ 914. Compulsory filing of intermediate account.—The Code provides²³ that “in either of the following cases the surrogate may, in his discretion, make an order, requiring an executor or administrator to render an intermediate account:

“1. Where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor.”²⁴

“2. On the return of a citation, issued upon the petition of a judgment creditor, praying for a decree, granting leave to issue

count, signifies a decree of a Surrogate’s Court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes or for certain purposes specified in the statute; and an account thus made conclusive is said to be judicially settled.” (Co. Civ. Proc., § 2514, subd. 8.)

¹⁹ See *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 222. Compare *Gilman v. Wilber*, 1 Dem. 547.

²⁰ Co. Civ. Proc., § 2514, subd. 9.

²¹ Co. Civ. Proc., § 2725, as amended 1893: consolidating former § 2722.

²² Co. Civ. Proc., § 2802.

²³ Co. Civ. Proc., § 2725, as amended 1893: consolidating former § 2723.

²⁴ “As prescribed in section 1826.”

¹⁹ See *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 222. Compare *Gilman v. Wilber*, 1 Dem. 547.

an execution on a judgment rendered against the decedent in his lifetime.²⁵

"3. On the return of a citation, issued on the petition of a creditor, or person entitled to a legacy, or other pecuniary provision, or a distributive share, praying for a decree directing payment thereof."²⁶

"4. Where eighteen months have elapsed since letters were issued, and no special proceeding, upon a petition for a judicial settlement of the executor's or administrator's account, is pending."

§ 915. **Intermediate accounting by testamentary trustee.**—"Upon the petition of a person interested, absolutely or contingently, in the estate or fund in the hands of a testamentary trustee, or in the application thereof, or of the income or other proceeds thereof, the surrogate may, in his discretion, make, at any time, an order requiring a testamentary trustee to render an intermediate account;"²⁷ and any testamentary trustee, or any trustee appointed by competent authority to execute any testamentary trust, may, at any time, file an intermediate account.²⁸ An account may be required, in order to disclose the state of the funds, notwithstanding there is no party entitled to present payment.²⁹

²⁵ "As prescribed in section 1381." See *ante*, § 684.

²⁶ "As prescribed in section 2722," as amended 1893. See *ante*, § 781. Where a legatee presented to the surrogate a petition praying that the executor be ordered to appear and render an account, and that such further or other proceedings be had as might be necessary to enforce the payment of her claim, and thereupon an order was granted that the executor "render a settlement," and a citation was issued thereon, requiring him to appear and "render an account."—Held, that the petition was sufficient under the original statute (2 R. S. 116, § 18) to give the surrogate jurisdiction over the subject-matter; and, having obtained jurisdiction of the person of the executor by the order and citation, he had power to proceed and examine into the account, and to settle and adjust the same, so far as to determine how much should be paid to the petitioning legatee (*Peek v. Sherwood*, 56 N. Y. 615); but if it appear that a real question exists as to the right of one of several persons to the legacy or fund, he cannot proceed to a determination without the presence of all

parties; and only on a final accounting, where such parties are brought in, has the surrogate jurisdiction to settle and adjust conflicting rights and interests. (*Riggs v. Cragg*, 89 N. Y. 479.) See *Matter of Marshall*, 5 Dem. 357.

²⁷ Co. Civ. Proc., § 2803. See *Matter of Odell*, 52 Hun. 88.

²⁸ Co. Civ. Proc., § 2802. Where no objection is made to the intermediate account of a testamentary trustee, but an improper use of the trust is alleged, an inquiry into the account should be deferred until the judicial settlement thereof. (*Glaskin v. Sheehy*, 2 Dem. 289.) Where the petition alleged that the trustee had funds of the estate in his hands and the answer did not deny it,—Held, that an order that he file an intermediate account, though not expressly asked for by the petitioner, was in the discretion of the surrogate, and was properly issued. (*Matter of Taggard*, 41 St. Rep. 796; 16 N. Y. Supp. 629.)

²⁹ *Matter of Lawrence*, 15 Civ. Proc. Rep. 54; 16 St. Rep. 971; *Bogart v. Van Velsor*, 4 Edw. 718; *Valentine v. Valentine*, 2 Barb. Ch. 430.

§ 916. **Surrogate may initiate the proceeding.**—The former statute expressly authorized the surrogate to call the executors or administrators to account, by a proceeding instituted by him *ex officio*, without an application by any one. And it was very reasonably suggested that it would be his duty to do so where infants are concerned, after a reasonable time has elapsed for the settlement of the estate, if he has reason to apprehend that the interests of the infant require such a course.³⁰ The present statute does not confer power upon the surrogate to compel, on his own motion, a final judicial settlement of the accounts of a representative or trustee; but it is not doubted that he may, on his own motion, call for an account in the nature of an intermediate account, without an application made to him by an interested party.³¹

§ 917. **Surrogate's limited authority.**—A stretch of this supervisory power of surrogates, to the extent of requiring an intermediate account, filed in obedience to his unsolicited mandate, to be the same in form and substance as an account is required to be, on its judicial settlement, can be justified, if at all, in only very special cases, where the parties are not *sui juris*, or, for any reason, cannot be cited to attend and protect their own interests.³² In such cases the action of the surrogate, being a special proceeding,

³⁰ *Smith v. Lawrence*, 11 Paige, 206. See *Tucker v. McDermott*, 2 Redf. 312.

³¹ *Campbell v. Bruen*, 1 Bradf. 224; *Thomson v. Thomson*, id. 24; *Gratacap v. Phyfe*, 1 Barb. Ch. 485. See remarks of Ransom, S., 6 Dem. 507.

³² In *Matter of Dwight* (29 St. Rep. 210; 9 N. Y. Supp. 927), the surrogate of New York county laid down the rule, for his own court, that "the account should state if an inventory has been filed, and if none has been filed, the account itself should furnish the information usually thus supplied. It should likewise state whether or not advertisements for claims have been published, what claims have been presented, what allowed, and what rejected; and the time and manner in which they were rejected or disputed, and the reason therefor. Also, what claims have been presented and allowed since the expiration of the publication of the advertisement for claims. The accountant should then proceed to credit himself with funeral charges and expenses of administration, with moneys paid to creditors, naming them, and payments to lega-

tees or next of kin. He should state the age of legatees and next of kin, if any are minors, and whether they have guardians, and if so their names and places of residence, and how appointed. If there is any other fact which has occurred as part of his proceedings, which may affect the estate or the rights of any distributee or his own rights, he is bound to state it. He must not only state in what character his payments were made, as whether to creditors, legatees or next of kin, or for expenses for funeral charges, or for administration, distinctly, but he must produce vouchers supporting each payment; or in cases of claims under §20, where no voucher is produced, he must make and present, in lieu of voucher, his own oath positively to the fact of payment, when made, and to whom. Unless the order of the surrogate, requiring an executor or administrator to render an account of his proceedings, is obeyed in this manner, as plainly indicated by the statute, he will not have made the proper response to the order."

is governed by the Statute of Limitations,³³ and when the account is filed the court's authority is exhausted.³⁴

§ 918. Consolidating the proceeding.—Any party may contest the account provided the proceeding is not consolidated with a subsequent proceeding instituted for the judicial settlement of the representative's account,³⁵ which can only be after the expiration of a year from the grant of letters. If a year has elapsed, by the return day of the citation, the representative may present a petition for the judicial settlement of his account, whether a compulsory proceeding against him is pending or not.³⁶ "The consolidation does not affect any power of the surrogate, which might be exercised in either proceeding."³⁷

ARTICLE FOURTH.

JUDICIAL SETTLEMENT OF ACCOUNT.

SUBDIVISION 1.

WHOSE ACCOUNTS SUBJECT TO JUDICIAL SETTLEMENT.

§ 919. Executors and administrators.—The executor or administrator may, himself, apply for the settlement of his account,³⁸ either (1) where one year has expired since letters were issued to him, (2) where notice requiring all persons having claims

³³ Matter of Hale, 6 App. Div. 411; 39 N. Y. Supp. 577; overruling, in part, Matter of De Russy, 37 St. Rep. 646.

³⁴ See Campbell v. Bruen, 1 Bradf. 224. In Matter of De Russy (37 St. Rep. 646; 20 Civ. Proc. Rep. 270), an intermediate account was filed, under subdivision 4, pursuant to an order made by the surrogate on his own motion. Held, that he had no authority to appoint a referee of his own motion, to examine it. The statute provides no authority for the judicial examination of an intermediate account by means of a reference or otherwise in such a case. "The parties in interest may contest and investigate the account, but until they shall be brought in, or otherwise appear, the power vested in the surrogate will be exhausted by obtaining and filing a proper account. The object of the law will then be attained, and that is to show by the account the condition of the estate." (Ib.;

per Daniels, J.) This decision overrules Anonymous, 14 Civ. Proc. Rep. 38; 14 St. Rep. 490. Under the Revised Statutes, which did not make a clear distinction between an intermediate and a final account, it was held, that where the petition asked for nothing further than that the representative be required to render an account, the surrogate's jurisdiction was exhausted when the prayer had been fully complied with. (Westervelt v. Gregg, 1 Barb. Ch. 469; Smith v. Van Kuren, 2 id. 473.)

³⁵ Co. Civ. Proc., § 2728, as amended 1893; consolidating former § 2729. See § 955, *post*.

³⁶ Co. Civ. Proc., § 2727, as amended 1901.

³⁷ Ib.

³⁸ This chapter relates to the accounting of executors, administrators, and testamentary trustees; for that of guardians, see c. XX, *post*, and that of freeholders who sell land, etc., of a decedent, *ante*, § 905.

against the deceased to exhibit the same, with the vouchers thereof, to such executor or administrator has been duly published according to law,³⁹ (3) where his letters have been revoked,⁴⁰ or (4) where he desires to resign and be discharged.⁴¹ He may also render a voluntary account, where he has disposed of real property, under a power contained in the will, where one year has elapsed since the issue of letters.⁴² The power of the surrogate to call an executor or administrator to account does not extend to every person who assumes to act as an executor or administrator. A court of equity will sometimes call to account one who has, without authority, assumed to act in such a capacity, on the ground that the party in interest is entitled to treat him as a trustee.⁴³ But the jurisdiction of the surrogate, which depends upon the statute, is limited to those who are or have been authorized to act as executors or administrators.⁴⁴ But if one, who has tortiously interfered with the estate, subsequently takes out letters and qualifies, he becomes liable to account before the surrogate, and in such case the letters relate back; so that the time after which he may be compelled to account is to be computed from the first act of his unauthorized interference with the estate.⁴⁵ One named in the will as executor, but who has not

³⁹ Co. Civ. Proc., § 2728, as amended 1894 (former §§ 2729-2732). But upon an accounting of an *executor* under that provision, there can be no decree judicially settling the account and directing distribution, unless one year has elapsed since the issue of letters. (Matter of Lansing, 37 Misc. 177; 74 N. Y. Supp. 945; Matter of Bronner, 30 Misc. 31; Matter of Lawson, 36 Misc. 96.) Compare Co. Civ. Proc., § 2743.

⁴⁰ *Ib.*

⁴¹ Co. Civ. Proc., § 2689.

⁴² Baldwin v. Smith, 3 App. Div. 350; 38 N. Y. Supp. 299.

⁴³ Le Fort v. Delafield, 3 Edw. 32.

⁴⁴ The Probate Court of another State cannot discharge administrators appointed by a Surrogate's Court of this State, from their obligation to account to the latter court for property of the decedent received by them and made subject to the surrogate's jurisdiction here; and such administrators, after the grant of letters to them here, and after taking possession of property here, cannot be allowed to withdraw such property from this State until they have accounted for it. (Duffy v. Smith, 1 Dem. 202; Black v. Woodman, 5 Redf. 363.)

⁴⁵ Matter of Farrell, 1 Tuck. 110; Matter of Richardson, 2 Misc. 288; 23 N. Y. Supp. 978. See §§ 131, 513, *ante*. And where executors improperly interfere with and receive the rents of an estate, they may be compelled to account, as in other cases, and be allowed for repairs and care of such real estate. (Matter of Wilson, 1 L. Bul. 24.) In Matter of Eisner (1 Connolly, 358), one of the executors had, prior to the death of the testator, acted as his agent, and as such received moneys due the testator. He'd. that the debt was an asset of the estate for which the agent who has qualified as executor was liable as for so much moneys in his hands. The surrogate has power to try the validity of such a claim, and to hold the executor, if he be found to be a debtor, accountable therefor upon the settlement of his account. The burden is not on the contestant to show that those moneys had not been disbursed on account of the testator, or satisfactorily accounted for to him. It is the duty of the executor to give some account of their disposition. The jurisdiction of the Surrogate's Court is sufficient to probe the transactions of the executor with any one, and to

qualified, clearly cannot be required to account;⁴⁶ and an accounting by a representative, whose authority is derived from an order, void in law, is not within the power of the surrogate to direct.⁴⁷

§ 920. **Separate proceeding by one of two representatives.**—One of two or more executors or administrators may present a petition for a judicial settlement of his separate account, and in such case he must pray that his co-executor or co-administrator may also be cited.⁴⁸ But one executor cannot petition for a settlement of the account of himself *and* his co-executor, on which a citation can issue directing the latter to attend “as one of the executors;”⁴⁹ nor, it seems, can one of two or more representatives be cited alone, to render his account for judicial settlement.⁵⁰ Where each of two executors has filed an account, and one of them dies, the accounting of the other may proceed, but no distribution can be ordered until the appointment of an administrator of the deceased executor, and his appearance in the proceeding.⁵¹

§ 921. **In case of a deceased representative.**—The Code contains a provision, to the effect that where an executor, administrator, guardian, or testamentary trustee dies, the Surrogate’s Court has the same jurisdiction, upon the petition of his successor, or of a surviving executor, administrator, or guardian, or of a creditor or a person interested in the estate, or of a guardian’s ward or the legal representative of a deceased ward, or a surety upon the official bond of the decedent, or the legal representatives of a deceased surety, to compel the executor or administrator of the decedent to account, which it would have against the decedent, if his letters had been revoked by a surrogate’s decree.⁵² The application may be made at any time, in fact immediately, after the appointment of the representative of the deceased representative;⁵³ and may be made for the rendition of successive accounts to each person entitled thereto.⁵⁴

adjudge that property acquired by him, either with or without the assertion of his authority as executor, is equitably assets in his hands for distribution. (Matter of Schaefer, 34 Misc. 34; 69 N. Y. Supp. 489.)

⁴⁶ Wever v. Marvin, 14 Barb. 376; 7 How. Pr. 182.

⁴⁷ Matter of Turner, 34 Misc. 366; 69 N. Y. Supp. 1019.

⁴⁸ Co. Civ. Proc., § 2728, as amended 1893; consolidating former § 2729.

⁴⁹ Matter of Menck, 5 St. Rep. 341.

⁵⁰ Hood v. Hood, 1 Dem. 392.

⁵¹ Matter of Koch, 33 Misc. 672; 68 N. Y. Supp. 938.

⁵² Co. Civ. Proc., § 2606, as amended 1891; Peltz v. Schultes, 64 Hun. 369; 19 N. Y. Supp. 637. As to the persons to be cited, see § 923, *post*. The proceeding may be instituted by a trustee in bankruptcy of a legatee. (Matter of Wood, 34 Misc. 209; 69 N. Y. Supp. 491.)

⁵³ Matter of Wiley, 119 N. Y. 642; 29 St. Rep. 787; Cuthbert v. Jacobson, 2 Dem. 134; Matter of Scudder, 21 Misc. 179; 47 N. Y. Supp. 101.

⁵⁴ Spencer v. Popham, 5 Redf. 425.

§ 922. **Compelling delivery of trust property.**—"The Surrogate's Court has also jurisdiction to compel the executor or administrator [of a deceased representative], or successor of any decedent, at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow each credit upon the decree, as justice requires."⁵⁵ An administrator *de bonis non* is the proper person to apply to compel an administrator, alleged to have received assets of a deceased executor, to account for such assets;⁵⁶ the proceeding cannot be maintained by the next of kin, until after the refusal of the administrator *de bonis non* to proceed upon the request.⁵⁷ This provision of the statute does not authorize a direction for the payment of debts, legacies, or distributive shares.⁵⁸

§ 923. **Accounting by representative of deceased representative.**—Where several estates are involved by the decease of an executor or administrator, and the appointment of a representative of his estate, the surrogate has a right, on the application of a legatee of the first estate, to cite the personal representatives of the executor or administrator of that estate to account for their administration.⁵⁹ And upon the final settlement of such accounts, the surrogate may determine and liquidate the amount of the claim of the legatee against the second estate, whether such claim was against the decedent in his character of executor, or merely as a trustee under the will of the first testator. Before the amendment of 1884, the surrogate had no power to compel the executors or administrators of the second estate to render an account

⁵⁵ Co. Civ. Proc., § 2606, as amended 1901.

⁵⁶ Delivery of the trust property should be directed to be made either to the court or to some *designated* person representing the estate. (Mount v. Mount, 68 App. Div. 144; 74 N. Y. Supp. 148.)

⁵⁷ Matter of O'Brien, 45 Hun. 284; Matter of Soutter, 105 N. Y. 514. In Matter of O'Brien (*supra*), an administrator had converted the assets and mingled them indistinguishably with his own property, and they were received in that condition by his executor without notice; the parties interested in the estate represented by the deceased executor neglected to assert their rights, and allowed the administrator to distribute the assets,—

Held, they could not compel the executor to account.

⁵⁸ Matter of Trask, 49 N. Y. Supp. 825.

⁵⁹ Where a will placed the residuum of the estate so completely at the disposal of the executor as devisee and legatee for life that so much of the estate as may have been consumed by him in his lifetime under the terms of the will could not be properly charged against his personal representative, it is incumbent on contestants, before they can surcharge the account of such representative, to show the amount of the estate which came to the hands of the executor and the amount undisposed of at his death. (Matter of Ryalls, 74 Hun. 205; 56 St. Rep. 291.)

of the administration of the first estate.⁶⁰ By that amendment, jurisdiction was granted to Surrogates' Courts, to compel an executor or administrator of a deceased executor, administrator, trustee, or guardian to render an account not only as to money and property of the first estate which may have come to the hands of the party cited, but also as regards all such money and property which came at any time into the hands of the deceased representative or guardian;⁶¹ but the jurisdiction thus granted was limited to cases of compulsory accounting, and did not enlarge the jurisdiction of the surrogate, so as to authorize a proceeding by the representative of a deceased representative for a *voluntary accounting* as to the estate of the first decedent generally.⁶² The only accounting which could be had as to assets of the first decedent was in a compulsory proceeding instituted by a creditor of, or person interested in, the estate of the first decedent, or a successor or survivor of the representative of the latter.⁶³ By amendments passed in 1891 and 1901, the representative of a deceased executor, administrator, guardian, or testamentary trustee "may voluntarily account for the acts and doings of the decedent and for the trust property which had come to his possession or into the possession of the decedent;" and, upon his petition, the successor of such decedent and all persons who would be necessary parties to a voluntary accounting by the latter, "shall be cited and required to attend such settlement."⁶⁴

⁶⁰ The accounting did not extend to all the property of the first decedent, which came under the control of the deceased executor, etc., or to funds or property received by deceased and administered or appropriated by him, but only to such of the trust property as had come into the possession or control of the accounting party. (*Le Count v. Le Count*, 1 Dem. 29; *S. P., Maze v. Brown*, 2 Dem. 217; *Scofield v. Adriance*, id. 486.) It does not now extend to funds taken by the deceased executrix and widow on account of her interest as residuary legatee. (*Matter of Smith*, 46 App. Div. 318.) The legatee, however, cannot obtain a decree directing the delivery of the property to himself, but only to a person authorized by law to receive it, in order properly to administer the same; the object being to enable any one interested to compel the placing of the funds in official custody. (*Spencer v. Popham*, 5 Redf. 425.) See *Mount v. Mount*, 68 App. Div. 144; *Dakin v. Demming*, 6 Paige, 95;

Montross v. Wheeler, 4 Lans. 99; *Walton v. Walton*, 4 Abb. Ct. App. Dec. 512; *Murray v. Vanderpoel*, 2 Dem. 311.) Prior to the Code, a surrogate had no power to settle the accounts of a deceased guardian against his administratrix, nor to order a payment of the amount found due on such an application. (*Andrade v. Cohen*, 32 Hun. 225.)

⁶¹ *Matter of Fithian*, 44 Hun. 457; *affd.*, 114 N. Y. 370; *Herbert v. Stevenson*, 3 Dem. 236; *Perkins v. Stimmel*, 114 N. Y. 370; *Matter of Clark*, 119 id. 429; *Matter of Irvin*, 68 App. Div. 158; 74 N. Y. Supp. 443.

⁶² *Crawford v. Crawford*, 5 Dem. 37.

⁶³ *Bunnell v. Ranney*, 2 Dem. 327; *Herbert v. Stevenson*, 3 id. 236; *Matter of Butler*, 1 Connolly, 58.

⁶⁴ *Co. Civ. Proc.*, § 2606, as amended 1891 and 1901. The amendment of 1901 also provides for the revival of a proceeding for an accounting in the name of the representative or successor of the deceased executor. See § 921, *ante*.

§ 923a. **Superseded executor, administrator, etc.**—The decree of a Surrogate's Court, revoking letters issued by an executor or administrator, "may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the Surrogate's Court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought."⁶⁵ It is further provided, that where letters have been revoked by a decree of the Surrogate's Court, that court has the same jurisdiction, upon the petition of the successor, or of a remaining executor, administrator, or trustee, "to compel the person whose letters have been revoked, to account for, or deliver over money or other property, and to settle his account, which it would have upon the petition of a creditor or person interested in the estate, if the term of office, conferred by the letters, had expired by its own limitation."⁶⁶ If the decree of revocation does not contain such a provision, the surrogate cannot compel him to account, on the petition of a creditor.⁶⁷ After proceedings have been instituted by an administrator, for a final accounting, and the surrogate has acquired jurisdiction thereof, the revocation of the letters of administration does not oust the surrogate of jurisdiction, or prevent him from proceeding to a final decree.⁶⁸

§ 924. **Testamentary trustees.**—The distinction between executors, on the one hand, whose duties are to collect the property, to pay the debts and general legacies, and ascertain the residuum either for distribution or for the constitution of a trust fund; and, on the other hand, testamentary trustees, who are to deal with real property in trust or administer a trust fund, has already

⁶⁵ Co. Civ. Proc., § 2603: which extends also to guardians. See § 444, *ante*. But this section does not authorize a direction to pay a legacy under the earlier will, or make distribution to creditors of the estate disposed of by it. (Matter of Moehring, 154 N. Y. 423.)

⁶⁶ Co. Civ. Proc., § 2605: which extends also to guardians. See Gerould v. Wilson, 81 N. Y. 573; Sperb v. McCoun, 110 id. 605; Matter of O'Brien, 45 Hun. 284. The beneficiaries under the will of the first decedent are not necessary parties to the proceeding by the successor. (Matter of Bacon, 24 Week. Dig. 194.)

⁶⁷ Breslin v. Smyth, 3 Dem. 251.

⁶⁸ Casoni v. Jerome, 58 N. Y. 315. It seems that, in such case, it is proper, and may be necessary, that a new administrator should be appointed to represent the estate, before continuing the proceedings. (Ib.) Before the amendments, the proceeding given in the case of a superseded executor or administrator was construed rather strictly, as a mere discovery, and as not enabling the surrogate to compel the predecessor to deliver and pay the assets to the successor. (Annett v. Kerr, 2 Robt. 556; 28 How. Pr. 324.)

been discussed.⁶⁹ The rules applicable to the control of these two classes of functionaries, to their accountings, and their removal and discharge, are somewhat different; and the difference may exist, although they are the same persons, vested, it may be, with both functions in regard to the same estate and even at the same time.⁷⁰

Formerly, Surrogates' Courts had no jurisdiction to compel testamentary trustees, as distinguished from executors, to account; and the rule was the same whether they held as trustees of a power, or held the title in trust.⁷¹ The first statute of this State which conferred upon these courts jurisdiction over testamentary trustees was the Act of 1850,⁷² which allowed such trustees to account before the surrogates. From that time, until the enactment of the Code, the power of the Surrogates' Courts, in this regard, was enlarged by various supplementary acts, so as to permit an accounting of testamentary trustees in the same manner and by the same procedure as in the case of executors and administrators.⁷³ These statutes have been revised and subjected to various amendments in the present Code. By the amendment of 1885, it is provided that "any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, may at any time file an intermediate account, and may also annually render and finally judicially settle his accounts before the surrogate of the county having jurisdiction of the estate or trust, in the manner provided by law for the final judicial settlement of the accounts of executors and administrators, and may

⁶⁹ See § 319, *ante*. Where an executor, who is also a testamentary trustee, has made no separation of the fund allotted to the beneficiaries, and has opened no account in his new capacity, he is still an executor and liable to account as such. (Matter of Hord, 104 N. Y. 103.) A residuary bequest to an executor in trust, to pay debts and then to pay the income to a beneficiary for life, was followed by a bequest of the whole estate, on the death of the beneficiary for life, to another beneficiary upon reaching the age of twenty-one years, the income to be for her benefit until that time.—Held, that a severance of the functions of executor and trustee was contemplated, and that the executor was entitled to account finally as executor, and to a decree transferring the estate from himself as executor to himself

as trustee. (Matter of Emerson, 59 Hun. 244; 36 St. Rep. 306.)

⁷⁰ See Wood v. Brown, 34 N. Y. 337, and cases cited; Burt v. Burt, 41 id. 46; Quackenboss v. Southwick, id. 117; Matter of Anderson, 5 N. Y. Leg. Obs. 302; Matter of Crossman, 20 How. Pr. 350; Matter of Bull, 31 id. 78; 45 Barb. 337. The surrogate never had power to settle the accounts of a trustee acting under a *deed* of trust. (Vulte v. Martin, 44 How. Pr. 18; Brown's Accounting, 16 Abb. Pr. [N. S.] 457.)

⁷¹ McSorley v. Leary, 4 Sandf. Ch. 414; Wever v. Marvin, 14 Barb. 376.

⁷² L. 1850, c. 272.

⁷³ See 2 R. S. 94, § 66; L. 1866, c. 115, § 1; amending L. 1850, c. 272, § 1; L. 1867, c. 782, § 1; L. 1871, c. 482, § 1. See Glover v. Holley, 2 Bradf. 20

for that purpose obtain and serve in the same manner the necessary citations requiring all persons interested to attend such final settlement; and the decree of the surrogate on such final settlement may be appealed from in the manner provided for an appeal from a decree of a Surrogate's Court on the final settlement of the accounts of an executor or administrator, and the like proceedings shall be had on such appeal; * * * the decree of the surrogate on such final annual settlement of an account provided for in this section, or the final determination, decree, or judgment of the appellate tribunal in case of appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trusts which shall have been embraced in such accounts, or litigated or determined on such settlement."⁷⁴

§ 925. Representative of a deceased trustee.—Whatever statutory jurisdiction Surrogates' Courts may have of a trustee *appointed by the Supreme Court*, the administration of the trust is primarily under the control of the latter court, and it does not follow that because the former court may call upon such a trustee, if living, for an accounting, it has the same authority to compel his representative to account.⁷⁵ Where, however, the trustee derives his authority from a will, such a power does exist.⁷⁶

§ 926. Temporary administrators.—The account of a temporary administrator may be judicially settled at any time,⁷⁷ and on the application of any one interested in the estate.⁷⁸ On the revoca-

⁷⁴ Co. Civ. Proc., § 2802, as amended 1885. The expression, "testamentary trustee," as used in the Code, "includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator." (Co. Civ. Proc., § 2514, subd. 6.) As to whether a surrogate has power to require a testamentary trustee to render to life beneficiaries *quarter-yearly* statements of their dealings with the estate, see *DeLafield v. Schuchardt*, 2 Dem. 435. An executor who is directed to sell testator's real estate, invest the proceeds, and

pay the income to testator's daughter for life, is a testamentary trustee within Co. Civ. Proc., § 2514, subd. 6, *supra*, and, therefore, he may be required to account in the Surrogate's Court for the proceeds of land sold by him and to distribute the same as provided by sections 2802-2811, relating to accountings by testamentary trustees. (*Matter of Valentine*, 23 N. Y. Supp. 289.)

⁷⁵ *Matter of Hazard*, 51 Hun. 201; 21 St. Rep. 787 (substituted trustee appointed by the Supreme Court).

⁷⁶ Co. Civ. Proc., § 2606; *Matter of Kreischer*, 30 App. Div. 313; 51 N. Y. Supp. 802. See *Matter of Steinway*, 37 Misc. 704.

⁷⁷ Co. Civ. Proc., § 2726, as amended 1893.

⁷⁸ *Matter of Gall*, N. Y. Law J., Jan. 30, 1890.

tion of his letters, his accounting may be compelled by his successor.⁷⁹ He has not an absolute right to demand a judicial settlement of his accounts until his function is terminated by the appointment of a permanent representative, who may be brought in as a party to the proceeding.⁸⁰

§ 927. **Administrators with the will annexed.**—An administrator with the will annexed may petition for a judicial settlement of his account and the distribution of the estate, without waiting the expiration of a year from date of his letters, as he is not within the restriction contained in the section authorizing a compulsory proceeding.⁸¹

SUBDIVISION 2.

WHEN SETTLEMENT MAY BE COMPELLED.

§ 928. **Accounts of executors and administrators.**—“In either of the following cases, the Surrogate’s Court may, from time to time, compel a judicial settlement of the account of an executor or administrator: (1) Where one year has expired since letters were issued to him. (2) Where letters issued to him have been revoked, or, for any other reason, his powers have ceased.” (3) Where a decree for the disposition of real property, or of an interest in real property, for the payment of debts or funeral expenses, has been made, as prescribed in the Code, and the property, or a part thereof, has been disposed of by him, pursuant to the decree.⁸² (4) Where he has sold, or otherwise disposed of, any of the decedent’s real property, or devisable interest in real property, or the rents, profits, or proceeds thereof, pursuant to a power contained in the decedent’s will, where one year has elapsed since letters were issued to him.”⁸³

§ 929. **Testamentary trustees.**—“In either of the following cases, the Surrogate’s Court may, from time to time, compel a judicial settlement of the account of a testamentary trustee: (1) Where one year has expired since the will was admitted to probate. (2) Where the trustee has been removed, or, for any other reason, his powers have ceased. (3) Where the trusts, or one or more distinct and separate trusts, created by the terms of the will,

⁷⁹ Co. Civ. Proc., § 2605. See § 422, 31 N. Y. Supp. 588; *affd.*, 146 N. Y. 257; *Matter of Bradley*, 25 Misc. 261; *ante*.

⁸⁰ *Bible Society v. Oakley*, 4 Dem. 54 N. Y. Supp. 555; *affd.*, 42 App. Div. 301.

⁸¹ *Matter of Burling*, 5 Dem. 47.

⁸² *Matter of Bolton*, 83 Hun. 259; 1893; consolidating former § 2724. ⁸³ Co. Civ. Proc., § 2726, as amended.

63 St. Rep. 142; as *Bolton v. Myers*,

have been executed, or are ready to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee.”⁸⁴ The testamentary trustee himself may *voluntarily* petition for the settlement of his account, either (1) “where one year has expired since the probate of the will, or when the trusts, or one or more distinct and separate trusts, created by the will, have been, or are ready to be, fully executed;”⁸⁵ or (2) when he desires to resign and obtain his discharge.⁸⁶

§ 930. **Successive accountings.**—Representatives are not to be required to account a second time in respect of moneys which they have duly paid, in accordance with a judgment which was obligatory upon them, although the judgment be afterward overruled or reversed.⁸⁷ After an executor’s account has once been judicially settled, the mere fact that, since the entry of the decree, assets have come into his possession for which the decree made no provision does not, of itself, afford sufficient ground for compelling another accounting. Considerations of economy may indicate the propriety of the postponement of another settlement, until it can embrace the results of a completed administration.⁸⁸ Moreover, the decree on the preceding accounting is, in certain particulars, conclusive on all the parties to it, until set aside.⁸⁹

§ 931. **Authority of surrogate pending accounting in Supreme Court.**—The fact that a trustee was appointed by the Supreme Court in the place of a deceased trustee named in the will, and consequently liable to account in that court, does not deprive the Surrogate’s Court of jurisdiction to compel him to account to it.⁹⁰ Therefore, an answer to a petition to compel an accounting, which, without denying the petitioner’s claim as legatee, sets up the pendency of an action commenced by the trustee, in which the petitioner and others are defendants, to settle alleged conflicting claims upon the fund, is not a ground for refusing an order that the trustee account in the Surrogate’s Court;⁹¹ but where a legatee

⁸⁴ Co. Civ. Proc., § 2807.

⁸⁵ Co. Civ. Proc., § 2810.

⁸⁶ Co. Civ. Proc., § 2814.

⁸⁷ Shipman v. Fanshaw, 15 Abb. N. C. 288.

⁸⁸ Wetmore v. Wetmore, 3 Dem. 414.

See Close v. Shute, 4 id. 546.

⁸⁹ Matter of Soutter, 105 N. Y. 607.

⁹⁰ Matter of Pitcher, 4 L. Bul. 32.

See Co. Civ. Proc., § 2810.

⁹¹ Matter of McCarter, 94 N. Y. 558. Compare Matter of Ayrault, 81

Hun, 107; 30 N. Y. Supp. 654. It is no answer to the application of the successor of a deceased executor to compel the accounting of the representative of such executor, that such executor had a claim against his own testator’s estate in respect to which an action is now pending. (Stewart v. O’Donnell, 2 Dem. 17.) Compare Christy v. Libby, 2 Daly, 418; Lewis v. Maloney, 12 Hun, 207. See § 908, *ante*. But it seems that it is im-

or distributee has commenced an action against the representative to recover the amount of his legacy or distributive share, the Surrogate's Court, though having the power, will not generally entertain a proceeding for the same purpose and for an accounting, pending the action.⁹² The pendency of an equitable suit, by a claimant, for his own benefit, and not for the general benefit of all entitled to share in the distribution, is not a reason for suspending the proceedings for an accounting before the surrogate. But the representative should not be unnecessarily put to the expense and trouble of a double accounting. In such a case, it is proper for him to apply, in the equitable suit, for a full and final accounting of his administration. If he fails to do so within a reasonable time, the surrogate may properly require him to proceed, notwithstanding the pendency of the suit in equity.⁹³ Where, however, a creditor has obtained a decree for an accounting, in the usual form, in behalf of himself and all others who may come in, the surrogate should not proceed, at the instance of other creditors, if the fact of the pendency of the suit is interposed in abatement. In such case, the court of equity might enjoin such other creditors from proceeding before the surrogate, and compel them to come in under the decree or be barred.⁹⁴

§ 932. **Proceeding barred by Statute of Limitations.**—As the right to *compel* an accounting accrues on the expiration of one year from the date of the grant of letters, such right is barred after the lapse of six years from the time of such expiration—

proper for testamentary trustees to begin an action in the Supreme Court for an accounting, pending their accounting as executors in the Surrogate's Court. Executors who are charged with trust duties should, when finally accounting as executors, include all their proceedings in the administration of the estate, in whatever capacity they have assumed to act. (*Whitney v. Phoenix*, 4 Redf. 180.)

⁹² *Lewis v. Maloney*, 12 Hun. 207; *Matter of Straut*, 22 St. Rep. 550; *Matter of De Pieris*, 79 Hun. 279; 29 N. Y. Supp. 360; *Matter of Merritt*, 35 App. Div. 337; 54 N. Y. Supp. 955. On the other hand, where an executor's accounts have already been passed by the surrogate, a party cannot compel the rendition of a new account in the Supreme Court until he has proved that he is entitled to it by impeaching the one already rendered. (*Moffat v. Moffat*, 3 How. Pr. [N. S.] 156.) As to binding effect of a judg-

ment of the Supreme Court upon the surrogate, on the question of distribution, see *Matter of Ransier*, 26 Misc. 582; 57 N. Y. Supp. 650.

⁹³ *Bloodgood v. Bruen*, 2 Bradf. 8.

⁹⁴ *Rogers v. King*, 8 Paige, 210; *Bloodgood v. Bruen*, 2 Bradf. 8. Compare *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214. Where executors brought an action against surviving partners of the testator to close up the estate, and it was alleged that moneys were withdrawn from the firm by the testator during his lifetime, and defendants interposed a counterclaim for the moneys thus withdrawn without their consent.—Held, that defendants, upon its appearing that the executors would probably make a distribution of the assets in their hands before the determination of the suit, might have an injunction to restrain them from so doing. (*Mitchell v. Stewart*, 3 Abb. Pr. [N. S.] 250.)

that is, seven years from the grant of letters,⁹⁵ *i. e.*, the grant of letters to the representative called on to account.⁹⁶ But this period may be extended by some act or admission of the representative, *e. g.*, payment on account of the petitioner's debt or legacy.⁹⁷ The provision of section 1819, that for the purpose of computing the time within which *an action* may be commenced to recover the amount of a legacy or distributive share, the cause of action is deemed to accrue when the representative's account is judicially settled, has no application to this proceeding.⁹⁸ The time when the petitioner first had knowledge of the grant of letters, has no effect on the running of the statute.⁹⁹ A surety on an adminis-

⁹⁵ *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359; *Thomson v. Thomson*, 1 Bradf. 24; *Matter of Miller*, 15 Misc. 556; 37 N. Y. Supp. 1129; *sub nom.* *Matter of Elkins*, 74 St. Rep. 299; *Matter of Kirkpatrick*, 9 Misc. 228; 30 N. Y. Supp. 283. See *Matter of Van Wert*, 3 Misc. 563; 24 N. Y. Supp. 719; *Matter of Schlesinger*, 36 App. Div. 77; 55 N. Y. Supp. 514; *Matter of Barnes*, 25 Misc. 279; 55 N. Y. Supp. 430, and cases *infra*. The objection must be taken by answer and not by motion to dismiss. (*Matter of Jordan*, 50 App. Div. 244; 63 N. Y. Supp. 911.) As to the application of the statute to an accounting for the proceeds of land sold to pay debts, see *Matter of Sargent*, 42 App. Div. 361; 59 N. Y. Supp. 105.

⁹⁶ In *Matter of Post* (30 St. Rep. 217; 9 N. Y. Supp. 449), a proceeding against an administrator with the will annexed, who had received assets within six years, was sustained, although more than that period had elapsed since the granting of original letters testamentary. If the representative has paid out the assets in advance of the final settlement, and costs he incurred in a suit in behalf of the estate in which he failed, the Statute of Limitations is no defense to a call upon him for an accounting for the claim. (*Matter of Mills*, 37 St. Rep. 706; 13 N. Y. Supp. 783.) In *Matter of O'Brien* (33 Misc. 17; 67 N. Y. Supp. 1116), a judgment having been obtained against an executor on a disputed claim, the party holding the judgment was allowed to intervene and file objections to the account, the decree on the accounting being vacated. The judgment being reversed, a motion was made to vacate the order allowing intervention.—Held,

that upon reversal the creditor became a mere holder of a disputed claim, and as such was barred by the lapse of time and the motion was granted, without prejudice to another application should he again recover judgment. An executrix having died nearly seven years after letters were issued to her, without accounting, and another executrix having qualified.—Held, that the latter could not be compelled to account until one year had elapsed from the date of her own appointment. (*Matter of Crowley*, 33 Misc. 624; 68 N. Y. Supp. 939.) In *Matter of Longbotham* (38 App. Div. 607; 57 N. Y. Supp. 118), the Appellate Division of the Second Department held, upon the authority of *Matter of Rogers* (153 N. Y. 316), that an accounting by an administratrix is barred by the lapse of ten years. From an examination of the *Rogers* case, however, it would seem not to be an authority for the proposition asserted by the learned Appellate Division. But see *Matter of Smith*, 66 App. Div. 340; 72 N. Y. Supp. 1062.

⁹⁷ *Matter of Campbell*, 21 Misc. 133; 47 N. Y. Supp. 29.

⁹⁸ *Matter of Van Dyke*, 44 Hun. 394; *Matter of Dunham*, 1 Connoly. 323; 22 Abb. N. C. 479; *Matter of Clayton*, 1 Connoly. 444; 22 St. Rep. 886. Compare *Butler v. Johnson*, 111 N. Y. 204; 19 St. Rep. 85; *Matter of Latz*, 33 Hun. 618; *Matter of Hodgman*, 31 St. Rep. 479; 10 N. Y. Supp. 491. And see § 782, *ante*.

⁹⁹ *Matter of Clayton*, 1 Connoly. 444. The cases of *Collins v. Waydell* (3 Dem. 30; 6 Civ. Proc. Rep. 85), and *Wood v. Rusco* (4 Redf. 380), are overruled on this point. See *Matter of Van Dyke*, 44 Hun. 394; *Drake v. Wilkie*, 30 id. 537.

trator's bond has no longer time to compel an accounting than any other party.¹ But a proceeding by the successor of a deceased representative for an accounting by the executor or administrator of the latter is not concurrent with any right of action at law, and is, therefore, not barred until ten years after the death of such predecessor;² otherwise, however, where such proceeding is instituted by legatees, next of kin, or creditors.³

Independently of the statute, a great lapse of time, *e. g.*, twenty-nine years since the issue of letters, has been regarded as sufficient to bar the right of a creditor to demand a formal account, even where the applicant's demand has not been barred by the Statute of Limitations. But in such case, if it be suggested that the executor or administrator has recently received assets, he may properly be compelled to submit to an examination, for the purpose of establishing the right to an account.⁴ But in the absence of any such suggestion, the surrogate may properly presume, after the lapse of a quarter of a century from the commencement of administration, that full administration has been had; or will hold, at least, that the applicant is barred by his own acquiescence.⁵ Where the fund is a direct trust, and not the ordinary case of assets of the estate, the rule applies that no lapse of time is a bar,⁶ so long as there is no open repudiation of the trust, or until the determination thereof.⁷

SUBDIVISION 3.

AT WHOSE INSTANCE SETTLEMENT MAY BE COMPELLED.

§ 933. **Compulsory settlement of account of executor, etc.**— Application to compel a judicial settlement of the account of an

¹ Matter of Perry, 37 St. Rep. 576; Div. 446; 42 N. Y. Supp. 295; Govin 15 N. Y. Supp. 535.

² Matter of Rogers, 153 N. Y. 316; Supp. 347; Matter of Martin, 27 Matter of Latz, 33 Hun, 618; Pitkin Misc. 416; 59 N. Y. Supp. 374; v. Wilcox, 12 N. Y. Supp. 322. See Matter of Post, 30 Misc. 551; 64 Matter of Waite, 43 App. Div. 296. N. Y. 369; Mount v. Mount, 35

³ Matter of Boylan, 25 Misc. 281; Misc. 62. For an application of this rule to executors, see Matter of 55 N. Y. Supp. 426; Matter of Barnes, 25 Misc. 279; 55 N. Y. Supp. 430. Beyea, 10 Misc. 198; 31 N. Y. Supp.

⁴ Leroy v. Bayard, 3 Bradf. 229; 200; Matter of Jones, 51 App. Div. Warren v. Paff, 4 id. 260. 420; 64 N. Y. Supp. 667. As to

⁵ Thomson v. Thomson, 1 Bradf. 24, guardians, Matter of Camp, 50 Hun, 29; Matter of Hood, 90 N. Y. 512. 388; s. c., on another appeal, 126 N. Y.

⁶ Robinson v. Robinson, 5 Lans. Y. 377. See Matter of Porter, 30 168; Stouvenel's Estate, 1 Tuck. 241; App. Div. 213; 51 N. Y. Supp. 609.

⁷ Merritt v. Merritt, 32 App. Div. 442; Matter of Irvin, 68 App. Div. 158; 53 N. Y. Supp. 127; affd., 161 N. Y. 74 N. Y. Supp. 443.

634; Cornwell v. Clement, 10 App.

executor or administrator, including a temporary administrator, may be made "by a creditor, or a person interested in the estate or fund, including a child born after the making of a will; or by any person, in behalf of an infant so interested; or by a surety in the official bond of the person required to account, or the legal representative of such a surety."⁸ The accounting which may be called for by a creditor or other party in interest, after the expiration of one year, is a matter of right, which the surrogate is bound to order, on the single fact being shown that the applicant has a demand as creditor, legatee, or next of kin.⁹

§ 934. Testamentary trustees.—Application to compel a judicial settlement of the account of a testamentary trustee may be made "by any person beneficially interested in the execution of any of the trusts; or by any person in behalf of an infant so beneficially interested; or by a surety in the bond of the testamentary trustee, given as prescribed" in the Code, or by the legal representative of such a surety.¹⁰ It is not necessary that there should be a party entitled to present payment; the account may be required in order to disclose the state of the fund, its amount, and the securities in which it is invested.¹¹ Thus, a remainderman is "a person interested in the estate," under the statute, and may demand an accounting without waiting the termination of the prior estate.¹² It is not necessary that the petitioner's legacy should be due and presently payable. One who is entitled to a legacy upon the death of another person has such an interest as entitles him to demand an accounting by the executor.¹³

§ 935. Settlement at instance of co-executors, etc.—It is well settled, that one executor or administrator may institute a pro-

⁸ Co. Civ. Proc., § 2727, as amended 1893: consolidating former § 2726. For the difference between an intermediate accounting and a judicial settlement, see *Matter of Fithian*, 1 Connolly, 187; and § 913, *ante*.

⁹ *Matter of Jones*, 1 Redf. 263. But a person interested, who was not cited on an accounting, is not entitled to proceed *de novo*, but should move to open the decree. (*Matter of Killan*, 66 App. Div. 312; 72 N. Y. Supp. 714.)

¹⁰ Co. Civ. Proc., § 2808.

¹¹ *Bogart v. Van Velsor*, 4 Edw. 718; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Matter of Lawrence*, 16 St. Rep. 971; 15 Civ. Proc. Rep. 54.

¹² *Campbell v. Purdy*, 5 Redf. 434. See *Matter of Watts*, 68 App. Div. 357; 74 N. Y. Supp. 75. Otherwise, prior to the Code. (*O'Connor v. Garigan*, 17 Week. Dig. 302.)

¹³ *Matter of Wood*, 5 Dem. 345. Where a fund is to be paid to legatees when they attain their majority, such legatees may, upon reaching that period, compel the executors to account before the surrogate, although the executors may have had their accounts finally settled during the minority of the legatees. (*Hood v. Hood*, 1 Dem. 392; 27 Hun. 579.) See s. c., 90 N. Y. 515, and *Edwards v. Edwards*, 1 Dem. 132.

ceeding to compel his co-executor or co-administrator to account for that part of the estate in his hands;¹⁴ and especially is this so, where the executors are also trustees under the will, entitled as such to the residue of the estate.¹⁵ In like manner, one of two executors may compel his co-executor to account as executor of *another* estate which the two executors are entitled to receive under the will of their testator. It is true that, in common-law courts, one co-executor or administrator cannot sue his colleague for a debt due from the latter to the decedent; but a court of equity can settle the question arising in such cases, and make such disposition of the fund as justice and equity require. And there is no reason why that cannot be done in this proceeding before the surrogate, as well as by a suit in equity. In such a case, the surrogate, upon a final settlement of the account of the executor who is thus required to render his account, may declare and determine the balance in the executor's hands which belongs to the estate of the second testator, and direct him to apply it, in the due course of his administration, as one of the executors of the latter estate. Then, whenever afterward called to account, as one of the executors of the latter estate, the decree of the surrogate will be the evidence of the amount due from him to such latter estate, in his character of executor of the former estate.¹⁶

¹⁴ Woodruff v. Woodruff, 17 Abb. Pr. 165; Matter of Rumsey, 45 St. Rep. 453; 18 N. Y. Supp. 402; Matter of Hodgman, 31 St. Rep. 479; 10 N. Y. Supp. 491. See Matter of Archer, 23 N. Y. Supp. 1041.

¹⁵ Buchan v. Rintoul, 70 N. Y. 1; Wood v. Brown, 34 id. 337; Burt v. Burt, 41 id. 46; Mead v. Willoughby, 4 Dem. 364. And a surviving executor may sue, for an accounting, the executor of his co-executor (who had exclusive control of the estate), alleging defendant's mismanagement of the deceased co-executor's estate. (Price v. Brown, 60 How. Pr. 511.) A removed executor may be cited by his successor to account. (Marrison v. Clark, 87 N. Y. 572; Matter of Seitz, 16 Misc. 522; 40 N. Y. Supp. 206.) See *ante*, § 923a.

¹⁶ Smith v. Lawrence, 11 Paige, 206. So, too, where the executor had been a co-partner with the decedent in a mercantile firm, and his co-executrix petitioned that he be required to account, and accordingly he filed an account, stating what interest of the

decedent was in the partnership, and that it was unliquidated.—Held, that the surrogate had power to require him to proceed with the accounting, and produce the papers and books of account of the late firm, and to submit to such examination as might be necessary to disclose the accounts of the decedent with the partnership. The co-partner and co-executor in such case may be required by the surrogate to disclose the state of the assets by rendering an account. (Woodruff v. Woodruff, 17 Abb. Pr. 165; followed in Matter of Stouvenel, 1 Tuck. 241.) The objection that he might not have the jurisdiction of a court of equity to settle the partnership account, and wind up the affairs of the concern upon the executor's application for a final settlement of the account, does not affect his power to require an account to be rendered in such a case. See Matter of Rumsey, 45 St. Rep. 453; 18 N. Y. Supp. 402; Matter of Hodgman, 31 St. Rep. 479; 10 N. Y. Supp. 491.

§ 936. Who is "a person interested."—"The expression, 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband and wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor."¹⁷ The representative's interest in the estate, to the extent of the statutory commissions he may become entitled to receive, does not make him a person interested within the meaning of the statute so as to entitle a receiver of his property to compel him to account, for the purpose of ascertaining the commission earned, and reaching the same or any surplus thereof.¹⁸ Creditors are entitled to institute the proceeding, and to be made parties to a voluntary accounting;¹⁹ but the creditor must be a creditor of the decedent. Hence one claiming to be a creditor upon a contract made with the executor has no standing.²⁰

§ 937. Legatees and distributees.—Legatees and distributees are given a remedy (besides that of an action) by a special proceeding for the payment of their legacy or distributive share;²¹ and they may include, in one proceeding, an application for the payment of the legacy or share, and for the settlement of the representative's account.²² Such a legatee or distributee may make the application, notwithstanding he has assigned his interest, or executed a release to the representative, on an allegation that the

¹⁷ Co. Civ. Proc., § 2514, subd. 11. See cases cited *ante*, § 98. The fact that the applicant has no interest in the estate, though it may be a sufficient defense to the proceeding before the surrogate, is not ground for granting an injunction in a court of equity, to stay the proceedings before the surrogate. (*Becker v. Hager*, 8 How. Pr. 68.)

¹⁸ *Worrall v. Driggs*, 1 Redf. 449. But when the husband of decedent is administrator of her estate, a receiver appointed in supplementary proceedings, instituted upon a judgment against the husband, is entitled to be cited upon the administrator's accounting, and is the assignee of the administrator's share of his wife's estate. (*Matter of Gilligan*, 1 Connolly, 137; 18 St. Rep. 812.) See *Matter of Rainey*, 26 N. Y. Supp. 892. Compare *Matter of Brown*, 47 Hun. 360.

¹⁹ See §§ 96, 97, *ante*, and § 938, *post*.

²⁰ *Mead v. Willoughby*, 4 Dem. 364 (services rendered to executor); *Matter of Sharp*, 5 id. 510 (goods purchased by executor, in continuation of decedent's business). See § 617, *ante*. *Matter of Flint*, 15 Misc. 598; 38 N. Y. Supp. 188 (claim for funeral expenses). See § 546, *ante*. Compare *Matter of Hickey*, 34 Misc. 360; 69 N. Y. Supp. 844. But in *Close v. Shute* (4 Dem. 546), it was held, that attorneys for a plaintiff who had recovered a judgment against an administrator, have, by reason of their lien upon such judgment, a right to institute a proceeding to compel a judicial settlement of the administrator's account. See *Matter of Shafer*, 35 Misc. 371; 71 N. Y. Supp. 1033. See *ante*, § 552.

²¹ See *ante*, § 781.

²² *Matter of Macaulay*, 27 Hun. 577. Compare *Ashley v. Lamb*, 50 id. 568.

assignment or release was void.²³ A legatee of the residuary estate is a party in interest.²⁴ All persons who are entitled to share in the proceeds of the testator's real estate, sold by the executor under a power contained in the will, are deemed legatees within the statute, because the proceeds of a sale so ordered are regarded as personal estate, being deemed in equity as converted from realty by the direction of the will.²⁵

§ 938. Assignees of creditor, legatee, or next of kin.—As the surrogate has power, in a proceeding for a judicial settlement, to direct distribution of the surplus to and among creditors, legatees, next of kin, etc., or their *assigns*, it necessarily follows that an accounting may be ordered at the instance of such assigns, including a receiver²⁶ or trustee in bankruptcy,²⁷ of a legatee or next of kin; provided the interest of the assignor was assignable.²⁸

§ 939. Persons entitled to next eventual estate.—Where the executor has, in his capacity as such, received accumulations of in-

²³ Matter of Jones, 7 L. Bul. 91; Reiley v. Duffy, 4 Dem. 366; Matter of Read, 41 Hun. 95; citing Riggs v. Cragg, 89 N. Y. 490; Lambert v. Craft, 98 id. 347; Fiester v. Shepard, 92 id. 254; Harris v. Ely, 25 id. 138; Clock v. Chadeagne, 10 Hun. 97. The surrogate has jurisdiction to try the question of the validity of the release. (Ib.) Attaching creditors of a distributee are not proper parties to an accounting of an administrator and cannot contest the validity of an assignment of the distributee's share. (Duncan v. Guest, 5 Redf. 440.)

²⁴ Matter of Prout, 52 Hun. 109.

²⁵ Stagg v. Jackson, 1 N. Y. 206.

²⁶ Matter of Gilligan, 1 Connolly, 137; 18 St. Rep. 812; Matter of Stevens, 64 N. Y. Supp. 990; Matter of Beyea, 10 Misc. 198; 31 N. Y. Supp. 200. A covenant by a person interested, to pay attorneys a certain share of moneys to be recovered from the estate, in return for their services, is not an assignment, and gives the attorneys no right to compel an accounting by the representative. (Matter of Shafer, 35 Misc. 371; 71 N. Y. Supp. 1033.) A receiver of a legatee sufficiently alleges his authority by stating he was appointed receiver in a proceeding specified, without reciting each step in the proceeding. (Matter of O'Connor, 47 St. Rep. 415; 19 N. Y. Supp. 971.) If a valid appointment is denied, however, the petitioner must

prove it. (Ib.) See Matter of Sistrare, 2 Connolly, 545.

²⁷ Matter of Wood, 34 Misc. 209.

²⁸ L. 1896, c. 547, § 83; 1 R. S. 730, § 63, provides that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created are assignable." See Lent v. Howard, 89 N. Y. 181; Tolles v. Wood, 16 Abb. N. C. 19; First Nat. Bank, etc. v. Mortimer, 28 Misc. 686; Matter of Tompkins, id. 351. In Matter of Eisner (N. Y. Law J., Apr. 22, 1891), the surrogate said: "The assignment made to the petitioner is, if valid, operative only as to such interest as the assignor has in the estate other than his beneficial interest in the trust created for his benefit. This is inalienable, and the assignee could acquire no interest in it. She is, therefore, not entitled to any accounting respecting it. The principal of the trust estate in which the assignor would be entitled to share in case he survive the expiration of the trust is held by the respondents as trustees, and they have not been cited to account as such. They are, therefore, not called upon to account in this proceeding for such principal."

terest, which arose upon a provision of the will, void by the statute against perpetuities, and the accumulations, therefore, presumptively belong to the parties entitled to the next eventual estate, such parties may compel an accounting before the surrogate. The jurisdiction of the surrogate extends to the accounting in respect to such a fund, for the principal is under the control of the executor as such, and the authority to receive the interest or income may be deemed valid, although the direction for an accumulation be void.²⁹

SUBDIVISION 4.

THE PETITION, CITATION, AND ANSWER.

§ 940. Petition for voluntary judicial settlement.—Where an acting executor or administrator makes the application, as to his own account, in a case other than where he desires a revocation of his letters and a discharge from the trust, it must be by “a written petition, duly verified, praying that his account may be judicially settled; and that the sureties in his official bond, or the legal representatives of such surety and all creditors, or persons claiming to be creditors, of the decedent, except such, as by vouchers annexed to the account filed, appear to have been paid,³⁰ and the decedent’s husband or wife, next of kin, and legatees, if any; or, if either of those persons has died, his executor or administrator, if any, may be cited to attend the settlement. If one of two or more co-executors or co-administrators presents a petition for a judicial settlement of his separate account, it must pray that his co-executors or co-administrators may also be cited.”³¹ The pendency of a compulsory proceeding against the representative does not preclude him from presenting such petition.³²

§ 941. Time of filing petition.—According to the statute, the petition may be filed at any time after the expiration of one year since letters were issued to the petitioner, or where notice to creditors has been duly published.³³ It is to be observed that the statute in terms permits the filing of an account where notice to creditors has been published, and this may be, and often is, within one year from the grant of letters. But so far as *executors* are con-

²⁹ Robison v. Robison, 5 Lans. 165.

³⁰ It is better practice, however, to cite all creditors, whether paid or not. (Matter of De Forest, 86 Hun. 300; 33 N. Y. Supp. 216.) See Matter of Rainforth, 37 Misc. 660.

³¹ Co. Civ. Proc., § 2728, as amended 1894: consolidating former § 2729.

³² Co. Civ. Proc., § 2727, as amended 1901.

³³ This provision was first contained in L. 1893, c. 252, but that act was superseded by L. 1893, c. 686, which adopted the original section. The substance of the former act was, however, embodied in L. 1894, c. 421.

cerned, the Legislature, in enacting this amendment, seems to have overlooked other sections of the Code which require, or at least contemplate, that testate estates shall remain within the jurisdiction of the surrogate for one year. Hence, it has been held that the second subdivision of the section applies only to *administrators*, and that *executors* are not entitled to a judicial settlement of their accounts until after the lapse of one year.³⁴

§ 942. **Petition for leave to account on resignation.**—Where the applicant's letters have been revoked, his petition must also be in writing and duly verified, and must pray "that his account be judicially settled, and that his successor, if a successor has been appointed, and the other persons" above specified, be cited to attend the settlement. Upon the presentation of the petition, in either of such cases, the surrogate must issue a citation accordingly.³⁵ And where an executor or administrator desires to procure a revocation of his letters and a discharge from his trust, he may apply to the Surrogate's Court by "a written petition, duly verified, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the same persons may be cited to show cause why such a decree should not be made, who must be cited upon a petition for a judicial settlement of his account. * * * The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition, praying for a judicial settlement of the account of an executor or administrator."³⁶

§ 943. **Petition by testamentary trustee.**—Where the testamentary trustee, himself, makes the application, in a case other than that of his intended resignation, it must be by "a petition, duly verified, setting forth the facts, and praying that his account may be judicially settled; and that all the persons who are entitled, absolutely or contingently, by the terms of the will, or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner, as a part of his trust, may be cited to attend the settlement. Thereupon the surrogate must issue a citation accordingly."³⁷

³⁴ Matter of Lansing, 37 Misc. 177; 36 Co. Civ. Proc., § 2689. See 74 N. Y. Supp. 945; Matter of Bronner, 30 Misc. 31; Matter of Lawson, 36 id. 96. Compare Co. Civ. Proc., § 2743, as amended 1898.

³⁵ Co. Civ. Proc., § 2728, as amended 1893; consolidating former § 2732.

³⁶ Co. Civ. Proc., §§ 442, 443, *ante*.
³⁷ Co. Civ. Proc., §§ 2810, 2814. For proceedings on a petition for leave to resign, see § 451, *ante*.

§ 944. **Petition for compulsory accounting.**—An application by a creditor or other person above mentioned,³⁸ to compel the settlement of an executor's or administrator's account, must be made by a petition praying for the judicial settlement of the account, and that the executor or administrator be cited to show cause why he should not render and settle the same.³⁹ Upon the presentation of such a petition, a citation must be issued accordingly; except that, where the ground of the application is that one year has expired since the issue of letters, if the petition is presented within eighteen months after letters were issued to the executor or administrator, the surrogate may entertain or decline to entertain it, in his discretion.⁴⁰ The petition should be confined to the purpose of an accounting. It is improper, for instance, to combine in one petition a prayer (1) to vacate a decree settling the executor's account; (2) to revoke the executor's letters; (3) to compel him to make a discovery, and (4) to compel him to account. These remedies, being regulated by distinct provisions of the Code, should be separately pursued.⁴¹

§ 945. **Petition and citation against testamentary trustee.**—An application by a beneficiary, or other person above mentioned,⁴² to compel the settlement of a testamentary trustee's account, must be made by a petition praying for the judicial settlement of the account, and that the testamentary trustee may be cited to show cause why he should not render and settle the same. "Upon the presentation of the petition, the surrogate must issue a citation accordingly, unless the account of the testamentary trustee has been judicially settled, within a year before the petition is presented; in which case, the surrogate may, in his discretion, entertain, or decline to entertain, the petition."⁴³

§ 946. **Requisites and object of petition.**—The petition should propound the substance of the petitioner's claim, and the nature and grounds thereof, thus enabling the executor or administrator to object that the allegations are insufficient and show no grounds for proceeding against him, or take issue on the allegation, or put in a counter-allegation in the nature of a plea in abatement or

³⁸ See § 933, *ante*.

³⁹ A legatee under a will may compel the executor to account but there can be no distribution of the fund until all the parties in interest have been cited and given an opportunity to be heard. (*Matter of Rainforth*, 37 Misc. 660.)

⁴⁰ Co. Civ. Proc., § 2727, as amended 1893; consolidating former § 2726.

⁴¹ *Hood v. Hood*, 1 Dem. 392. See § 88, *ante*.

⁴² See § 933, *ante*.

⁴³ Co. Civ. Proc., § 2808.

bar.⁴⁴ Under the former statute, wherein the present clear distinction between an intermediate accounting, and the judicial settlement of an account, did not exist, it was held that a petition which sought anything more than the rendering of an account ought, properly, to specify the object, so as to include the settlement and adjustment of the account, and the payment of the debt, legacy, or distributive share which was sought for.⁴⁵ And although a prayer for general relief might be sufficient for this purpose,⁴⁶ yet it was held that where no relief, either general or specific, was asked, except the rendering of an account, the jurisdiction of the surrogate was exhausted when that prayer had been fully complied with;⁴⁷ the prayer for relief being regarded as determining the character of the proceeding.⁴⁸

§ 947. **Allegation of interest.**—The Code contains an express provision relating to the sufficiency of an allegation of interest on the part of “a person interested,” but the like subject, in respect to a creditor, is left under the rule established by the decisions. Where a provision of the eighteenth chapter of the Code “prescribes that a person interested may object to an appointment, or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending.”⁴⁹ It has been the settled practice to order an account, where only the rendering of an account is required, notwithstanding the interest of the party applying be denied, provided the allegation of interest is positive; that is, if facts are stated on oath sufficient, in the first instance, if uncontroverted, to show a legal interest.⁵⁰ But where, though an interest is alleged, the papers show on their face that the petitioner has no interest, the surrogate is not bound to entertain the application.⁵¹ Thus, where, in opposition to a petition for an accounting and payment, the representative set up that the petitioner had sold and assigned his claim to a third person named, who was not a party to the pro-

⁴⁴ *Foster v. Wilbur*, 1 Paige, 537; *Gratacap v. Phyfe*, 1 Barb. Ch. 485.

⁴⁵ *Westervelt v. Gregg*, 1 Barb. Ch. 469.

⁴⁶ *Wood v. Brown*, 34 N. Y. 337.

⁴⁷ *Westervelt v. Gregg*, *supra*; *Smith v. Van Kuren*, 2 Barb. Ch. 473.

⁴⁸ *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359. And see *Tucker v. McDermott*, 2 Redf. 314.

⁴⁹ Co. Civ. Proc., § 2514, subd. 11. In *Wever v. Marvin* (14 Barb. 376), a petition stating that the petitioner “was a creditor of the deceased, and, as such, has claims against the estate” was held sufficient.

⁵⁰ *Burwell v. Shaw*, 2 Bradf. 322, and cases *ante*, §§ 98, 99, and 936.

⁵¹ *Matter of De Pieris*, 79 Hun, 279; 29 N. Y. Supp. 360.

ceeding, the surrogate held that, as he could not determine the right of the assignee, because he could not be made a party, unless cited by the administrator on an application for a final settlement of the account, the proper course was to order the accounts to be rendered, as the applicant was, upon his own petition, *prima facie* entitled to the account, and might need the rendering of the account, to ascertain whether there had been a fair settlement, and whether there was good ground for an attempt to set aside the alleged assignment.⁵²

§ 948. **Representative's answer to petition.**— By way of answer to a petition and citation for a compulsory accounting, the representative may interpose a plea to the jurisdiction, or in abatement, or in bar, on the sufficiency of which the petitioner is entitled to be heard — that is, he may reply, by way of demurrer to the sufficiency of the answer, or he may set up new matter avoiding the answer. It is no sufficient answer by one of several executors to say that the others have not been served with the order to account; those served can account for what they have received. And he cannot claim that by a voluntary settlement with legatees, made out of court, he has been discharged as executor, and now holds the fund only as a trustee.⁵³ But where the validity and binding force of such a settlement is not called in question by the petitioner, and particular securities which were turned over to him in payment of his legacy, in pursuance of such settlement, continue to be held by the executor as the legatee's agent, the surrogate has no jurisdiction to order the latter to account as executor.⁵⁴

§ 949. **Impeaching petitioner's interest.**— The question of jurisdiction not infrequently arises, in these proceedings, on a plea that the petitioner has released his interest in the estate, as legatee, next of kin, or otherwise, to which the petitioner replies that the alleged release is void for the reasons set forth. Has the Surrogate's Court jurisdiction to try and determine the validity of such release? It is obvious that the determination of this question

⁵² Bonfanti v. Deguerre, 3 Bradf. 429.

⁵³ Bonfanti v. Deguerre, 3 Bradf. 431; Matter of Stouvenel, 1 Tuck. 241; Matter of Hood, 104 N. Y. 103; Matter of Shipman, 53 Hun. 511. By not objecting until after such objections have been filed, he loses the right to object on the ground that he

holds the property, at the time, as a trustee under the will. (Matter of Hutchinson, 19 Week. Dig. 268.) See Adams v. Outhouse, 45 N. Y. 318. As to what issues the surrogate has jurisdiction to try, see subd. 6 of this article, *post*.

⁵⁴ Woodruff v. Young, 31 Hun. 420.

is absolutely essential to enable the court to make an order of distribution, as to which its jurisdiction is very broad. The right of a particular person to participate in such distribution is an issue necessarily incidental to a determination as to how the account should be made and stated, and to whom the surplus should be paid. Hence, an answer setting up such an alleged release is not a ground for dismissing the petition of one of the next of kin. He has a right, as such, to demand an account for the purpose of ascertaining the condition of the accounts at the execution of the release, alleged to be invalid, and the further right, upon an accounting being had, to try the question of the validity of the release, as a necessary incident to his right to a distributive share.⁵⁵ So, an answer which, by not denying, admits the validity and legality of the petitioner's claim to interest on the trust fund, but sets up affirmatively that petitioner has assigned his interest, which averment the petitioner denies, does not show that the claim is of doubtful validity so as to deprive the surrogate of jurisdiction to order an account filed.⁵⁶ The fact that a creditor's claim is disputed is no ground for denying his application for a compulsory accounting.⁵⁷ One having an *apparent* interest in an estate may maintain the proceeding, notwithstanding he has executed a release of his interest in the estate, where there is a sworn allegation that such release is invalid.⁵⁸ It is not necessary that the petitioner's interest be established by full proof; if the petition is properly verified, the surrogate may, and ordinarily will, require the account, without trying the issue of interest, as between the representative and the petitioner.⁵⁹

The provision of the Code requiring a dismissal of the petition for the payment of a legacy or distributive share, upon the filing of a verified answer, raising a doubt as to the validity of peti-

⁵⁵ Matter of Read, 41 Hun, 95; 2 St. Rep. 339; followed in Matter of Dunkel, 5 Dem. 188. Compare Matter of Pruyn, 141 N. Y. 544; 57 St. Rep. 824. See Duane v. Paige, 82 Hun, 139; 31 N. Y. Supp. 310.

⁵⁶ Matter of McCarter, 94 N. Y. 558.

⁵⁷ Matter of Cowdrey, 5 Dem. 453; Schmidt v. Heusner, 4 id. 275; overruling Matter of George, 1 L. Bul. 87. See Matter of Zeuschner, 15 St. Rep. 744. An answer that the executor was the residuary legatee; that he was able and willing to pay all just claims due; that he had in fact paid

all claims except the petitioner's which was in dispute.—Held, not sufficient to warrant a dismissal. (Matter of Callahan, 66 Hun, 118; 49 St. Rep. 425.)

⁵⁸ Reilley v. Duffy, 4 Dem. 366; s. e. as Matter of Duffy, 3 How. Pr. (N. S.) 240; Fraenzinck v. Miller, 1 Dem. 136; Harris v. Ely, 25 N. Y. 138; Rieben v. Hicks, 4 Bradf. 136. See § 937, *ante*.

⁵⁹ Thomson v. Thomson, 1 Bradf. 24. See Matter of Kipp, 17 Misc. 491; 41 N. Y. Supp. 259; *affd.*, 5 App. Div. 625.

tioner's claim, applies exclusively to proceedings taken under that section, and has no application to a proceeding for a compulsory accounting.⁶⁰

§ 950. Defense of prior accounting.—Any plea in abatement or in bar, which would be held good in an action, may be interposed by the representative to the petition and citation in this proceeding. Thus, it is a good answer that a prior final accounting has been had, to which the petitioner was a party, as the decree on the prior accounting presumptively embraced all the matters as to which the representative was liable to account. If it did not, or if new facts existed rendering a further account proper, they should have been averred in the petition.⁶¹ The court has, however, under its general powers “to direct and control and settle the accounts of executors,” etc., discretionary power to open the account, and hear objections to it, on the representative's application to be finally discharged.⁶² It is no answer to a petition for an accounting to set up a counterclaim, since that cannot be tried before a surrogate,⁶³ or that the petitioner has collateral security belonging to the decedent, from the sale of which he

⁶⁰ Wood v. Crooke, 5 Redf. 381; Matter of Bearn, 5 L. Bul. 48. The account being ordered, the question of the jurisdiction of the surrogate to try and determine, upon the settlement of the account, the conflicting claims of the petitioner and of a third person, under an assignment of the petitioner's interest, is another matter, to which allusion will be made hereafter. See § 968, *post*.

⁶¹ Matter of Hood, 90 N. Y. 512; Hyland v. Baxter, 98 id. 610. Compare Rieben v. Hicks, 4 Bradf. 136. Such an accounting and decree do not bar a proceeding for the removal of the executor. (Matter of Hood, 98 N. Y. 363.) It is a good answer to an application to compel an accounting by a surviving representative that a full settlement had been made while the deceased representative was alive and solvent, which settlement had been, for many years, acquiesced in, and that by a stipulation in writing then made between the parties, an order was to be entered approving the account, though such order was never entered. The fact that the account was not approved and passed by the surrogate is not material. (Brandage v. Rust, 21 St. Rep. 900.) S. P., Mat-

ter of Wagner, 52 Hun, 23; Matter of O'Brien, 45 id. 284; Matter of Soutter, 105 N. Y. 514. The reversal, on appeal, of a prior decree, judgment not having been entered, is no answer to an application for a final accounting by an executor. (Matter of Reeves, 37 St. Rep. 959; 14 N. Y. Supp. 454; *affd.*, it seems, without opinion, in 128 N. Y. 612.)

⁶² In Matter of Cornell (137 N. Y. 600), an administrator petitioned to be discharged upon filing receipts showing payments made pursuant to the surrogate's decree in proceedings for a final accounting then pending, and that objections then filed should be overruled. The next of kin appeared, insisted upon said objections, and made further objections, referring to facts alleged which occurred since the accounting, showing bad faith on the part of the administrator on the accounting. Held, it was within the discretion of the surrogate to deny the motion, permit the filing of an answer by the next of kin, and direct a hearing thereon and that the exercise of this discretion was not reviewable in the Court of Appeals.

⁶³ Matter of O'Connor, 47 St. Rep. 415; 19 N. Y. Supp. 971.

had realized money for which he had not accounted, but which was applicable to the petitioner's claim.⁶⁴

§ 951. **Statute of Limitations.**—In addition to the plea that the proceeding is barred, as being commenced after the expiration of seven years from the grant of letters,⁶⁵ the outlawry of the claim upon which the petition is based is a good answer to it, where the fact appears on the face of the papers. If it does not so appear, the surrogate will not determine this issue upon the petition and answer alone, as the petitioner has the right to offer evidence to avoid the defense of the statute.⁶⁶ To be made available, the statute should be pleaded.⁶⁷ The plea of the statute may be interposed at any stage of the proceeding, *e. g.*, by the answer of the accounting representative made to objections of a creditor filed to the account.⁶⁸ It may be interposed, as well by a legatee or next of kin, as by the representative; and (with the qualification hereafter explained) as well against a claim presented by the representative, in his own favor, as against a claim by a creditor, legatee, or distributee.⁶⁹ And the same limitation which would apply to the claim in an action of law is, by analogy, applicable to the proceedings in the Surrogate's Court.⁷⁰

⁶⁴ Matter of Lyman, 60 Hun, 82; 37 St. Rep. 928; *affd.*, 128 N. Y. 614.

⁶⁵ See § 932, *ante*.

⁶⁶ Matter of Underhill, 1 Connolly, 541; 9 N. Y. Supp. 455; *affd.*, 32 St. Rep. 1061.

⁶⁷ Matter of Read, 41 Hun, 95. See Matter of Nicholls, 23 Abb. N. C. 479; Matter of Jordan, 50 App. Div. 244; 63 N. Y. Supp. 911.

⁶⁸ Where the representative accounts more than six years after the issue of letters, he cannot invoke the statute against objections to the account. (Matter of Lyth, 32 Misc. 608; 67 N. Y. Supp. 579.) In Matter of Clayton (1 Connolly, 444; 22 St. Rep. 886), the administrator filed a voluntary account admitting the receipt of the proceeds of a certain mortgage, but alleged that it was done only nominally as administrator, for the purpose of being able to satisfy the mortgage, to oblige the mortgagor; alleging that the mortgage was the individual property of the administrator, and denying that the same was an asset of the estate.—Held, that by this accounting the protection of the Statute of Limitations was not waived.

⁶⁹ Martin v. Gage, 9 N. Y. 398; Clark v. Ford, 1 Abb. Ct. App. Dec.

359; Warren v. Paff, 4 Bradf. 260; Treat v. Fortune, 2 id. 116; Broome v. Van Hook, 1 Redf. 444.

⁷⁰ Clark v. Ford, 1 Abb. Ct. App. Dec. 359. The statute begins to run against legatees, whose bequests are made payable out of the proceeds of real estate directed to be sold by the executors, from the time the executors execute the power. (Warren v. Paff, 4 Bradf. 260.) Lands vested in the deceased debtor are assets at the time of his death, and as to them the statute begins to run from the time the compulsory remedy, afforded by the statute for their sale, can be invoked, that is, [twelve] months after the grant of letters, or when an account of the personal estate has been rendered. (Ib.) But a decree against executors or administrators in a court of this State and of general jurisdiction cannot be questioned before the surrogate, in a proceeding relating to the personal estate. If the Statute of Limitations was a good bar to the claim in that court, it should have been interposed there. A judgment establishes a valid debt, entitled to be paid in due course of administration, if there are assets wherewith to pay it. (Leroy v. Bayard, 3 Bradf. 228.)

§ 952. **Denial of assets.**—It is a good answer to an application to compel the survivor of two executors or administrators to account that he never received any of the assets, the same having been exclusively managed and controlled by the deceased co-representative, the survivor not having been guilty of negligence or bad faith;⁷¹ although a mere denial by the representative that any property has come into his possession or under his control, does not terminate the proceeding; for the applicant may still examine the representative under oath.⁷² An answer denying the representative's knowledge or possession of any assets of the decedent may be treated as if it were an account filed, which the petitioner may object to, and falsify in the same manner.⁷³

§ 953. **When order to account is discretionary.**—If the petition is based on the fact of the lapse of one year since the issue of letters, and is presented "within eighteen months after letters were issued," in such case "the surrogate may entertain, or decline to entertain, it, in his discretion."⁷⁴ The real question for him to consider is whether it is for the best interest of the estate, and practicable, for the representative to render his account.⁷⁵ Such a discretionary order is not subject to review in the Court of Appeals;⁷⁶ and an order, though not discretionary, that the representative make and file an account is not appealable to that court, it not being a final order within the meaning of section 190.⁷⁷

⁷¹ *Brundage v. Rust*, 21 St. Rep. 900; s. c. as *Matter of Rust*, 23 Abb. N. C. 78.

⁷² Co. Civ. Proc., § 2729, as amended 1893; consolidating former § 2735.

⁷³ *Matter of Allen*, N. Y. Law J., June 30, 1892. In *Matter of Palmer* (3 Dem. 129), no inventory of decedent's property having been made or filed, and no proceedings having been taken to compel the return of an inventory, certain creditors cited the executors to account, with a view to the payment of their claims; whereupon the latter filed a duly verified account showing that no property of decedent's estate had come into their hands. Held, that the burden was cast upon the creditors of proving that the executors were chargeable with assets.

⁷⁴ Co. Civ. Proc., § 2727.

⁷⁵ In *Matter of Rabb* (N. Y. Law J., Nov. 25, 1891), the executor set up,

by way of an answer to a petition for a compulsory accounting, that one M. had an action pending in the Supreme Court against decedent to recover \$10,000, and that there were also pending certain actions to foreclose mechanics' liens. The application was granted, the surrogate saying: "Neither the details of the litigations, nor the reason why their pendency makes it impracticable for the executors to render an account, are stated. While it is possible that this may be a proper case for denying the application, the general allegations of the answer would not justify its denial." See *Matter of Merritt*, 35 App. Div. 337; 54 N. Y. Supp. 955; *Matter of Withers*, 23 App. Div. 404; 48 N. Y. Supp. 169.

⁷⁶ *Matter of Cornell*, 137 N. Y. 600.

⁷⁷ *Matter of Callahan*, 139 N. Y. 51.

SUBDIVISION 5.

FILING ACCOUNT AND OBJECTIONS THERETO.

§ 954. **Compulsory proceeding; order to account.**—If, on the return of a citation, issued against an executor or administrator, to show cause why he should not account, he fails either to appear or to show good cause to the contrary, or to present, in a proper case,—*i. e.*, if a year has elapsed since his letters were issued,—his own petition for a judicial settlement of his account, “an order must be made, directing him to account within such a time, and in such a manner, as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose.” He is “bound by such an order, without service thereof;⁷⁸ and if he disobeys it, the surrogate may issue a warrant of attachment against him, and his letters may be revoked, as where a warrant of attachment is issued to compel the return of an inventory.”⁷⁹

§ 955. **Consolidating compulsory and voluntary proceedings.**—Upon the return of a citation issued against a personal representative, or trustee, to compel either an intermediate account, or a judicial settlement of account, the representative may assume the initiative by himself presenting a petition asking for a judicial settlement of his account. If such petition is presented at or before the return of the citation⁸⁰ in the proceedings pending against him, the citation issued thereon need not be directed to petitioner in that proceeding, and the two proceedings must be consolidated. The surrogate may, in his discretion, and on such terms as may be just, direct the consolidation of any two or more of such proceedings pending before him, and such

⁷⁸ Only, however, where the citation has been served upon him personally, or where it is proved that the copy left at his residence has come to his actual knowledge. (Matter of Williams, 3 L. Bul. 96.)

⁷⁹ Co. Civ. Proc., § 2727, as amended 1893. This section is made applicable to testamentary trustees by section 2809. For proceeding to compel a return of an inventory, see § 500, *ante*; for proceedings to enforce orders generally, see c. XXI, *post*. If the representative, after failing to file an account on the day fixed by the order, comes in afterward and files one, he will not be committed as for a con-

tempt, but may be personally charged with the costs of the proceeding. (Matter of Wenning, N. Y. Law J., March 25, 1890.) A nonresident executrix, of a deceased executor, who has been ordered, but has neglected, to render an account of his proceedings as executor, will not be granted any relief, for until she obeys its order, she is not in a position to ask favors of the court. (Matter of Wade, 38 Misc. 154.)

⁸⁰ The consolidation may be made upon the return of the citation in the voluntary proceeding. (Matter of Mulry, 31 Misc. 78; 64 N. Y. Supp. 576.)

consolidation does not affect any power of the surrogate, which might be exercised in either proceeding.”⁸¹ But a proceeding, instituted for the payment of a debt or legacy, cannot be met by a counter-petition⁸² of the representative for a judicial settlement of his account. To make such a counter-petition effectual as the basis of a judicial settlement or for any other purpose, a citation must be issued on it, directed to and served on the necessary parties. It need not, however, be directed to the petitioner in the compulsory proceeding pending against the representative.⁸³ The petitioner in the compulsory proceeding becomes a party to the judicial settlement, and gives him the right to appear and contest the account, without any new evidence of interest, although, of course, the demand on which he claims an interest must be established or admitted on the accounting, before he can have a decree for its payment.⁸⁴

In case the party cited files an account as required, but does not take steps to initiate a proceeding for a voluntary accounting, the account as filed may be judicially settled in the compulsory proceeding, all the parties in interest being first brought in. The statute provides that if it appears (on the return of the citation issued in the compulsory proceeding⁸⁵) that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, upon a petition for a voluntary judicial settlement, and requiring them to attend the accounting.⁸⁶ Until the return of such supplemental citation, no distribution can be decreed.⁸⁷

§ 956. Consolidation of proceedings by and against representatives of deceased representative.— Prior to 1901 the course of procedure just described was not intended for the case of a proceeding for a compulsory accounting against a representative of a deceased representative, trustee or guardian, brought under section 2606; such a proceeding not being susceptible of consolidation by the filing of a counter-petition for a judicial settlement.⁸⁸ But by an amendment in that year, it was provided that

⁸¹ Co. Civ. Proc., § 2727, as amended 1901 (former §§ 2726, 2727, 2728).

⁸² Crawford v. Crawford, 5 Dem. 37.

⁸³ Co. Civ. Proc., § 2727, as amended 1901 (former § 2728).

⁸⁴ A formal order need not be entered granting to a creditor an accounting by an executor, where he files his account in response to the citation. (Schlegel v. Winckel, 2 Dem. 232.)

⁸⁵ Schlegel v. Winckel, 2 Dem. 232.

⁸⁶ Co. Civ. Proc., § 2727, as amended 1893.

⁸⁷ Matter of Hector, N. Y. Surr. Decis. 1888, p. 357; Matter of Herring, N. Y. Law J., April 15, 1893.

⁸⁸ Matter of Chuck, N. Y. Law J., Dec. 19, 1890. See Matter of Shipman, 82 Hun. 108; 31 N. Y. Supp. 571.

the Surrogate's Court may, at any time, on its own motion, or on the motion of any party to any one of two or more proceedings for an accounting by, or against, a representative of a deceased representative,⁸⁹ consolidate said proceeding; but without prejudice to the power of the court to make any subsequent order in either of them.

§ 957. **Voluntary proceeding; parties to be cited.**—After what has been said in a previous chapter on the subject of parties in special proceedings in Surrogates' Courts, it is only necessary to add here that certain persons, though not necessary, are yet proper, parties to a proceeding for a voluntary accounting, such as the assignee of a legatee, or of a distributee, or a receiver of his property;⁹⁰ since, in this proceeding, distribution may be decreed among those primarily entitled, *or their assigns*. But the creditors of a legatee, or of a distributee, are not proper parties, and have no right, as such, to intervene with a view of contesting the validity of an assignment of a distributive share, or of preventing its payment, until the validity of the transfer is determined in another forum.⁹¹

§ 958. **Intervening of third parties.**—A creditor, or a person interested in the estate represented by the executor, administrator, or trustee, although not cited,⁹² and any person, although not named in the citation, who is beneficially interested in the estate or fund which came to a testamentary trustee's hands, or in the proceeds thereof, or in the application of that estate or fund, or of the proceeds thereof,⁹³ is entitled to appear upon the hearing, and thus make himself a party to the proceeding so instituted by an executor, administrator, or trustee.⁹⁴ The surrogate may

⁸⁹ Co. Civ. Proc., § 2606, as amended 1901.

⁹⁰ *Monahan v. Fitzpatrick*, 16 Misc. 508; 39 N. Y. Supp. 857.

⁹¹ *Matter of Redfield*, 71 Hun. 344; *Duncan v. Guest*, 5 Redf. 440. See § 968, *post*.

⁹² *Matter of Martine*, 11 Abb. N. C. 50.

⁹³ Co. Civ. Proc., § 2810. In the absence of a fraudulent connivance or combination on the part of the residuary legatees and where it appears that the trust fund was set apart and invested by the executors, an irregularity in not citing the beneficiary and remainderman to appear upon the accounting does not render the distribution of the residuary estate in-

valid. (*Mills v. Smith*, 141 N. Y. 256.)

⁹⁴ Co. Civ. Proc., § 2728, as amended 1893; consolidating former § 2731. In *Weller v. Suggett* (3 Redf. 249), the committee of a legatee appointed by a court of another State sought to represent such legatee, on a final accounting of the executor, and claimed to be entitled to receive the legatee's share of the estate. Held, that such committee could not intervene on the accounting, and had no standing in court, by virtue of his foreign appointment. As to who are proper parties on an accounting by the administrator of a surviving partner, see *Welte v. Bosch*, 6 Dem. 364; *Matter of Wood*, 5 id. 345.

join an assignee of a legatee with such legatee, as a party to an accounting, without displacing the latter.⁹⁵

§ 959. **Filing account for judicial settlement.**—The statute,⁹⁶ impliedly at least, requires the filing of the account by the representative as a prerequisite to issuing a citation; but in many of the counties of the State it is treated as a not inflexible rule. It has been held sufficient if he file it on or before the return day, or on the day to which the hearing upon the citation is adjourned.⁹⁷

§ 960. **Examination of account and of accounting party.**—It is not necessary for a party in interest to file formal objections to the account to entitle him to examine, under oath, the accounting representative; he may have such examination for the purpose of enabling him to formulate objections to specific items,⁹⁸ or the court, for its own information, may require such examination, whether formal objections to the account have been filed or not.⁹⁹ "The surrogate may, at any time, make an order requiring the accounting party to make and file his account; or to attend and be examined under oath, touching his receipts and disbursements; or touching any other matter relating to his administration of the estate, or any act done by him under color of his letters, or after the decedent's death, and before the letters were issued; or touching any personal property, owned or held by the decedent at the time of his death."¹ In a case, however, where an issue has been made by objections filed, and the matter is before the court or referee for trial, a party who has filed no objections is not entitled, as matter of right, to cross-examine the accounting party.²

§ 961. **Filing objections to account.**—The rendering of an account by the representative and the judicial settlement of it, after it has been rendered, are distinct proceedings,³ though, as matters of common practice, the one is merely a continuation of the other.⁴ Any party may contest the account, with respect to a

⁹⁵ *Tilden v. Dows*, 2 Dem. 489; *Gibbons v. Shepard*, id. 247. See § 105, *ante*.

⁹⁶ Co. Civ. Proc., § 2728.

⁹⁷ *Matter of Harris*, 1 Civ. Proc. Rep. 162.

⁹⁸ *Hathaway v. Russell*, 7 Abb. N. C. 138; *Matter of Hall*, id. 149; *Matter of Denike*, 21 id. 289; *Matter of Douglass*, 3 Redf. 538; *Robert v. Morgan*, 4 Dem. 148; *Matter of Fithian*, 14 Civ. Proc. Rep. 52. See Rule VIII, N. Y. Surr. Ct., *post*, § 961, note 8.

⁹⁹ *Geer v. Ransom*, 5 Redf. 578.

¹ Co. Civ. Proc., § 2729, as amended 1893; consolidating former § 2735. As to testamentary trustees, see id., § 2811.

² *Matter of Healy*, 26 St. Rep. 944; 7 N. Y. Supp. 694.

³ *Remington v. Walker*, 21 Hun. 322.

⁴ *Westervelt v. Gregg*, 1 Barb. Ch. 469; *Smith v. Van Kuren*, 2 id. 473. See *Mount v. Mitchell*, 31 N. Y. 356, 363; 19 Abb. Pr. 1.

matter affecting his interest in the settlement and distribution of the estate.⁵ The surrogate may require written statements of claims, objections, and other matters contested, so that the issue may be defined, and the parties precluded from taking new objections after the proofs are closed;⁶ but the objecting party is not absolutely confined to his first objections.⁷ The allegation of objections may, of course, cover every possible ground, such as a want of proper vouchers, or that payments have been made, or that debts are entered, which are not properly to be charged against the estate, or that fraudulent charges have been made, or that assets not included in the inventory have come into the hands of the executor or administrator. There is no statutory requirement to file *specific* objections to an account by an executor.⁸ The practice generally prevails of permitting objections to be stated in the most general language. The filing of a notice, which either generally or specifically denies the correctness of the ac-

⁵ Co. Civ. Proc., § 2728, as amended 1893; consolidating former § 2730. See *Buchan v. Rintoul*, 70 N. Y. 1. Objections filed by persons who are not parties must be disregarded as objections, although they may be considered as notice of the claims of the persons interposing them, and thus warrant a direction in the decree for the retention of a proper sum to meet their claims. (*Matter of Collyer*, 4 Dem. 24.)

⁶ See Co. Civ. Proc., § 2533; *Disoway v. Bank of Washington*, 24 Barb. 60. After the proofs are closed and the cause submitted, it is too late to interpose the Statute of Limitations for the first time. The parties should make statements of their claims, in the nature of pleadings, so as to define the issue. (*Van Vleck v. Burroughs*, 6 Barb. 341.) See *Matter of Heuser*, 87 Hun, 262; 33 N. Y. Supp. 831.

⁷ *Gardner v. Gardner*, 7 Paige, 112. The surrogate may allow the filing of further objections in addition to the original objections to an account (*Matter of Turfler*, 78 Hun, 258; *Matter of Von Glahn*, 53 App. Div. 164; *Matter of Heuser*, *supra*), and it seems that the referee, to whom the account has been sent, may do the same. (*Matter of Fithian*, 5 Dem. 305; 15 St. Rep. 734.) The contestant may amend his objections by alleging an indebtedness of which he had at first but indefinite information. (*Matter of Burnett*, 15

St. Rep. 116; appeal dismissed, 110 N. Y. 641.)

⁸ *Thompson v. Mott*, 2 Dem. 154. No pleadings or specifications are necessary to charge an accounting executor with a debt which he owed the testator. (*Matter of Consalus*, 95 N. Y. 340.) In New York county, the following rule on this subject is established: "On any accounting by an executor, administrator, guardian, or trustee, which may be contested, any party interested, or a creditor desiring to contest the account, shall file specific objections thereto in writing, and serve a copy thereof upon the accounting party or upon his attorney, in case he shall have appeared by attorney, within eight days after the filing of the account in the surrogate's office, where the accounting is a compulsory one, and within eight days after the return of the citation where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the surrogate; and the contest of such account shall be confined to the items or matter so objected to. If it shall appear to the satisfaction of the surrogate, by affidavit or petition, that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the surrogate for that purpose." (Rule VIII.)

count, is sufficient to raise an issue, though unquestionably the surrogate has a discretion to require the objection to be made more definite and specific.⁹ Thus an objection to a trustee's account, to the effect that "the trustees have not accounted for interest on the moneys in their hands," is too indefinite, as it does not show whether the trustees had actually received interest for which they had not accounted, or whether by diversion of trust moneys they had become chargeable with interest.¹⁰ While it is a proper and a better practice to object specifically to the items of the account which it is meant to question, yet, under a general objection to any and all of the items, it has been held, that the surrogate could inquire into and scrutinize the account, and is not bound by the executor's oath thereto, or the vouchers produced by him;¹¹ and the surrogate, in examining it, may allow, for his information, any person to point out errors and defects therein.¹² Nevertheless, it is not error for the court or referee to refuse to consider, upon the hearing of objections filed to an account, claims of creditors or others which were in no way referred to in the objections filed by them.¹³

§ 962. Serving copy of objections.—It is the better practice for the contesting party, besides filing his objections, to serve a copy thereof upon the attorney of the accountant. But the fact that a copy of the objection filed had not been served upon the attorney for the accounting party, is no ground for overruling the objection.¹⁴ As the surrogate may require a petition or answer to be verified,¹⁵ he may also require objection to an account filed to be verified.¹⁶

⁹ Matter of Brenfleck, N. Y. Surr. Ct., Dec. 9, 1876, MS.; Matter of Hall, 7 Abb. N. C. 149. See Matter of Boyd, 1 L. Bul. 87; Larroux v. Larroux, 2 Redf. 74.

¹⁰ Frame v. Willets, 4 Dem. 369.

¹¹ Peck v. Sherwood, 56 N. Y. 615.

¹² Buchan v. Rintoul, 70 N. Y. 1. Where, therefore, the person, upon whose application the order requiring the account was granted, files objections thereto, the surrogate is not bound to strike out or dismiss them, but, at least, may retain and use them as the basis of his investigation. (Ib.)

¹³ Matter of Hart, 60 Hun. 516; 39 St. Rep. 521. "In these proceedings, the account and the objections

thereto form the pleadings, and the objector to an account is as much bound to set up in such objections any claims which he proposes to make against the administrator as the defendant in an action is bound to set up in his answer any claims which he proposes to urge against the plaintiff." (Ib.; per Van Brunt, C. J.) It was also held, in that case, that although the appellate court had the power to amend the objections *nunc pro tunc*, in support of a decree, it would never do so in order to justify the reversal of the decision below.

¹⁴ Journault v. Ferris, 2 Dem. 320.

¹⁵ Co. Civ. Proc., § 2533.

¹⁶ Thompson v. Mott, 2 Dem. 154.

SUBDIVISION 6.

PROCEEDINGS UPON CONTESTED ACCOUNTINGS.

§ 963. **Referring the account.**—Until 1870, no surrogate had the power to order a reference, except in the single proceeding for the final settlement of the account of an executor or administrator, in which case the statute¹⁷ permitted him, in his discretion, to refer the account to one or more auditors to examine and report upon the same, subject to his confirmation. In the above year an act was passed, applying only to New York county, giving the surrogate a general power to appoint a referee to take testimony in any proceeding before him, and to hear and determine disputed claims and other matters relating to accounts, and to report thereon, subject to the surrogate's confirmation.¹⁸ The Code adopted this provision, extending it to all surrogates, and enlarging the referee's powers.

§ 964. **Referee's powers.**—The statute expressly provides that the referee may be authorized to "examine an account rendered, to hear and determine all questions arising upon the settlement of such an account which the surrogate has power to determine; and to make a report thereon, subject, however, to confirmation or modification by the surrogate. Such a referee has the same power, and is entitled to the same compensation, as a referee appointed by the Supreme Court, for the trial of an issue of fact in an action;" and the provisions of the Code, applicable to a reference by the Supreme Court, apply to such a reference, so far as they can be applied in substance, without regard to the form of the proceeding.¹⁹ This enactment supersedes many of the rulings which had been made as to the functions of, and proceedings before, auditors, particularly by virtue of the clause assimilating the referee's powers to those of a referee in the Supreme Court. Parties may, of course, appear before the referee, by counsel, as it was held they might before an auditor,²⁰

¹⁷ 2 R. S. 94, § 64.

¹⁸ L. 1870, c. 359, § 6. This provision applied to testamentary trustees. (*Matter of Uglow*, 51 How. Pr. 342.) In *Matter of Hoes* (54 App. Div. 281) it was held, that the surrogate had power to refer a disputed claim which the parties had consented should be determined by him. See *ante*, § 117.

¹⁹ Co. Civ. Proc., § 2546. See *Matter of Russell*, 3 Dem. 377. The office

and title of auditor no longer exist. Under the Act of 1870, the surrogate of New York county referred an account to one termed, in the order of reference, an auditor; but this was held not to vitiate the order, the misnomer being but a matter of form, and the order operative to appoint a referee. (*Buchan v. Rintoul*, 70 N. Y. 1.) See now, Co. Civ. Proc., § 1018; also, *Matter of Odell*, 1 Connoly. 91.

²⁰ *Matter of Ritch*, 3 Redf. 177.

and such counsel may examine the accounting party. An auditor appointed under the Revised Statutes had no power to allow further objections to be filed; if the contestants desired to present additional objections, they were required to file them before the surrogate, and obtain an order referring them to the auditor.²¹

§ 965. Referee subject to surrogate's directions.—The report of the referee has no binding force or effect, and affords no evidence of the facts therein stated, until it is confirmed by the surrogate's decree.²² The surrogate has power to send the same back to the referee with directions to pass upon any questions of fact not covered by his report, or he may, himself, modify the report and determine, upon the evidence submitted to the referee, any question presented.²³ Even after the surrogate has confirmed the report of a referee settling the accounts of an administrator, he has power nevertheless to make an order permitting the filing of a supplemental account and referring the same back to the referee to hear and determine.²⁴

§ 966. General principles of settlement.—In adjusting the accounts of executors and administrators, the Surrogate's Court is governed by principles of equity, as well as of law; and it is at all times competent for the representative or trustee, unimpeded by technical rules, to show the fairness of his dealings, the real nature of the transactions, and the amount for which he should be held liable. The Surrogate's Court has ample powers to consider and adjust, upon equitable principles, questions between the accounting party and those interested in the estate.²⁵ Thus, where, on an accounting by an administrator, he claimed credits for moneys paid to the widow for the support of herself and infant children, the latter having no guardian entitled to receive for them any portion of the fund, the equities being clearly in favor of allowing the claim, the court has jurisdiction to allow it.²⁶

²¹ Boughton v. Flint, 74 N. Y. 476.

²² Matter of McEvoy, 1 L. Bul. 63.

²³ Matter of Schaefer, 65 App. Div. 378. As to the necessity of his making separate findings in such cases, see § 119, *ante*.

²⁴ People *ex rel.* Stevens v. Lott, 42 Hun. 408. Such order is appealable, and a writ of mandamus will not issue to compel the signing of a decree based on the original report. (Ib.) See Matter of Pollock, 3 Redf. 101; Matter of Quin, 1 Connoly, 381.

²⁵ In Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755, the text

was quoted with approval. See Matter of Wagner, 119 N. Y. 28.

²⁶ Hyland v. Baxter, 98 N. Y. 610; affg. 42 Hun. 9. In that case, the surrogate had decided that he had no jurisdiction to adjust such equities, and the facts establishing them had, therefore, not been fully presented: the Supreme Court on appeal remitted the case to the Surrogate's Court for a rehearing and decision upon the additional facts. In Browne v. Bedford (4 Dem. 304), a widow, without taking out letters of administration upon her husband's estate, used the income

Upon the same principle, the equitable lien which an executor has upon a legacy for the amount of the legatee's debt to the testator, will be protected, in a proceeding to settle his account and distribute the assets of the estate; and this right is unaffected by the fact that such debt is barred by the Statute of Limitations.²⁷ This is not a question of legal set-off, but of equitable lien and right of retainer. It is only where the legatee's alleged indebtedness is denied, and is, therefore, in dispute, that the surrogate will decline jurisdiction of such a question.²⁸ The surrogate has ample power to entertain, in any proceeding before him, the defense of an equitable estoppel, and, on an accounting and distribution of an estate, can prevent injustice being done executors who have proceeded in the course of distribution according to the consent of all the legatees and persons interested.²⁹ On the other hand, the power to enforce the set-off of mutual judgments, as where an accounting executor seeks to set off a judgment belonging to the decedent against a judgment-creditor's claim presented against the estate, does not belong to Surrogates' Courts.³⁰ Where

thereof for the support of herself and children.—Held, that subsequently taking out letters and accounting to such children, she might be allowed the sums so expended for the benefit of children, as payments upon their share, and such allowance need not be limited to income, but, where the estate is so small that the income is insufficient, it may take in the principal of the infant's share. In *Matter of Hobson* (61 Hun. 504; 41 St. Rep. 565; *affd.*, 131 N. Y. 575), it was held, that an administrator was not entitled to be credited with a payment to the mother of infant beneficiaries, she not being their guardian, in the absence of proof that the money was expended for their support,—it being assumed that it was expended for her benefit in the main.

²⁷ *Smith v. Kearney*, 2 Barb. Ch. 533; *Rogers v. Murdock*, 45 Hun. 30; *Smith v. Murray*, 1 Dem. 34; *Matter of Foster*, 15 Misc. 175; 37 N. Y. Supp. 36. But, *it seems*, that a trustee cannot set off personal claims for professional services against claims of beneficiaries against him as trustee. (*Harris v. Elliott*, 24 App. Div. 133; 48 N. Y. Supp. 1020.) The surrogate has no jurisdiction, against objection, to determine whether an indorser on a note made and paid by the decedent, is liable to the estate for the amount

of the note, as made for the indorser's accommodation, though he is husband of the decedent and a legatee. (*Matter of Schmidt*, 58 N. Y. Supp. 595.) The proper proceeding in such case is to adjourn the accounting of the executor, to enable the parties to establish their rights in the appropriate tribunal, and then proceed with the accounting and distribution. (*Ib.*)

²⁸ *Rudd v. Rudd*, 4 Dem. 335; *Matter of Schmidt*, 58 N. Y. Supp. 595, and cases cited. § 784, *ante*. See *Matter of Peaslee*, 81 Hun. 597; 30 N. Y. Supp. 1028.

²⁹ *Paxton v. Patterson*, 26 Abb. N. C. 389; 12 N. Y. Supp. 563. A legatee who does not object to a payment by executors to two of the legatees for the purpose of equalizing them with the others, and who has knowledge that such payments are about to be made, is estopped from afterward charging the executors with such payments on the ground that they were not authorized by the will. (*Matter of Turfler*, 1 Misc. 58; 23 N. Y. Supp. 135.)

³⁰ *Stilwell v. Carpenter*, 59 N. Y. 414, and cases cited *ante*, § 47. The rule that an executor or administrator cannot set off a debt due to him personally, or purchased by him since the decedent's death, against a demand against the estate, applies to

an executor in good faith resists the charging of a legacy upon the residuary estate in his hands, and shows that there exists a real question of fact or law, the surrogate will not decide the question upon settlement of the executor's accounts.³¹

§ 967. **Issues triable.**—The limitations upon the jurisdiction of Surrogates' Courts have been generally considered already.³² His jurisdiction over questions on an accounting of executors, administrators, trustees, and guardians is not expressly defined, but the courts have liberally allowed powers as incidental to general jurisdiction, which enable the court or referee to pass upon all such questions as the amounts with which the accounting party is chargeable, and the amount which ought to be credited to and allowed him. The decision of these questions involves the determination of what are assets in their hands; whether the representative has been guilty of any negligence in getting in the estate; whether he has retained, as part of the estate, property which he should have sold and turned into cash; whether the cash received has been invested upon proper securities; whether sales of property have been made in good faith toward the estate and in due form;³³ whether he is chargeable with any, and, if so, how much, interest on the moneys received;³⁴ whether he has failed to collect debts which he ought to have collected,³⁵ or has improperly paid or compromised any;³⁶ whether he has been guilty of any fraud or bad faith in dealing with the estate, as by using the property or moneys of it for his own advantage, or by buying it in for his own profit at sales made by him; whether the amounts paid by him, on account of alleged debts or liabilities

the case of a judgment for costs against the executor or administrator in his representative capacity, and to be collected out of the estate. (Dudley v. Griswold, 2 Bradf. 24.) Nor can he set off, in equity, a debt due to him personally, against a claim of the defendant on the estate. (Mead v. Merritt, 2 Paige, 402.)

³¹ Bevan v. Cooper, 72 N. Y. 313.

³² See *ante*, § 47 *et seq.*

³³ But see Matter of Valentine, 1 Misc. 491, and § 598, *ante*.

³⁴ See *ante*, § 619 *et seq.*

³⁵ Harrington v. Keteltas, 92 N. Y. 40; O'Connor v. Gifford, 6 Dem. 71; *s. c.* as Matter of O'Connor, 20 St. Rep. 140; Matter of Dunn, 8 *id.* 766. A trustee of real property who leased the same for a sum exceeding its fair rental value was imposed upon by the

lessees with instruments offered as pretended security for the rent, with the result that nothing was collected during the entire term. Upon the accounting of such trustee.—Held, that if it appeared that such tenants were worthless, it became the duty of the trustee to have evicted them within a reasonable time and relet the premises, and for failure to do so, if he had acted in bad faith or was guilty of such neglect of duty as amounted to wilful negligence, he was chargeable with the loss of the reasonable rental value, and not with rent at the contract rate. (Matter of Hunt, 3 St. Rep. 346.)

³⁶ Shute v. Shute, 5 Dem. 1; Matter of Strickland, 22 St. Rep. 901; 5 N. Y. Suppl. 851. See *ante*, § 630.

of the decedent, were proper charges upon his estate; whether the amounts paid out, in the administration of the estate, for funeral expenses, headstones, and costs and counsel fees in suits brought by and against him, are proper in themselves and reasonable in amount; and what sum he is entitled to as commissions. In short, all the questions already treated of in the seventeenth chapter of this work,³⁷ as to the rights and liabilities of executors and administrators, and the payment of funeral expenses and debts, are usually raised and determined on such accounting; as well as the questions, who are entitled to the residue as legatees or distributees and the amounts of their respective shares; and in case a debt of the estate has not been paid, and is not disputed, or has been established, the surrogate in making a decree of distribution may also provide for its payment.

§ 968. **Limits of surrogate's powers on decreeing distribution.**—The principle has been many times repeated that Surrogates' Courts can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted;³⁸ and further, that jurisdiction cannot be obtained by assuming it, without objection on the part of any of the parties before the court, or even on the express consent of such parties.³⁹ Another observation worth repeating here is, that, on the one hand, these courts do not possess the general powers of a court of equity, and, on the other, they are not, by their very constitution, adapted to exercise the powers of common-law courts in disposing of a variety of questions, such as questions of title to property, which have always been reserved for common-law courts, where, except in cases of equitable cognizance, the right to a jury trial is guaranteed.⁴⁰ The statutory powers of a surrogate on a judicial settlement of the accounts of *executors and administrators*⁴¹ are defined by a section of the Code which provides⁴² that where any part of the estate "is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the pay-

³⁷ See §§ 600, 630, *ante*.

³⁸ *Riggs v. Cragg*, 89 N. Y. 489; *Matter of Underhill*, 117 id. 471; *Matter of Wagner*, 119 id. 28; 28 St. Rep. 266, and cases cited, §§ 42, 47 *et seq.*

³⁹ *Tucker v. Tucker*, 4 Abb. Ct. App. Dec. 428; *Bevan v. Cooper*, 72 N.

Y. 318, 329; *Matter of Walker*, 136 id. 20.

⁴⁰ *Matter of Walker*, *supra*. See § 43, *ante*.

⁴¹ See § 2812, in reference to accounting by testamentary trustees; § 973, *post*.

⁴² Co. Civ. Proc., § 2743, as amended 1895.

ment and distribution thereof to the persons so entitled, according to their respective rights. * * * Where the validity of the debt, claim, or distributive share *is admitted, or has been established* upon the accounting or other proceeding in the Surrogate's Court, or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same."⁴³

There is an embarrassing conflict of decisions as to the authority of these courts, in decreeing a distribution of the estate, to recognize equitable titles to, or equitable interests in, any portion of the distributable surplus, as against legal titles, and to determine disputes between rival claimants of the same debt, legacy or distributive share, where questions of fraud, duress, and the like, are necessarily involved, and in which relief, if any, must be granted upon equitable principles, depending, frequently, on a complicated state of facts. Such is the nature of the claim of a third person to a legatee's or distributee's share, under an assignment to him, which is impeached by the assignor on the ground that it had been procured by false and fraudulent representations;⁴⁴ and the claim of a creditor of the distributee that he has an equitable lien on the share, superior to the title of an assignee of the distributee;⁴⁵ and the claim of a distributee that a release of his interest executed to the representative is void or voidable, on the ground of mistake, concealment or false representations.⁴⁶ Without attempting any discussion of the subject, it is enough to say that, in our opinion, the weight of authority establishes the true interpretation of the foregoing section of the Code to be this: that in directing "the payment and dis-

⁴³ See *Matter of Clauss*, 16 App. Div. 34; 44 N. Y. Supp. 805.

⁴⁴ *Matter of McCabe* (28 Abb. N. C. 59; 18 N. Y. Supp. 715), where it was held the court had jurisdiction to determine the validity of the assignment. See *Strong v. Strong*, 3 Redf. 477; *Dubois v. Brown*, 1 Dem. 317. Compare *Matter of Geis* (27 Misc. 490; 59 N. Y. Supp. 175), where it was said that, although the Surrogate's Court, not being a court of equity, has no jurisdiction to try an issue as to the validity of an assignment attacked on the ground of fraud or mistake, it will determine the fact whether or not a decedent to whom a legacy was given, assigned it so as to justify his administrator in paying it to the person claiming the amount.

⁴⁵ *Matter of Redfield* (71 Hun. 344), where it was held the surrogate could not determine the question whether a share of a next of kin should be paid to his assignee or to one claiming to be a creditor of the next of kin. Nor has he any jurisdiction to determine the right to a legacy as between an assignee and an attaching creditor of the legatee. (*Matter of Arkenburgh*, 38 App. Div. 473; 56 N. Y. Supp. 523.) But a receiver of a legatee is entitled to so much of the legacy as will pay the judgment and also the expenses of the receivership. (*Monahan v. Fitzpatrick*, 16 Misc. 508; 39 N. Y. Supp. 857.)

⁴⁶ *Sanders v. Soutter*, 126 N. Y. 193.

tribution to the persons so entitled" (*i. e.*, "to creditors, legatees, next of kin, husband or wife of the decedent or their assigns"), and in determining to whom a debt, claim, or distributive share "is payable and the sum to be paid and all other questions concerning the same," the court will not recognize claimants other than those having legal titles, but will remit parties claiming adversely to such titles, on grounds of equity, to other tribunals, as not itself having any power to nullify and set aside the deeds of the parties for fraud, or on other equitable considerations.⁴⁷

§ 969. What disputes surrogate may decide.—It is well settled that a Surrogate's Court has jurisdiction to entertain, on the final accounting, or in any other proceeding where the matter is at issue, such questions as the right of a person to a legacy,⁴⁸ or whether a legacy has lapsed,⁴⁹ or abated,⁵⁰ or whether it is valid,⁵¹ or when it was vested,⁵² or whether a legatee is competent to take,⁵³ or a distributee is legitimate;⁵⁴ whether a widow is entitled

⁴⁷ In *Matter of Wagner* (119 N. Y. 28), Gray, J., said: "I think we should hold it as the true exposition of the law in such cases, where an application is made to the surrogate for an order compelling the executor or administrator to file an inventory, or to render an account, and it appears, in answer to it, that the applicant can have no right to such an order, by reason of his interest having been satisfied and extinguished by a settlement and distribution, whether in or out of court, or barred by a release, or otherwise, and the *factum* of a settlement, or of a release, or any act constituting the bar, is put in issue by the reply of the applicant, that the surrogate should dismiss the petition and remit the applicant to his proceeding in a court having general equity powers to try out such an issue. That power the surrogate does not possess." The question of jurisdiction was carefully examined in *Matter of Cook* (68 Hun. 280; 22 N. Y. Supp. 969), and in *Matter of Redfield* (71 Hun. 344), where this doctrine was reiterated and followed. See *Matter of Brown*, 3 Civ. Proc. Rep. 39, 55; *Matter of Martine*, 11 Abb. N. C. 54; *Matter of Colwell*, 15 St. Rep. 742; *Van Valkenburg v. Lasher*, 53 Hun. 594; 25 St. Rep. 291; 6 N. Y. Supp. 775; *Woodruff v. Woodruff*, 3 Dem. 505; *Peck v. Peck*, *id.* 548; *Matter of Sistare*, 27 Abb. N. C. 34; *Adams v. Glidden*, 6 Dem. 197;

Matter of Dunn, 8 St. Rep. 766; *Matter of Woodward*, 69 App. Div. 286; 74 N. Y. Supp. 755; *Matter of Grant*, 37 Misc. 151; 74 N. Y. Supp. 958; *Matter of Randall*, 152 N. Y. 508. In *Fraenznick v. Miller* (1 Dem. 136; 3 Civ. Proc. Rep. 39), it was held, that where a release or an assignment is assailed by its maker as invalid and ineffectual by reason of fraud, the court should hold in abeyance its decree of distribution, so far, at least, as concerns that interest in the estate to which such assignment or release relates, until the rights of the parties can be determined in another tribunal. See *Matter of Rutherford*, 5 Dem. 499; *Tappen v. M. E. Church*, 3 *id.* 187; *s. c.* as *Matter of York*, 6 Civ. Proc. Rep. 245.

⁴⁸ *Riggs v. Cragg*, 89 N. Y. 479; *Matter of Arden*, 1 Connoly, 159; *Matter of George*, 23 Abb. N. C. 43; 21 St. Rep. 128 [*gift causa mortis*].

⁴⁹ *Gill v. Brouwer*, 37 N. Y. 549.

⁵⁰ *Orton v. Orton*, 3 Keyes, 486.

⁵¹ *Matter of Wehrhane*, 40 Hun, 542; *Matter of Johnson*, 1 Connoly, 518; *Lynch v. Lorretta*, 4 Dem. 312.

⁵² *Jones v. M. E. Sunday School*, 4 Dem. 271; *Matter of Hedger*, 1 Connoly, 524.

⁵³ *Wardlow v. Home for Incurables*, 4 Dem. 473; *Matter of Look*, 1 Connoly, 403.

⁵⁴ *Matter of Laramie*, 24 St. Rep. 702; 6 N. Y. Supp. 175; *Matter of Pearsall*, 4 *id.* 365.

to dower in addition to benefits given by the will,⁵⁵ or whether one claiming as husband is entitled as such, to an interest in his wife's estate,⁵⁶ and other like questions.⁵⁷ As every item of an account, as filed by the representative, may be controverted, and the entire management of the estate may be overhauled, it follows that the question whether the representative was justified in allowing or paying a particular creditor's claim, may properly, and perhaps necessarily, arise and call for decision, although this, in one sense, involves the trial of a "disputed claim."⁵⁸ The surrogate may determine whether a claim has been rejected by the representative,⁵⁹ and he may determine the validity of a claim allowed by him, and for which he claims to be credited in his account;⁶⁰ but he cannot, at the instance of a creditor, pass upon the validity of an alleged debt which the representative has rejected as invalid, except upon the consent of the parties.⁶¹ But a judgment against the decedent, although disputed or rejected by his personal representatives, need not be sued over, in order to authorize a decree for its payment by the surrogate.⁶²

⁵⁵ Matter of Gorden, 68 App. Div. 388; 74 N. Y. Supp. 259. Even though it involves the validity of an antenuptial bond. (Matter of Jones, 3 Misc. 586.)

⁵⁶ Matter of Tabor, 31 Misc. 579. In such case the next of kin may attack the validity of the marriage. (Ib.)

⁵⁷ See Matter of Verplanck, 27 Hun, 609; Ferrer v. Pyne, 81 N. Y. 281; Wheeler v. Ruthven, 74 id. 428; Luce v. Dunham, 69 id. 36; Lawrence v. Lindsay, 68 id. 108; Teed v. Morton, 60 id. 502; Hoppock v. Tucker, 59 id. 202; Cushman v. Horton, id. 149; Whitson v. Whitson, 53 id. 479; Bascom v. Albertson, 34 id. 584; McNaughton v. McNaughton, id. 201; Stagg v. Jackson, 1 id. 206; Parsons v. Lyman, 20 id. 103; Sayre v. Ladd, 7 Week. Dig. 302; Board of Missions v. Seovell, 3 Dem. 516. The surrogate has jurisdiction to determine the amount of advances to a legatee, and his decision in that respect is binding and conclusive. (Foulks v. Foulks, 32 St. Rep. 1038; 10 N. Y. Supp. 785.) But he has no power to determine the claim of an administrator for advances in the form of merchandise made to a distributee, where the latter denies the receipt of such merchandise and disputes its value. (Barker v. Laney, 90 Hun, 108; 35 N. Y. Supp. 626.)

⁵⁸ Matter of Strickland, 1 Connoly, 435; 22 St. Rep. 902. See §§ 627, 634 *et seq.*, *ante*.

⁵⁹ Lambert v. Craft, 98 N. Y. 342; Hoyt v. Bonnett, 50 id. 538; Bowne v. Lange, 4 Dem. 350.

⁶⁰ Matter of Frazer, 92 N. Y. 239. It is not essential that the accounting party shall have actually paid the claim of a creditor, to enable the court to pass upon it on the accounting. It is sufficient if the representative, having allowed the claim, includes it in his account as a credit, though the same has not been paid. (Matter of Strickland, *supra*.) See Matter of Warrin, 56 App. Div. 414. If a voucher showing payment of a claim be objected to, the objector may show that the signature thereto was forged, that the amount represented was not due to the alleged creditor, that it has not been paid, or that only a portion of it has been paid. (Matter of Lloyd, 39 St. Rep. 851.)

⁶¹ Co. Civ. Proc. § 1822, as amended 1895. For a case prior to the amendment, see Matter of Perry, 5 Misc. 149.

⁶² McNulty v. Hurd, 72 N. Y. 518. The surrogate may, upon application for a decree, inquire into and pass upon alleged payments made to apply upon the judgment, and determine the amount due thereon, and may also determine who is the owner of the

§ 970. **Power to construe will.**—The implied power of surrogates *to construe a will*, in any proceeding touching the administration of the estate under it, and to determine the validity of any of its provisions, where that question is pertinent, has been already sufficiently stated.⁶³ Questions frequently arise on an accounting, as to the rights of legatees, often involving a judicial interpretation of the will, and as to the rights of the next of kin, their identity, their legitimacy, and the like; all which questions the Surrogate's Court has jurisdiction to determine, as, without such determination, a distribution of the estate cannot be had. A Surrogate's Court has no jurisdiction to determine the right to inheritance of the heirs-at-law in a contested proceeding, nor to direct the division of a fund, regarded in law as real estate;⁶⁴ but, upon the accounting, the surrogate has jurisdiction to try and determine a question as to the meaning of the provisions of the decedent's will, so far as necessary to enable him to direct the distribution of the entire estate;⁶⁵ but not to adjudge that next of kin who have received assets shall pay to the administrator their share of debts incurred by the latter, and giving the latter execution therefor.⁶⁶ The question of the taxability of any legacy or distributive share may be raised upon the accounting of the executor or administrator. On such accounting, the county

judgment and entitled to the money; but he has no jurisdiction to determine whether there has been an accord and satisfaction, or whether the estate is entitled in equity to a release or discharge, either in whole or in part, from the judgment. (Ib.) See *ante*, § 692 *et seq.* He may, however, entertain an objection that a judgment presented as a claim was rendered in a court having no jurisdiction. (Matter of Radde, 30 St. Rep. 741; 9 N. Y. Supp. 812.)

⁶³ See § 253 *et seq.*, *ante*. The general doctrine was stated by Gray, J., in *Garlock v. Vandervoort* (128 N. Y. 374), thus: "Though a judicial officer with limited and prescribed jurisdiction and powers, yet it is not open to question that in a proceeding before him, having for its object the settlement of an executor's accounts and to obtain a decree directing the distribution of the fund in his hands, and with all the parties in interest present, the surrogate may construe the provisions of the will and determine the meaning and validity of any of them, whenever such a deter-

mination is necessary in order to make his decree as to distribution. Such a jurisdiction is, of course, not general; but it is one which is incidental to his office, and which flows clearly from the authority conferred upon him by the statute."

⁶⁴ Matter of Woodworth, 5 Dem. 156. As to power to determine whether a legacy is a charge on real estate, see Matter of Kick, 11 St. Rep. 688; *Bloodgood v. Bruen*, 2 Bradf. 8. The surrogate has jurisdiction to determine that there was by the will such an equitable conversion of the testator's real estate into personalty as authorized and required the executor to collect rents and sell the realty and to apply the same or the proceeds thereof to the payment of legacies. (Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.)

⁶⁵ Board of Missions v. Scovell, 3 Dem. 516; *Baldwin v. Smith*, 3 App. Div. 350; 38 N. Y. Supp. 299. Compare Matter of Schweigert, 17 Misc. 186; 40 N. Y. Supp. 979.

⁶⁶ Matter of Keef, 43 Hun. 98. See § 774, *ante*.

treasurer may intervene (if he was not served with the citation in the accounting proceeding) and make a claim that certain legacies or shares are subject to the tax. Thereupon, the surrogate may issue a citation to the proper parties to show cause why the tax should not be assessed and paid, and pending the appraisal and assessment, the decree settling the account will be suspended.

§ 971. Advances to beneficiaries.—Moneys advanced by an executor or administrator, out of his own resources, to a legatee or distributee, may be reimbursed by allowing his charge therefor on his accounting.⁶⁷ And where allowances are made for the support of minors in the family of the executor or administrator, the subject of offsetting the value of their services should be considered.⁶⁸

§ 972. Disputed claim made by or against representative.—There is one sort of "disputed" claim which the surrogate is expressly authorized and directed to determine, on the judicial settlement of accounts, which has been already mentioned.⁶⁹ On the judicial settlement of his account, the accounting party "may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties, respecting any property alleged to belong to the estate, but to which the accounting party lays claim, either individually or as the representative of the estate; or respecting a debt, alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party; the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue, arising in the Surrogate's Court."⁷⁰ The Surrogate's Court has jurisdiction, therefore, to try and determine a disputed claim of the accounting party against the decedent,⁷¹ or a claim alleged to be

⁶⁷ *Broome v. Van Hook*, 1 Redf. 444; *Matter of Atwood*, 10 Misc. 480; 32 N. Y. Supp. 115. As to proper form of account by administrator, who has made advances to next of kin without reserving sufficient to pay debts, see *Matter of Keef*, 43 Hun, 98. See *ante*, § 969, note 57.

⁶⁸ *Evertson v. Tappen*, 5 Johns. Ch. 497.

⁶⁹ See § 642, *ante*.

⁷⁰ Co. Civ. Proc., § 2731, as amended 1895 (former § 2739). An interest in real property was conveyed to the wife of decedent in his lifetime as se-

curity for a debt due to decedent. On decedent's death, the wife was appointed administratrix, and the property was sold. Held, that the administratrix held the proceeds as trustee for the estate, for which she must account, at the instance of a creditor of decedent, and that the surrogate had jurisdiction to determine such a claim. (*Matter of Potter*, 32 Hun, 599.)

⁷¹ *Kyle v. Kyle*, 67 N. Y. 400; *Boughton v. Flint*, 74 id. 476. See *Bevan v. Cooper*, 72 id. 318; *Stiles v. Burch*, 5 Paige, 132; *Payne v. Mat-*

due by the representative to the estate, either individually,⁷² or jointly with another.⁷³ But it has no jurisdiction to determine the validity of a claim due from the estate to a firm of which the executor is a member.⁷⁴

It is manifestly the duty of the accounting party to include in his account a statement of a claim due to himself by the decedent and support it by affirmative proof, whether it is disputed or not.⁷⁵ He should, of course, at the same time, exhibit and charge himself with any debt due by himself to the decedent. If he fails to do so, any party interested may present a claim therefor, and the proper time to do so is on the accounting,⁷⁶ and he may be charged for such debt wherever he administers, notwithstanding he resides in another jurisdiction, unless the rights of creditors in the place of his residence require protection.⁷⁷

§ 973. *Testamentary trustees' accounts.*—Where an executor is also a testamentary trustee and his accounting involves all that has been done by him in that capacity under the same will, the surrogate has authority to pass upon a claim presented against such testamentary trustee.⁷⁸ The suggestion that the court's powers on a trustee's accounting are broader than those which can be exercised on an executor's accounting, is not sustained.⁷⁹ The Code provides that "upon a judicial settlement of the account of a *testamentary trustee*, a controversy which arises, respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, must be determined in

thews, 6 id. 19; *Jumel v. Jumel*, 7 id. 591; *Merchant v. Merchant*, 2 Bradf. 432; *Matter of Leslie*, 3 Redf. 280; *Leviness v. Cassebeer*, 3 id. 491; *Barras v. Barras*, 4 id. 263; *Smith v. Christopher*, 6 Sup. Ct. (T. & C.) 288; *Richardson v. Root*, 19 Hun, 476; *Sexton v. Sexton*, 64 App. Div. 385; 72 N. Y. Supp. 213. The surrogate has no power, however, to try issues arising out of the representative's interest as mortgagee of decedent's real estate. (*Matter of Monroe*, 142 N. Y. 484; 60 St. Rep. 102.)

⁷² *Everts v. Everts*, 62 Barb. 577; *Gardner v. Gardner*, 7 Paige, 112. See *Neilley v. Neilley*, 89 N. Y. 352; *Matter of Eisner*, 1 Connolly, 358.

⁷³ *Shakespeare v. Markham*, 72 N. Y. 400; *Matter of Eisner*, 5 Dem. 383.

⁷⁴ In such a case, the executor may pay the firm, and on filing a voucher therefor, ask credit for the amount,

on the accounting, at which time any interested party may question the propriety of its payment. (*Matter of Jones*, 2 Misc. 221; 54 St. Rep. 273.)

⁷⁵ As to the nature and sufficiency of the proof required, see *ante*, § 643. "There is no necessity for filing a further or supplemental account for the purpose of enabling the administratrix to verify the claim which she has presented against the estate. It is within the province of the referee to allow a properly verified claim to be now filed, or the claim as presented to be now verified." (*Matter of Cavanagh*, N. Y. Law J., July 28, 1892.)

⁷⁶ *Churchill v. Prescott*, 3 Bradf. 233.

⁷⁷ *Churchill v. Prescott*, 3 Bradf. 233.

⁷⁸ *Gladding v. Follett*, 2 Dem. 58.

⁷⁹ *Van Sinderen v. Lawrence*, 50 Hun, 272.

the same manner as other issues are determined.”⁸⁰ Under this section, it has been held that a surrogate has power to determine the validity and legality of an alleged assignment by a *cestui que trust*.⁸¹ He may also pass upon the right of the trustee to deduct from income an overpayment previously made by mistake,⁸² but he has no power to determine the validity of agreements by the distributees as to the trustee’s compensation.⁸³

§ 974. Proceedings on settlement of account.—On the return of the citation, issued in a voluntary proceeding, “the surrogate must take the account, and hear the allegations and proofs of the parties respecting the same.”⁸⁴ Where the parties cited on the representative’s petition neglect to appear, the latter may proceed *ex parte*; but an infant who thus makes default is not thereby deprived of his right. A guardian *ad litem* should be appointed;⁸⁵ and in New York county the rule is that a decree shall only be entered, on a written report of the guardian appearing for the infant to the effect that he has carefully examined the account and finds it correct.

§ 975. Proceedings before referee.—The general powers of referees appointed in Surrogates’ Courts have already been fully

⁸⁰ Co. Civ. Proc., § 2812. This section refers to a controversy which involves a claim to, or a lien upon, the specific share itself. Hence, a surrogate cannot withhold payment of a distributive share until an action is brought and it is determined whether the owner of the share is liable as surety upon the bond of a former trustee of the estate. (Matter of Horn, 7 App. Div. 89; 39 N. Y. Supp. 954.) Upon the accounting of a testamentary trustee who has been directed to hold a certain sum invested in order to produce certain annuities, the objection that the sum so held is unnecessarily large, and that a part of it should be returned to the residuary estate, does not relate to the accounting and cannot be considered in that proceeding. (Matter of Willets, 5 Dem. 342; *affd.*, on other points, in 9 St. Rep. 321.)

⁸¹ Matter of Rogers, 2 Connolly, 639.

⁸² Rutherford v. Myers, 50 App. Div. 298; 63 N. Y. Supp. 939.

⁸³ Matter of Young, 15 App. Div. 285; 44 N. Y. Supp. 585.

⁸⁴ Co. Civ. Proc., § 2728, as amended 1893 (former § 2730).

⁸⁵ Kellett v. Rathbun, 4 Paige, 101;

Matter of Leinkauf, 4 Dem. 1. The appointment of special guardians, or guardians *ad litem*, for infants, is governed by general regulations applicable to all special proceedings in the Surrogate’s Court. See *ante*, § 108. If minors are cited, it is imperative that special guardians of such minors should be appointed, or the Surrogate’s Court will have no jurisdiction over such minors, except for service of the citation. (Matter of Lockman, 4 Abb. N. C. 173.) The recital in the surrogate’s decree upon the final accounting of an executor, that proof of service of the citation upon infant legatees was produced, is not conclusive: it is the executor’s duty to see that proof of service is preserved. (Hood v. Hood, 85 N. Y. 561.) Pending a voluntary accounting by a testamentary trustee, a beneficiary of the trust estate died, leaving an infant child and a will, executed before the child’s birth, which made no provision for it. Held, that, on its parents’ death, the child was vested with some interest in the trust estate, and was, therefore, a proper, although perhaps not a necessary, party to the accounting; and that the

stated.⁸⁶ On a judicial settlement, the account itself is the subject-matter of the proceeding; and, like a pleading in an action, the court or referee, even at the trial, may allow any amendment of it which does not include a transaction subsequent in time to the return day of the citation.⁸⁷

§ 976. **Burden of proof.**— Items in the account, not disputed, are to be admitted.⁸⁸ Where the affidavit annexed to the account is full and distinct as to the payments, and the items charged as disbursements under twenty dollars, do not, together, exceed five hundred dollars, and the payment of sums over that amount are supported by vouchers, it is for the party who objects to the account to falsify and surcharge it, by objections in the form of distinct and specific allegations, and, on the hearing, he must support his allegations by proof.⁸⁹ While the accounting party must be prepared to establish the propriety of his payments, if disputed; yet, speaking generally, the burden of impeaching the accounts, if they are duly supported by his oath, is upon the party objecting.⁹⁰ It is not necessary that a debt should have

child, as well as the executor of its deceased parent, having been made parties to the accounting, the judgment on the accounting would be binding on the child and on its parents' estate. (Matter of Smith, 68 Hun, 530; 23 N. Y. Supp. 87.) See the seventh article of this chapter, *post*.

⁸⁶ See §§ 118, 650, 653, *ante*.

⁸⁷ Matter of Odell, 1 Connolly, 94; 18 St. Rep. 997; Matter of Gears, 27 Misc. 76; 58 N. Y. Supp. 200; Matter of Frank, 1 App. Div. 39; s. c. as Matter of Schneider, 36 N. Y. Supp. 972; Matter of Munoz, N. Y. Law J., July 26, 1893. In Price v. Brown (112 N. Y. 677), upon trial before a referee of an action to recover a balance of trust funds alleged to have been in the hands of defendant's testator at the time of his death, the referee allowed an amendment of the complaint by striking out a credit given by mistake and increasing the amount claimed, and where the judgment entered upon the referee's report was reversed and a new trial granted. — Held, that the amendment did not introduce a new cause of action and was within the discretion of the referee. See § 118, *ante*.

⁸⁸ Westervelt v. Gregg, 1 Barb. Ch. 469.

⁸⁹ Valentine v. Valentine, 2 Barb.

Ch. 430; Orser v. Orser, 5 Dem. 21; Matter of Rowland, *id.* 216; Metzger v. Metzger, 1 Bradf. 265; Carroll v. Hughes, 5 Redf. 337. A payment made on account of a debt of the estate, not exceeding the *pro rata* share to which such debt would be entitled in the *pro rata* distribution, should be allowed, though the creditor does not come in to claim the residue upon the final settlement. (Johnson v. Corbett, 11 Paige, 265.)

⁹⁰ Journault v. Ferris, 2 Dem. 320; St. John v. McKee, *id.* 236; Matter of Palmer, 3 *id.* 129; Lynch v. Patchen, *id.* 58; Matter of White, 6 *id.* 375; Matter of Fithian, 1 Connolly, 187; Bellinger v. Potter, 36 St. Rep. 601; 13 N. Y. Supp. 9; Matter of Smith, 13 Misc. 592; Matter of Arkenburgh, *id.* 744; 35 N. Y. Supp. 251; Matter of Sprague, 40 App. Div. 615; 57 N. Y. Supp. 1128; *affd.*, 162 N. Y. 611; Matter of Stevenson, 86 Hun, 325; 33 N. Y. Supp. 493; Matter of Baker, 42 App. Div. 370. The burden of proving that an executor might have collected a demand inventoried is upon the contestant (Smith v. Collamer, 2 Dem. 147); and so is the burden of impeaching the justness of disbursements, made by a trustee for expenses of administration. (Valentine v. Val-

been paid — the allowance and payment of which are contested — in order to shift the burden of proof from the contestant; it is enough that the claim has been allowed by the accounting party.⁹¹

§ 977. **Proceedings upon referee's report.**— The report of the referee being filed,⁹² any party dissatisfied therewith should file

entine, 3 Dem. 597.) On the accounting of an administratrix of an executor, to whom the will gave the right to use the estate for his own benefit, the burden is upon the contestants to show, by competent proof, the amount remaining in the executor's hands at his death. (Matter of Ryalls, 80 Hun, 459; 62 St. Rep. 287.) But in the absence of a voucher, the burden is upon the accounting party to prove the correctness and justice of a charge for which he asks credit, and the voucher for which has been lost. (Matter of Rowland, 5 Dem. 216.) See *Rose v. Rose*, 6 Dem. 26; s. c., 19 St. Rep. 783. But compare *Matter of Nockin*, 15 id. 731; *Matter of Selleck*, 111 N. Y. 284. The surrogate may compel an accounting executor to be cross-examined as to the items of his attorney's bill for costs. (Matter of Denike, 48 Hun, 606.) Where the accounting party is thus examined under oath by an adverse party, his whole statement must be taken together; and a part tending to charge him cannot be separated from a part tending to explain it and operating in his favor. (Ogilvie v. Ogilvie, 1 Bradf. 356.) Compare *Rouse v. Whited*, 25 N. Y. 170. Upon a question of assets, the declarations of the decedent as to the amount or value of his property are not competent to charge the administrator with assets. The administrator is only bound to a faithful attempt to realize upon such assets as may come to his knowledge. The declarations of deceased can have no other effect than to put him upon inquiry, upon their being brought home to him. (Ginochio v. Porcella, 3 Bradf. 277.) See *Matter of Woodward*, 69 App. Div. 286. It is error for the surrogate to receive evidence of the declarations of the testator, against the executor, in reference to business matters between them, tending to charge the latter with an indebtedness to the estate. (Everts v. Everts, 62 Barb. 577.) Where the representative sold property belonging to the estate, the price mentioned in

the conveyance is not necessarily conclusive on him on the accounting. (Upson v. Badeau, 3 Bradf. 13.) The surrogate should not refuse to allow proof of certain payments to the next of kin, because the parties have submitted their case without proof of such payment, if the application is made while the proceedings are still pending, and after the surrogate has announced that he would hear the parties touching anything that had escaped his attention, when they come before him to settle the decree. (People v. Coffin, 7 Hun, 608.) The submission of the case, without proof of the payment, at most, furnishes matter for the exercise of his discretion, like an application on a trial to introduce further testimony after counsel have rested, or to recall a witness after he has left the stand; and although, as a general rule, a higher court will not review the exercise of a discretionary power by an inferior tribunal, yet it is its duty to do so, in the case of a palpable abuse of discretion. As the surrogate in this case refused to exercise his discretion, on the ground of a want of power, that was an error which it was the duty of the higher court to correct. (Ib.)

⁹¹ *Matter of Warrin*, 56 App. Div. 414. Compare *Matter of Davis*, N. Y. Law J., Feb. 19, 1892.

⁹² As to form of report, exceptions thereto, and proceedings thereon, generally, see § 118 *et seq.*, *ante*. After a referee has filed his report, he cannot make an additional finding. (Matter of Richardson, 2 Misc. 288.) But see § 964, *ante*. An auditor appointed pursuant to the Revised Statutes could not withhold his report until his fees were paid, since the allowance to be made to him by the surrogate was to follow the confirmation of the report or other determination upon it. (Matter of Woodhouse, 1 L. Bul. 15; Matter of Foster, 3 Redf. 532.) In the latter case, the auditor instituted a proceeding to compel the executor to take up a report in his favor, and there were no assets in his hands.

exceptions thereto,⁹³ and these should specifically point out the errors complained of, where they do not appear from a mere denial of the correctness of the finding.⁹⁴ It is the duty of the court to consider the exceptions filed, and determine the questions presented thereby.⁹⁵ The court is not bound to sustain or overrule the exceptions specifically, but if it is satisfied that justice requires the taking of further testimony, it will reserve the questions on the exceptions, and order further testimony to be taken.⁹⁶ The proceedings to review a referee's report are now substantially the same as if the reference was had in an ordinary civil action, and the rules applicable thereto are to be found in the general provisions of the Code of Civil Procedure.

ARTICLE FIFTH.

FORM AND CONTENTS OF THE ACCOUNT, AND PRODUCTION OF VOUCHERS.

SUBDIVISION 1.

FORM OF THE ACCOUNT, ITS VERIFICATION, AND VOUCHERS.

§ 978. **The debtor side of the account.**—Executors and administrators, in making up their accounts,⁹⁷ are, in convenient order, first, to charge themselves with the amount of the property of the

Otherwise, as to a referee appointed in accordance with the provisions of the statute of 1870. (Ib.) Doubtless, the latter ruling applies to a referee appointed under the Code.

⁹³ In New York county the following rule is in force: "When a referee's report shall be filed, together with the testimony taken before him, said report shall be confirmed as of course, unless exceptions thereto shall be filed by a creditor or party interested in the accounting or proceeding, within eight days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, either party may bring on the hearing of said exceptions on eight days' notice, on any stated motion day of said Surrogate's Court." Where the accounting party does not file exceptions, it will be inferred that he acquiesced in the report, and the court will not afterward grant him a rehearing on the matters decided by the referee. (Matter of Mull, 22 St. Rep. 327.)

⁹⁴ *Ingrem v. Mackey*, 5 Redf. 357. The court is entitled to something more than a general exception that the conclusion of law is "contrary to the evidence and the law." (Matter of Sickles, N. Y. Law J., Feb. 10, 1890.)

⁹⁵ Matter of Pool, 18 Week. Dig. 555.

⁹⁶ Matter of Pollock, 3 Redf. 101.

⁹⁷ The statute does not prescribe any special form to be adopted by an executor in making up his account. Such a paper should contain a clear and definite statement of his dealing with his testator's estate, so that it can be made the subject of intelligent objections. (*Solomons v. Kursheedt*, 3 Dem. 307.) In that case, the executor of the will of each of two decedents, whose respective testamentary provisions were in direct antagonism, cited all persons interested in either of the estates to attend the judicial settlement of his account as representative of one thereof, and applied to the court for instructions as to the proper mode of presenting the account.

deceased contained in the inventory, at the appraised value. They are then to charge themselves with the increase thereof, such as interest that has accrued on debts owing to the deceased, and property and demands which have been discovered subsequently to the taking of the inventory; next, sums for which they have sold property exceeding its appraised value, and then all other increase to the inventory, showing the items thereof. The sum total of these matters of increase, added to the value of the property shown by the inventory, and subject to such modification as the event justifies, upon principles which are elsewhere explained, constitutes the debtor side of the account.⁹⁸ Where the executor or administrator has received the proceeds of real property, he should not, in the absence of any equitable conversion of such proceeds into personalty, include them as personal assets, but they should be stated, if at all, separately.⁹⁹ When the provisions of the will operate as an equitable conversion of the real estate, the executor is accountable for the rents.¹

§ 979. The credit side of the account.—The next business of the accounting party is to show what has become of the sum total. And, in a convenient order, the first class of items on the credit side consists of debts found to be bad or doubtful, which have not been paid, and these are credited as the uncollectible amounts set down in the inventory. And the reason why such debts were not collectible should be stated, except where it is unnecessary because they were marked worthless in the inventory, and may be presumed uncollectible. The fact whether debts are marked worthless were collectible or not, is a fact to be judicially determined by the surrogate in passing upon the account. And if a final accounting is sought, the facts justifying the credit claimed should be stated. The statement of the fact that the debts are not collected will not justify a decree that they were not collectible.² The next class of credits comprise the sums for which the representative has neces-

Held, that such instructions should not be given: the executor should, in the first instance, solve for himself the problem which confronted him, leaving it to those interested to raise desired issues by filing objections.

⁹⁸ Matter of Jones, 1 Redf. 263; Wilcox v. Smith, 26 Barb. 346.

⁹⁹ Matter of Place, 1 Redf. 276; Matter of Brown, 5 Dem. 223. As to the proper statement of the account of a testamentary trustee who has invested moneys on mortgage, and bought in the property at a lesser fig-

ure, and subsequently sold at a higher sum, see *Farmers' Loan & Trust Co. v. Hall*, 5 Dem. 73. A testamentary trustee of a life estate in net income must distinguish in his accounts between the income derived from the estate and the charges thereon, and the principal or *corpus* of the estate. (*Wilcox v. Quinby*, 73 Hun. 524; 26 N. Y. Supp. 114.)

¹ Matter of Langlois, 26 Abb. N. C. 226; 14 N. Y. Supp. 146.

² Matter of Jones, 1 Redf. 263.

sarily sold property at less prices than its appraised value, with a list of articles or description of the property so sold.³ A third class comprises the articles of property lost without the fault of the executor or administrator. And here, too, the cause of loss, with the appraised value of the articles in question, should be stated, for the surrogate is here, also, to pass judicially on the sufficiency of the excuse offered. The fourth class comprises the funeral expenses and the debts of the decedent, naming the creditors and the times and amounts of payments. The fifth class comprises the items of the actual and necessary expenses paid in the course of administration in execution of duty.⁴ The sixth class comprises payments to legatees and next of kin.⁵ The sum total of such credits is then to be subtracted from the amount of the debtor side of the account. Following this, should be mentioned the articles of property which are yet unsold, with the appraised value thereof, and the reasons why they have not been sold. And the delivery of articles set apart for the widow and children, if any, under the statute, may also properly be stated.

§ 980. Facts additional to the pecuniary items.—Besides the items of account, strictly so called, the accounting party should set forth a number of other facts which are pertinent and proper to be considered by the surrogate in making up his decree — such as an enumeration of the parties in interest, and a statement as to the proceedings of advertisement, etc., to ascertain the debts. Under these heads, the executor or administrator should, in ordinary cases, state the names and ages of the legatees and next of kin; and if any are minors or incompetents, that fact should be

³ *Willeox v. Smith*, 26 Barb. 316, 346. See *Farmers' Loan & Trust Co. v. Hall*, 5 Dem. 73.

⁴ The expenses of the accounting proceeding should not appear in the account, but should form a part of the bill of costs presented for allowance and taxation upon the entry of the decree passing the account. (*Matter of Perry*, 5 Misc. 149.) The failure of the executor to set forth in his account the items of necessary expense actually paid by him, does not preclude an allowance therefor by the surrogate. (*Matter of Kane*, 64 App. Div. 566; 72 N. Y. Supp. 333.)

⁵ The account should be made up so as to show, in the first instance, the net amount of assets in the hands of the accounting party, and the distributive share to which each legatee

is entitled. In ascertaining this amount, the executors are entitled to credit for payments to legatees, only to the extent of the distributive share to which each legatee was entitled at the time of the accounting. If they have overpaid a legatee, they must look to him for reimbursement: they cannot claim credit for the amount so overpaid, and thereby diminish or postpone the amounts payable to other legatees. (*Adair v. Brimmer*, 74 N. Y. 539.) Moneys paid out by the executor for the support of infant children of the testator, before his receipt of any moneys in the capacity of guardian, should be credited in his account as executor. (*Matter of Gearns*, 27 Misc. 76; 58 N. Y. Supp. 200.)

stated, and whether they have guardians, and, if so, their names, residences, and the mode of their appointment; and if any are females, whether they are married or unmarried — these circumstances being necessary to enable the surrogate to pass on the propriety of payments made to them, or their right in respect to claims of legacies or shares. The account should also state, as part of the proceedings, when the inventory was filed; when the advertisements for claims were published; what claims were allowed, what disputed, and what were rejected, and the time and manner in which they were rejected or disputed; what suits, if any, have been commenced thereon; which of them have been determined, and how, and which are pending, and the amount claimed. This is necessary, in order to enable the surrogate to determine if any of the estate is to be reserved for disputed claims. The account should also state what claims have been presented and allowed since the expiration of the advertisement for claims. If no such claims have been rejected or disputed and no suits have been commenced, it must be so stated. If the accounting party has a claim for debt owing to him by the decedent, it should be stated with some fullness. If he took no voucher when he made payment of a claim, or if the voucher taken has been lost or destroyed, he should state the fact, and attach the proof of payment.⁶ All these things are essential in the account.⁷ It is material, also, that the character of the debts paid, allowed, or prosecuted should be stated; that is, whether they are judgments docketed, etc., or debts of an inferior class.⁸ If any other fact has occurred, as a part of the proceedings, which may affect the estate, or the rights of any party in interest, or his own rights, he ought to state it.

§ 981. Separate account for each of several trusts.—In the case of several distinct trusts, as where the decree settling the accounts of executors directs them to set apart twelve different trusts as provided by the will, the trustees, in subsequently accounting, may properly do so by twelve separate petitions and citations, instead of one, the trustees having kept the accounts as to each

⁶ See § 984, *post*.

⁷ But it need not show the amount of the residuary estate when it does show the amount of such estate, subject to deductions which can only be fixed at the entry of the decree of settlement. (*Bullard v. Benson*, 1 Dem. 486.)

⁸ See *Matter of Jones*, 1 Redf. 263. Where executors credit themselves with payment of a debt by off-setting one due the estate, they must show such offset has been allowed by the other party. (*In re Archer*, 23 N. Y. Supp. 1041.)

trust separately; and the surrogate properly denied a motion to compel a consolidation of the accounts.⁹

§ 982. **Verification of account.**—To each account “must be appended the affidavit of the accounting party, to the effect that the account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate of the decedent; and of all money and other property belonging to the estate, which have come to his hands, or been received by any other person, by his order or authority, for his use; and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate of the decedent.”¹⁰ The like affidavit must be appended to each account filed with the surrogate by a testamentary trustee, “except that the expression, ‘the trust created by the will,’ with such other description of the trust as is necessary to identify it, must be submitted in place of the words, ‘the estate of the decedent.’”¹¹

§ 983. **Production of vouchers.**—The accounting party must produce and file a voucher for every payment, except in one of the following cases: “(1) He may be allowed, without a voucher, any proper item of expenditure, not exceeding twenty dollars, if it is supported by his own uncontradicted oath, stating positively the fact of payment, and specifying when and to whom the payment was made; but all the items so allowed against an estate, on all the accountings of all the executors, or administrators, shall not exceed five hundred dollars. (2) If he proves, by his own oath, or another’s testimony, that he did not take a voucher when he made the payment; or that the voucher then taken by him has been lost or destroyed; he may be allowed any item, the payment of which he satisfactorily proves by the testimony of the person to whom he made it; or, if that person is dead, or cannot after diligent search be found, by any competent evidence, other than his own oath or that of his wife.”¹²

⁹ Matter of Willets, 112 N. Y. 289.

¹⁰ Co. Civ. Proc., § 2729, as amended 1893: consolidating former § 2733. See Williams v. Purdy, 6 Paige, 166; Gardner v. Gardner, 7 id. 112.

¹¹ Co. Civ. Proc., § 2811.

¹² Co. Civ. Proc., § 2729, as amended 1893: consolidating former § 2734. And see Co. Civ. Proc., § 2811. The last clause modifies the provision of the former statute, as to which it was said to be manifest, that if the rules

should not be relaxed, in favor of the representative of an estate under certain circumstances, injustice would be done, and a serious obstacle to the assumption of such trusts be prevented. (Matter of Pollock, 3 Redf. 100, 130.) So, it was held, that executors were not bound to require vouchers from creditors whose claims were attested by the decedent’s books of account, and by personal information of their correctness from his book-

§ 984. **Proof on nonproduction of voucher.**—"But an allowance cannot be so made, unless the surrogate is satisfied that the charge is correct and just."¹³ The accounting party is not bound to establish payments for which he presents vouchers unless denied by objections, and the burden of impeaching such payments is on the contestant.¹⁴ The lack of vouchers is not necessarily an insuperable obstacle to passing the accounts. The surrogate, by reason of the nature of his office, may, by evidence morally admissible, ascertain where truth and justice lies and decree accordingly.¹⁵ It seems, however, that an oral admission by contes-

keeper (*Gillespie v. Brooks*, 2 Redf. 349); and that information from the widow that a certain sum was due from the decedent to a servant was sufficient to justify the executor in making payment without a voucher. (Ib.) In *Willeox v. Smith* (26 Barb. 216), it was held, that the statute was imperative in requiring the production of vouchers; and that if an account could be allowed in any case without vouchers, and without proof, other than the oath of the executor or administrator, it was only where creditors refused to give vouchers, or where they had been lost or destroyed. In *Westervelt v. Gregg* (1 Barb. Ch. 469, 479), it was held, that an estate should not be subject to the useless expense of producing evidence to prove the items in a verified account, when the correctness of those items was not in fact questioned by the parties in interest.

¹³ Co. Civ. Proc., § 2729, as amended 1893. See *Peck v. Sherwood*, 56 N. Y. 615. Payments made by the representative cannot be rejected merely because neither the accounts, nor the oath to the accounts, disclose to whom such payments have been made: it is sufficient if the testimony of the representative shows to whom the money has been paid; and it seems that in case of payments under \$20, where there is no reason to doubt that the payment has been made, such payments will not be disallowed in all cases, even where the representative cannot remember the name of the payee, and cannot identify him. *Matter of Nichols*, 4 Redf. 288; decided under the R. S. It is not an insuperable objection to allowing a gross sum for disbursements made by the executor, in managing the estate for a series of years, that he is not liable to give in detail all the various items

of charge. (*Brohde v. Bruner*, 2 Redf. 333.) See *Cornwell v. Deck*, id. 87.

¹⁴ *Boughton v. Flint*, 74 N. Y. 477; *Bainbridge v. McCullough*, 1 Hun. 488; *Carroll v. Hughes*, 5 Redf. 337. Where an administrator actually has vouchers for claims under \$20 which he has paid, the surrogate may require their production upon his accounting in order that they may be scrutinized by the contestants, and his refusal to do so, will be a ground for suspicion and furnish the surrogate sufficient reason in the exercise of his discretion for the rejection of such claims as credits. (*Orser v. Orser*, 5 Dem. 21.) The neglect of the representative to require the affidavit of the claimant on the presentation of the debt, as he is authorized to do, is not in itself ground for rejecting the allowance, if the demand is supported by a voucher upon the accounting. (*Metzger v. Metzger*, 1 Bradf. 265.) See § 640, ante.

¹⁵ *Matter of Langlois*, 2 Connoly, 481; 26 Abb. N. C. 226. In that case, the books of a deceased executrix were, without objection, received in evidence in support of the account of her successors, and contestants' counsel orally admitted in open court the correctness of the account. In *Matter of Wagner* (119 N. Y. 31), the remark of Gray, J., though *obiter*, commends itself: "The general jurisdiction conferred upon the Surrogate's Court in matters relating to the conduct of executors and administrators would seem meaningless, if not an absurdity, if it did not comprehend the right to decree intelligently, and upon equitable principles, and to order their conduct upon principles of justice and of reason." In *Willeox v. Smith* (26 Barb. 343), after stating the stringent rules to which executors and administrators are held in establishing their accounts,

tant's counsel in open court, of the correctness of the account, is a complete waiver of the objection that proper vouchers or evidence have not been produced.¹⁶

SUBDIVISION 2.

THE SUBJECT-MATTER OF THE ACCOUNT.

§ 985. **The assets mentioned in the inventory.**—If a proper inventory has been filed, it will usually disclose the principal assets for which the representative is bound to account; and presumptively, the value fixed in the inventory is the value for which he must account.¹⁷ The inventory is *prima facie* evidence against him, both of what the assets consist of and of their value. But the inventory is not conclusive against either party. The representative has a right to show that property was included in the inventory which, in fact, did not belong to the estate,¹⁸ and he may also show that property belonging to the estate was, in fact, of less value than the amount at which it was inventoried, and that, notwithstanding his diligence and fidelity, he has been unable to realize the amounts contained in the inventory.¹⁹ So,

and pronouncing them "eminently just," the court said these rules "should not be departed from except in cases of the most urgent necessity, and in order to prevent absolute injustice." In *Matter of Gerow* (23 N. Y. Supp. 847), the surrogate of Rockland held, that, in the absence of vouchers, *some* proof of payment must be furnished by competent witnesses, as provided by subdivision 2. Referring to *Matter of Langlois*, he said: "If a surrogate can substitute his own sense of justice in place of that of the Legislature, as embodied in section 2734, and determine that vouchers need not be taken, then the rule is practically annulled." Compare *Matter of Cruger*, 34 N. Y. Supp. 191; 68 St. Rep. 241. In *Matter of Grant* (40 St. Rep. 944; 16 N. Y. Supp. 716), the General Term of Fifth Department reversed a decree allowing payments for a tombstone and funeral expenses, where no vouchers were filed and no evidence showing payment appeared in the case on appeal. The letter, as well as the policy of the statute, require that the oath of the accounting party, in the case of a lost or destroyed voucher, should be excluded. But where he is called as a witness by

the contestant and examined as to such payments, his testimony concerning payments made by him, where he took vouchers, which are lost, concludes the contestant. (*Rose v. Rose*, 6 Dem. 26; s. c. as *Matter of Rose*, 19 St. Rep. 783.)

¹⁶ *Matter of Langlois*, *supra*.

¹⁷ *Matter of Childs*, 26 N. Y. Supp. 721; *Matter of Shipman*, 82 Hun. 108; 31 N. Y. Supp. 571; *Matter of Maack*, 13 Misc. 368; 35 N. Y. Supp. 109. See Co. Civ. Proc., § 1832.

¹⁸ Where the appraisers had failed to set apart the statutory allowance to the widow, it may be done on the accounting. (*Matter of Maack*, *supra*.)

¹⁹ Co. Civ. Proc., § 1832; *Schultz v. Pulver*, 11 Wend. 361. Where debts due decedent, to a large amount, were inventoried as worthless, and the executors, under the advice of decedent's bookkeeper, who was familiar with the circumstances, did not attempt to collect them by suit.—Held, they were not chargeable with such debts, in the absence of evidence that the debts might have been collected. (*Gillespie v. Brooks*, 2 Redf. 349.) Where the surviving partner is also the executor or administrator of the deceased part-

where the representative received money paid to him by mistake, as due to the estate, he is not chargeable with it as assets, unless the person paying it has waived his claim to recall it.²⁰ He may also show that the value placed upon any article of the assets in the inventory was excessive, but very clear proof of this should be required. It is not enough to show that he has not realized the inventory value. Thus, if he sells assets at the inventory valuation, and, instead of securing payment of the price, gives a long credit without sufficient security, and by this negligence loses a part of the price, he is not entitled to a diminution of the valuation upon the ground that the price for which he bargained was higher than he could have secured on a cash sale.²¹ Upon the same principle, if the executor buys in assets for his own benefit, though in the name of another person, at less than the inventory price, he cannot be allowed to account at only the price fixed by the sale. In such a case, he is properly chargeable with the value of the assets so sold; and in the absence of any decisive and satisfactory proof otherwise, the best evidence will be the sworn inventory filed by the representative himself.²²

§ 986. Impeaching inventory.—On the other hand, the parties interested may show that assets, other than those contained in the inventory, have come to the hands of the representative, or might have come, by the exercise of due care and attention.²³

ner, a statement of the partnership affairs is incidental to the settlement of the accounts of the executor or administrator, and, in a case of final accounting, is absolutely necessary. (*Marre v. Ginocchio*, 2 Bradf. 165.) The books of the firm and the balance sheet, showing the amount due the estate, are evidence against him on his accounting. And if he claims that any deduction shall be made with reference to the uncertain value of the assets, the burden is upon him to show what corrections, if any, are to be made. (*Matter of Saltus*, 3 Abb. Ct. App. Dec. 243.)

²⁰ *Johnson v. Corbett*, 11 Paige, 265. In *Matter of Pollock* (3 Redf. 101), the executor, in his accounts, erroneously charged himself with sums of money.—Held, it did not prevent him from afterward, on his accounting, claiming that he was not properly chargeable with them. See *Matter of Rembe*, 23 Misc. 44; 51 N. Y. Supp. 507. In *Betts v. Betts* (4 Abb. N. C. 324, 439), an agent of executors re-

ported to them the sum of \$475, as collected from a tenant, which was not actually collected; and the executors, in accounting before the surrogate, credited the estate with that sum. But the tenant having failed, and the sum remaining uncollected, without fault of the agent.—Held, proper for the executors to repay it, and charge it in their account.

²¹ *Hasbrouck v. Hasbrouck*, 27 N. Y. 182.

²² *Schenck v. Dart*, 22 N. Y. 420. In *Wright v. Fleming* (71 N. Y. 612), an administrator's accounts showed a sale of bonds belonging to the estate, and he accounted for the proceeds. In the absence of any objection to them or proof tending to impeach the statement.—Held, error for the surrogate to charge him with the value and interest, as if he had retained them. See *Matter of Yetter*, 44 App. Div. 404; 61 N. Y. Supp. 175; aff'd., 162 N. Y. 615.

²³ The burden of so doing is upon the contestant. (*Matter of Mullan*,

The inventory may be rebutted by showing that the account which the representative renders is false or erroneous in the omission of assets received, or which ought to have been received, or by showing that the accounting party has intentionally failed to account for parts of the estate, or made himself liable by wrong dealing or negligence.²⁴

§ 987. **Assets not in inventory.**—Where the existence of other assets is alleged, for which the representative has not accounted, the surrogate has, of course, jurisdiction to determine the question; and if the representative, admitting that the articles referred to belong to the decedent, sets up a gift by the decedent to him before death, the surrogate has jurisdiction to determine the question of a gift as necessarily incidental to the settlement of the accounts, and making a decree for distribution.²⁵ It will often happen that assets have been acquired since the filing of the inventory, the existence of which was unknown at the time, or depended on a contingency, making their inventory and appraisal impracticable. In case of an equitable conversion, the executor has, by virtue of his office, the administration of both kinds of property, real and personal, and should account for all as assets.²⁶

145 N. Y. 98; 64 St. Rep. 551; *Matter of Van Sise*, 38 Misc. 155.) Co. Civ. Proc., § 1832, relating to the rebuttal of inventories, was not designed to operate upon an accounting where an administrator's management of his trust is upon trial. (*Matter of Woodworth*, 5 Dem. 156.)

²⁴ *Hasbrouck v. Hasbrouck*, *supra*; *Halsted v. Hyman*, 3 Bradf. 426; *Montgomery v. Dunning*, 2 id. 220. See *Matter of Tobin*, 40 St. Rep. 366; 16 N. Y. Supp. 462. The mere fact that decedent owned certain property some years before her death, does not authorize the presumption that she died the owner of it. (*Matter of Ryalls*, 80 Hun. 459; 30 N. Y. Supp. 455.)

²⁵ *Merchant v. Merchant*, 2 Bradf. 432, 437. See §§ 584, 967, *ante*. Also *Doty v. Willson*, 47 N. Y. 580; *Fowler v. Lockwood*, 3 Redf. 465; *Matter of Barefield*, 36 Misc. 745; 74 N. Y. Supp. 472. So, too, a person interested in the estate as a widow or next of kin, who has presented to the appraisers an article, under the belief that it was a part of the property of the decedent, is not necessarily estopped by the appraisal; but may subsequently, on being advised of his

own title thereto, interpose his claim. (*Sanford v. Sanford*, 5 Lans. 486; 61 Barb. 293.) Compare *Van Slooten v. Wheeler*, 140 N. Y. 624. See *Matter of Myers*, 36 App. Div. 625; 55 N. Y. Supp. 168. For a case where the representative deposited her own moneys in the testator's bank account and it was sought to add them to the inventory, see *Matter of Shipman*, 82 Hun. 108.

²⁶ *Matter of Mitchell*, 61 Hun. 372; 16 N. Y. Supp. 180. See *Shuttleworth v. Winter*, 55 N. Y. 624, 631. The surrogate has power to compel an executor to account for proceeds resulting from the exercise of a discretionary power to sell real estate. (*Matter of Cutting*, N. Y. Daily Reg., Nov. 18, 1885.) A general devise to executors to sell and distribute, in a specified way, the proceeds of real estate, does not convert it into personalty, so as to make them accountable for such as has not been sold, as personalty upon their final accounting, and, if a sale is not made within a proper time, the remedy is by application to the court to compel it. (*Matter of Hunter*, 3 Redf. 175.) As to powers of personal representatives with respect to real estate and their accountability for

The representative is not chargeable with the value of chattels, in the use of which the testator has given a life estate to one person, with remainder over to others. The remedy of the remaindermen is not against the representative, but, in case of danger to the chattels, to require the life tenant to give security.²⁷ Having already treated, as fully as was thought to be necessary, of the quantity of the estate, and what assets executors and administrators are accountable for, it will be unnecessary to pursue the subject any further here.²⁸

ARTICLE SIXTH.

COMPENSATION OF EXECUTORS, ADMINISTRATORS, AND TESTAMENTARY TRUSTEES.

§ 988. Rate of compensation of executors and administrators.—

The statute provides that, "on the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them, according to the services rendered by them respectively, over and above his or their expenses, at the following rates:

"For receiving and paying out all sums of money not exceeding one thousand dollars at the rate of five per centum.

"For receiving and paying out any additional sums, not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

"For all sums above eleven thousand dollars, at the rate of one per centum."²⁹

§ 989. Allowance for expenses.—In addition to the allowance by way of compensation for their personal services, the representatives must be allowed for their "necessary expenses actually

rents and profits, see *ante*, §§ 530, 532.

²⁷ *Matter of Place*, 1 Redf. 276. See § 749, *ante*. Under a will which gave to trustees a farm and farming utensils and live stock for the use of testator's son.—Held, that the trustees were not chargeable to the remainderman for the personal property because they gave it into the custody of the son. (*Matter of Washbon*, 38 St. Rep. 619; 14 N. Y. Supp. 672.)

²⁸ See § 528 *et seq.*, *ante*.

²⁹ By L. 1893, c. 686, the foregoing provision of the Revised Statutes (2 R. S. 93, § 58, as amended L. 1863, c. 362, § 8; L. 1880, c. 245) was car-

ried into the Code, and being consolidated with the former sections 2736, 2737, and 2738 (now repealed), constitute section 2730. The second paragraph of the original statute (before the amendment of 1893, on bringing it into the Code) allowed 2½ per cent. "for receiving and paying out any sums exceeding \$1,000, and not amounting to \$10,000," that is, on \$9,000; and 1 per cent. on all sums above \$10,000; whereas now the rate is increased by \$25 on all sums of \$11,000 or under. As to compensation of temporary administrators, see § 423, *ante*.

paid by them.”³⁰ The reader is referred to previous pages, where the subject of expenses of administration is fully dealt with.³¹ Expenses of *accounting* are mentioned later on.

§ 990. Compensation of testamentary trustees.—Notwithstanding the repeal of the statute,³² which gave the same commissions to testamentary trustees as to executors, etc., it was held that trustees were within the equity of the statute, and the surrogate had power to grant them such commissions as are incident to his general power to settle their accounts, and the power was uniformly assumed.³³ The statute now provides, however, that in all “annual accountings” of trustees created by will or appointed by any competent authority to execute a trust created by will, the surrogate “shall allow to the trustee or trustees the same compensation for his or their services, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein.”³⁴

§ 991. Ground of the right to compensation.—The statute gives the commissions as matter of right, and the surrogate has no power to withhold them, or to state a balance excluding them,³⁵ providing the representative has properly administered the estate.³⁶ The doctrine of the common law, on the contrary, is that an executor or administrator, like any other trustee, is not entitled to commissions, nor to any compensation for his services in the execution of his trust; the reason of this refusal to award a compensation, without statute authority, being, that the acceptance of a trust must be deemed voluntary and confidential, and a just indemnity is all that can be expected or required.³⁷ The

³⁰ Co. Civ. Proc., § 2730, as amended 1895.

³¹ See § 552 *et seq.*, *ante*.

³² L. 1866, c. 155.

³³ Hurlburt v. Durant, 88 N. Y. 121; Johnson v. Lawrence, 95 id. 154; Laytin v. Davidson, id. 263; Meeker v. Crawford, 5 Redf. 450; Matter of Roosevelt, id. 601; Hall v. Campbell, 1 Dem. 415; Slosson v. Naylor, 2 id. 257; 4 Civ. Proc. Rep. 280.

³⁴ Co. Civ. Proc., § 2802, as amended 1885. The commissions of testamentary trustees are governed by the law in force at the time of the settlement of their accounts, although the services may have been performed prior to the enactment of such law. (Naylor v. Gale, 73 Hun, 53; 25 N. Y. Supp. 934.)

³⁵ Halsey v. Van Amringe, 6 Paige, 12; Dakin v. Demming, id. 95; Matter of Curtiss, 9 App. Div. 285. Compare Secor v. Sentis, 5 Redf. 570. The commissions of an insolvent executor, who is indebted to the estate, must be applied, on the settlement of his account, to the liquidation of his indebtedness to the decedent. (Freeman v. Freeman, 4 Redf. 211.)

³⁶ See Wheelwright v. Rhoades, 28 Hun, 57; 11 Abb. N. C. 382; Welling v. Welling, 3 Dem. 511, and cases *infra*.

³⁷ In an early case, Chancellor Kent, in refusing a trustee's request to be allowed commissions, said that it could not have a very favorable influence on the prudence and diligence of a trustee, were the court to promote, by the

statute now allows a specific compensation; but as to all beyond that, the courts still adhere to this statutory principle, and the executor or administrator cannot, even by rendering service beyond his duty as trustee, entitle himself to additional compensation, however necessary the service and reasonable his price.³⁸

§ 992. **Statute allowance exclusive.**—The statute allowance, if claimed, is exclusive of a specific compensation in the will; and if a testator has provided for such compensation, an election between that and the statute allowance is necessary. The Code declares that where the will provides a specific compensation to an executor, administrator, or trustee, he is not entitled to any allowance for his services, unless, by a written instrument filed with the surrogate, he renounces the specific compensation.³⁹ The subjects of legacies given in lieu of commissions is con-

hopes of reward, a competition, or even a desire, for the possession of private trusts that relate to the moneyed concerns of the helpless and infirm. (*Manning v. Manning*, 1 Johns. Ch. 527.)

³⁸ *Myers v. Bolton*, 157 N. Y. 393; 28 Civ. Proc. Rep. 397; *Matter of Howard*, 3 Misc. 170; 24 N. Y. Supp. 836. See § 557 *et seq.*, *ante*. As to the transferable nature of the right to commissions, see *De Peyster v. Ferrers*, 11 Paige, 13; *Gray v. Murray*, 3 Johns. Ch. 167; *Worrall v. Driggs*, 1 Redf. 449; *Matter of Worthington*, 141 N. Y. 9; 56 St. Rep. 561. A decree of a surrogate will not be reversed because it allows a gross sum to the administrator for his services, if it appear that it does not exceed the amount of his statutory fees. (*Green v. Sanders*, 18 Hun. 308.) For proceedings in an action to recover from executors commissions allowed by a decree of the surrogate, which was afterward reversed, see *Scholey v. Halsey*, 72 N. Y. 578.

³⁹ Co. Civ. Proc., § 2730, as amended 1893; consolidating former § 2737. Compare *Russell v. Hilton*, 37 Misc. 642; 76 N. Y. Supp. 233. Section 2811, making former section 2737 (now repealed) apply to testamentary trustees, will doubtless be held to make present section 2730 applicable to them. Though the statute fixes no time for the election, the executors are bound, if they desire to renounce the latter, to do so as soon as they ascertain which rate would be more

advantageous, and they may lose their opportunity by *laches*. (*Arthur v. Nelson*, 1 Dem. 337.) In *Matter of Weeks* (5 Dem. 194), it was held, that the time within which an executor may renounce his legacy is not limited by law. So long as he has not indicated his election between such provision and the statutory commissions, either by taking to himself one or the other, or by some other mode, his right to file a renunciation, and to avail himself of its benefits, remains unimpaired. To the same effect, *Matter of Arkenburgh*, 38 App. Div. 473; 56 N. Y. Supp. 523; distinguishing *Arthur v. Nelson*, *supra*. Where an executor has renounced the right to specified compensation, the surrogate is not authorized to permit him to retract the same without the consent of the parties in interest. (*Ib.*) In *Matter of Tilden* (5 Dem. 230; 44 Hun. 441; 98 N. Y. Supp. 434), the will provided for compensation to be received by the executors, which it directed to be paid to them from time to time in proportion to their services. Held, that a decree settling their accounts was not an adjudication that the sum therein charged as commissions was all the compensation to which the executors were then entitled, and that such decree did not prevent a subsequent allowance as commissions of any sum in addition to the sums there allowed which the executors could show themselves entitled to upon a subsequent accounting. See *Smith v. Lansing*, 24 Misc. 566.

sidered elsewhere.⁴⁰ When the provision made by the will fails, the court cannot, in construing the will, award the executor a compensation in money, in lieu thereof, on the theory that it may award a pecuniary equivalent.⁴¹ But since a testator may give what compensation he pleases (except as against creditors), he may expressly give compensation in addition to the statute allowance, and in such case the court will award payment of both, if the services are actually performed.⁴² On the other hand, the will may limit the compensation for particular services rendered. Thus a direction in a will, that one of three executors should "receive a commission of six per cent. upon all moneys collected by him," does not entitle him to the commission on the entire proceeds of the estate, or upon all sums received by him, but only on collections, giving the word its ordinary meaning.⁴³

§ 993. Compensation regardless of statute.— It is a general rule, that where the instrument creating a trust provides that the trustee shall have "a reasonable compensation" for his services, he is not confined to the statutory allowances to executors, etc.; but his compensation is to be adjusted at what shall be determined, upon judicial investigation, to be reasonable under the circumstances, without regard to the statute.⁴⁴ It is perfectly competent for the parties interested to agree with the representative for the allowance to him in addition to his statutory commissions, and such an agreement, if just and fair, will be enforced.⁴⁵

§ 994. Estoppel from claiming commissions.— The allowance of commissions is not mandatory or compulsory, but is to be ad-

⁴⁰ See § 746, *ante*.

⁴¹ *Downing v. Marshall*, 1 Abb. Ct. App. Dec. 525. See *Bigelow v. Tilden*, 52 App. Div. 390.

⁴² *Clinch v. Eckford*, 8 Paige, 411; but not where the representative has neglected and mismanaged the estate. (*Widmayer v. Widmayer*, 76 Hun, 251; 27 St. Rep. 773.) A testator may likewise authorize his executors to agree with one of their own number for a special compensation to be made to him for special services. (*Clinch v. Eckford*, *supra*.) And see § 557, *ante*.

⁴³ *Ireland v. Corse*, 67 N. Y. 343. A will provided that the executors should receive for their services "on all sums received for personal property sold, or rents, or the collection of

debts owing to me, or for the income of other funds or investments, five per cent. of the amount received;"—Held, to include the principal of government bonds held by testator at the time of his death, and paid by the government to such executors. (*Matter of Tilden*, 44 Hun, 441; 5 Dem. 230.)

⁴⁴ *Matter of Schell*, 53 N. Y. 263. See *Cram v. Cram*, 2 Redf. 246.

⁴⁵ *Matter of McCord*, 2 App. Div. 324; 37 N. Y. Supp. 852; *Matter of Braunsdorf*, 13 Misc. 666; 35 N. Y. Supp. 298; *affd.*, 2 App. Div. 73; *Matter of Young*, 17 Misc. 680; *sub nom.* *Matter of Cornell*, 41 N. Y. Supp. 539; *affd.*, 15 App. Div. 285; *Matter of Turfler*, 24 N. Y. Supp. 91. See *Matter of Hodgman*, 69 Hun, 484; *affd.*, 140 N. Y. 421.

judged by the surrogate. A party may be estopped from claiming them by an agreement, express or implied,⁴⁶ or by the terms of the will, in the case of executors.⁴⁷ The fact that the executor was given the whole income for life will not bar his right to commissions upon sums received and paid for the benefit of the general estate.⁴⁸

§ 995. **Forfeiture of commissions.**—Executors and administrators who have resigned their trusts, before the complete execution of the duties imposed upon them, are not entitled to compensation to be charged upon the *corpus* of the estate.⁴⁹ Although one of several executors has not resigned, yet where he declined to unite in the inventory, and performed none of the duties as executor, he may be refused commissions.⁵⁰ Trustees do not necessarily lose their right to commissions by improper investment of the trust funds, for which payment of interest has been imposed upon them, where the estate has suffered no loss.⁵¹ But

⁴⁶ *Matter of Hopkins*, 32 Hun. 618; *Matter of Cooper*, 93 N. Y. 507. See *Matter of Allen*, 96 id. 327; *Matter of Hodgman*, *supra*. Where the trustees annually rendered accounts, and paid over the whole net income to the beneficiaries, without making any claim for commissions, they waived their right thereto, the income being the sole fund from which the commissions were payable, and they cannot charge past commissions upon the income of future years. (*Spencer v. Spencer*, 38 App. Div. 403; 56 N. Y. Supp. 460.) To the same effect, *Matter of Bevier*, 17 Misc. 486; 41 N. Y. Supp. 268; *Matter of Harper*, 27 Misc. 471; 59 N. Y. Supp. 373; *Matter of Haight*, 51 App. Div. 310; 64 N. Y. Supp. 1029; *Matter of Slocum*, 60 App. Div. 438; 69 N. Y. Supp. 1036; modified on another point, 169 N. Y. 153; *Matter of Tucker*, 29 Misc. 728; 62 N. Y. Supp. 1021.

⁴⁷ In *Matter of Kernochan* (104 N. Y. 618), testator's will provided: "It is also my request that all persons herein named as executors and trustees, and that each executor and trustee, other than my wife, do also receive and take the full rate of commissions provided by law for each executor, intending this to provide suitable compensation for their services in and attention to the duties herein devolved upon them." Substantially the whole income of the estate in the hands of the executors was

given to the wife:—Held, that it was testator's intention to exclude his wife from compensation. Where an executor is denied compensation in the will, the surrogate cannot allow him commissions on the ground that, by the nonaction of a co-executor, his labors have been more onerous than testator anticipated. (*Matter of Gerard*, 1 Dem. 244.) The testator, by his will, granted to one of two executors, and to the wife of the other, one-half of the residuum, and declared that the executors should receive no compensation or fees for their services in settling the estate. On their final accounting, the executors asked for fees:—Held, not allowable. (*Secor v. Sentis*, 5 Redf. 570; explaining *Halsey v. Van Amringe*, 6 Paige, 12; *Dakin v. Demming*, id. 95.)

⁴⁸ *Betts v. Betts*, 4 Abb. N. C. 324.

⁴⁹ *Matter of Hayden*, 54 Hun. 197; *affd.*, 125 N. Y. 776; *Matter of Allen*, 96 id. 327; *Matter of Baker*, 35 id. 272; *Matter of Jones*, 4 Sandf. Ch. 615. Compare *Matter of Douglas*, 60 App. Div. 64; 69 N. Y. Supp. 687.

⁵⁰ *Eager v. Roberts*, 2 Redf. 247; *Walke v. Hitchcock*, 5 id. 217; *Matter of Pike*, 2 id. 255. But see *Matter of Dunkel*, 5 Dem. 188, and § 487, *ante*.

⁵¹ *Morgan v. Morgan*, 4 Dem. 353; *Gillespie v. Brooks*, 2 Redf. 349; *Matter of Baker*, 72 App. Div. 211. See *Wheelwright v. Rhoades*, 28 Hun. 57.

where the accounting party is shown to have grossly mismanaged the trust, in effect converting a part of the estate to his own use, keeping no proper accounts, and subjecting the parties interested to great difficulty and expense in attempting to unravel them, the court may properly disallow commissions.⁵²

§ 996. **Double commissions as executor and as trustee.**—Some embarrassment has been met with in deciding the question whether one who is both executor and trustee is entitled to commissions in each character, *i. e.*, to double commissions. Many authorities may be cited against giving an executor double commissions *on the same fund*, where he is merely required by the will to invest and hold it in trust and apply the income, until such time as, by the terms of the will, the principal is payable.⁵³ If it does not appear, from the language of the will, that the testator contemplated a trust that would attach to the person of the executor, or intended the execution of it in the character of a trustee rather than an executor, a payment out of the general fund, held in trust, is a payment by him as executor and not as trustee; and having been allowed full commissions as executor, he is not entitled to additional commissions as trustee.⁵⁴ That

⁵² Cook v. Lowry, 95 N. Y. 103; Matter of Harnett, 15 St. Rep. 725; Matter of Conklin, 2 Connolly, 176; 20 N. Y. Supp. 59; Stevens v. Melcher, 152 N. Y. 551; Matter of Wotton, 59 App. Div. 584; 69 N. Y. Supp. 753 (167 N. Y. 629); Matter of Matthewson, 8 App. Div. 8; 40 N. Y. Supp. 140; Matter of Welling, 51 App. Div. 355; 64 N. Y. Supp. 1025; Matter of Scudder, 21 Misc. 179; 47 N. Y. Supp. 101; White v. Rankin, 18 App. Div. 293; 46 N. Y. Supp. 228; *affd.*, 162 N. Y. 622. See Matter of Rutledge, *id.* 31; 30 Civ. Proc. Rep. 405. An executor who pays the whole of the assets to a legatee for life, without taking security to protect the interest of the remaindermen, can only have commissions (and any demand established by him against the estate), to be paid out of such assets as remain in his hands, or may be thereafter received. (Lang v. Howell, 20 Abb. N. C. 117.) Where an executor had wrongfully withheld a bond and mortgage, he was not allowed commissions upon it. (McMahon v. Allen, 4 E. D. Smith, 519.)

⁵³ Valentine v. Valentine, 2 Barb. Ch. 430; Drake v. Price, 7 Barb. 388;

affd., 5 N. Y. 430; Westerfield v. Westerfield, 1 Bradf. 198; Mann v. Lawrence, 3 *id.* 424; Lansing v. Lansing, 45 *id.* 182; Betts v. Betts, 4 Abb. N. C. 437; Meeker v. Crawford, 5 Redf. 450; Johnson v. Lawrence, 95 N. Y. 154; Matter of Woolsey, 29 Hun, 626; Matter of Leinkauf, 4 Dem. 1; Matter of Starr, 2 *id.* 141; Matter of Slocum, 169 N. Y. 153.

⁵⁴ Hall v. Hall, 78 N. Y. 535. In that case, the will devised real estate, subject to a power of sale given to the executors; the residuary estate was given to the executors and trustees, "the survivors and survivor of them and the successors and successor of them in trust," to convert into money, invest and hold for the purposes of certain trusts specified. The executors exercised the power of sale as to the real estate, and invested and held the proceeds. On an accounting, they were allowed full commissions as executors. In subsequent proceedings for a final accounting as executors, a decree was made, directing them to pay over to one of the legatees her share of the estate; there had been no separation of this share from the general fund in the hands of the ex-

is, where the functions or duties of executor and of trustees are not separable, but are blended, double commissions are not allowable.⁵⁵

§ 997. Same; when allowed.— But where the will contemplates a time when the duties of the executors, as such, shall cease, after which they shall assume the character exclusively of trustees, an allowance to them as executors, on their accounting as such, does not prevent a like allowance to them on a subsequent accounting as trustees. In order to entitle them to such double commissions, it is not necessary, as was at one time held, that the separation of the two functions of executor and trustee shall have been *actually effected*, either voluntarily by the executor in the actual division of the trust estate into several distinct trusts,⁵⁶ or that the separation shall have been ordered by the

executors. Held, that the executors were properly allowed commissions only on the amount of income collected since the last accounting; that they were entitled to full commissions as trustees on the amount paid such legatee; and, as the payment was not of a separate fund in the hands of the executors, there was no such holding. In this same estate, subsequently to this decision the trustees separated each trust fund from the general fund, and kept them separately invested. Upon paying the principal of one of such trust funds, and on an accounting as to that fund, full commissions, as trustees, were allowed. (*Hall v. Campbell*, 1 Dem. 415.) To the same effect are *Matter of Carman*, 3 Redf. 46; *Ward v. Ford*, 4 id. 34. The employment of no other than merely executorial functions being required by the will, the wording of a decree that the executor do retain a certain sum "as trustee" does not change the character of the executor into that of a trustee so as to entitle him to double commissions. (*McKie v. Clark*, 3 Dem. 380.) In *Matter of Townsend* (5 Dem. 147), testator gave the residue of his real and personal property to his executors, in trust to sell the former, and divide the proceeds of the entire residue into thirty-two equal parts, whereof he directed the executors to invest in their names as trustees, five for the benefit of his daughter M., eight for that of his daughter B., and nineteen for that of his daughter C., during their respective natural lives, and, at the death of each of his said daughters, to pay the principal invested for her benefit to her de-

scendants. He appointed C. and two others "executors of this my will, and trustees of the several trusts hereinbefore created," and provided, in case "any of said trustees" should die or become disqualified, for the appointment of a successor. Held, that the executors were not entitled to double commissions.

⁵⁵ *Johnson v. Lawrence*, 95 N. Y. 154; *Matter of Babcock*, 52 Hun. 510; *Matter of McAlpine*, 15 St. Rep. 532; 113 N. Y. 658; *McAlpine v. Potter*, 126 id. 285; *Matter of Hogarty*, 62 App. Div. 79; 70 N. Y. Supp. 839; *Matter of Clinton*, 12 App. Div. 132; 42 N. Y. Supp. 674; *Matter of Slocum*, 169 N. Y. 153. Where the petition, on an accounting, alleges that there has been no accounting by the executor and trustee, and the will itself is not before the court, it cannot assume that the functions of executor and trustee co-exist and are inseparably blended. (*Matter of Hammond*, 92 Hun. 478; 36 N. Y. Supp. 1074.)

⁵⁶ *Laytin v. Davidson*, 95 N. Y. 263. In that case, the executors had a final accounting; the amount of the residuary estate was adjudged, and the decree directed the executors to retain and hold the same "as trustees" under the will. Subsequently, upon the death of one of the *cestuis que trust*, the trustees, on a judicial settlement of their accounts, claimed one-half commissions on the whole capital of the trust fund, and, in addition, one-half on the share of the deceased *cestuis que trust* directed to be distributed. Held, that they were entitled to commissions as claimed, and the fact that they had not made an

decree of the court. No doubt a separation by order or decree of the surrogate would be the most satisfactory evidence of the real relation of the party to the fund, but the statute recognizes the existence of the office of executor and of testamentary trustee in the same person, and provides for compensation of each under certain circumstances.⁵⁷ It is not necessary, therefore, that the decree upon the settlement of their accounts as executors should, in terms, discharge them as such.⁵⁸ It is sufficient that their functions as executors have been, in effect, terminated by the decree, and that they have assumed the duties of trustees. Thus, where, upon the settlement of the accounts of executors, the decree directed them to pay to themselves, as trustees, the several trust funds, under the will, which was done, they thenceforth assume the duties of trustees.⁵⁹

actual division of the trust fund into shares, as directed, did not change the question. To the same effect, *Matter of Crawford*, 113 N. Y. 560; *Foot v. Bruggerhof*, 66 Hun, 406; 21 N. Y. Supp. 509; *Blake v. Blake*, 30 Hun, 471. See *Matter of Martens*, 16 Misc. 245; 39 N. Y. Supp. 189; *Matter of Beard*, 77 Hun, 111; 28 N. Y. Supp. 305; *Matter of Curtiss*, 9 App. Div. 285; *Matter of Gilbert*, 25 Misc. 584; 56 N. Y. Supp. 149; *Matter of Tucker*, 29 Misc. 728; 62 N. Y. Supp. 1021; *Matter of Union Trust Co.*, 70 App. Div. 5; 75 N. Y. Supp. 68. Where it was for the mutual benefit of the beneficiaries that the trust estate should not be presently divided as directed by the will, and each got his proper income, the executors' failure to make a division does not affect their right to commissions as trustees. (*Matter of Johnson*, 57 App. Div. 494; 67 N. Y. Supp. 1004; modified on another point, 170 N. Y. 139.) In *Clute v. Gould* (28 Hun, 348), testator, after the payment of debts and certain specific legacies, bequeathed \$30,000 to his executor in trust, to invest and collect the interest and income thereof, and pay over the same to testator's widow so long as she remained unmarried; then to divide the residue of his estate into five equal parts. One of said parts he separately bequeathed to his executor to be held in trust for one of testator's five children. He appointed one Savage guardian and trustee of his children, and executor of his will. Savage was removed for misconduct, and plaintiff was appointed trustee, and subsequently he was appointed admin-

istrator with the will annexed. Upon an accounting by plaintiff,—Held, that he was entitled to commissions as trustee upon each of the six distinct trusts held by him, even though there had been no actual division of the estate into separate funds. See also s. c., 24 Hun, 307. Where the trust estates were *actually* severed from the general assets, and thereafter separate accounts were kept with each beneficiary, there is no doubt as to the trustee's right to receive double commissions. (*Phoenix v. Livingston*, 101 N. Y. 451; 28 Hun, 629.) Compare *Roosevelt v. Van Alen*, 31 App. Div. 1; 52 N. Y. Supp. 304. But where the life beneficiary died before the payment over by the executors of the trust fund to themselves as trustees, they were not entitled to commissions on the principal as trustees. (*Matter of Irwin*, 29 Misc. 266; *Matter of Lawrence*, 37 id. 702.)

⁵⁷ *Hurlburt v. Durant*, 88 N. Y. 121; *Johnson v. Lawrence*, 95 id. 154; *Matter of Mason*, 98 id. 527. But where there has been no accounting as executor, nor separation of his functions, he is not entitled to trustee's commissions. (*Matter of Reed*, 45 App. Div. 196; 61 N. Y. Supp. 50.)

⁵⁸ *Laytin v. Davidson*, 95 N. Y. 263. Compare *Matter of Slocum*, 169 N. Y. 153.

⁵⁹ *Matter of Willets*, 112 N. Y. 289; *Matter of Crawford*, 113 id. 560; *Willey v. Robinson*, 85 Hun, 362; 32 N. Y. Supp. 1018. In *Matter of Carman* (3 Redf. 46), testator devised all the residue of his property to his executors in trust (with power of sale) to divide it into three equal shares, and

§ 998. **One-half commissions.**—Executors, administrators, and trustees are entitled to one-half of their commissions for the receipt of the funds and the other half for paying out the same.⁶⁰ A trustee, as such, is entitled to one-half commissions for receiving trust funds from himself as executor, although the *corpus* remains in his hands,⁶¹ and the other half on the termination of the trust, when he pays the principal to the beneficiary. Thus, where one of several trusts has terminated, the executor is entitled to full commissions as trustee upon the principal released for distribution, and half commissions on the residue still held in trust.⁶² In case an account is presented for settlement before completion of the performance of the executorial duties, only half commissions can be allowed upon proceeds of sale in hand, the other half being awardable when those duties, with respect to the fund, are terminated, and the accounting parties enter upon the discharge of their functions as trustees.⁶³ Where one of two executors qualifies and receives full commissions and then dies, and thereafter the other nominee receives letters, he is entitled to full commissions on moneys received and paid out, and half commissions on moneys received and held.⁶⁴

§ 999. **Full compensation to each of several.**—"If the value of the personal property of the decedent amounts to one hundred thousand dollars, or more, over all his debts, each executor, or administrator, is entitled to the full compensation *on principal*

pay over the rents and profits of one share to A. for his life. The executors, on a final accounting, on which they were allowed full commissions, were ordered to set apart and keep invested, for the benefit of A., a fixed sum (being one-third of the residue). The executors set apart such sum, and kept a separate account of it, and paid over the rents and profits to A. during his life, and on his death accounted as testamentary trustees before the surrogate. Held, that they were entitled to the full commissions, as though they had never accounted as executors.

⁶⁰ Matter of Roosevelt, 5 Redf. 601; Morgan's Estate, 15 Abb. N. C. 198; s. c. as Rowland v. Morgan, 3 Dem. 289; Lyendecker v. Eisemann, 3 id. 72; Frame v. Willets, 4 id. 368. The mere transfer of the fund to another trustee is not a "paying out." (Matter of Todd, 64 App. Div. 435; 72 N. Y. Supp. 277.) An executrix who did not close up the estate of her testator

is not entitled to commissions for merely receiving its moneys nor unless she has also paid them out. (Matter of Bidgood, 36 Misc. 516; 73 N. Y. Supp. 1061.)

⁶¹ Matter of Willets, 112 N. Y. 289. The decision in this case was explained in McAlpine v. Potter (126 N. Y. 285), where it was held that no law justifies the allowance of one-half commissions upon the estimated value of securities, in advance of their conversion into money or its equivalent. "Until the securities become sums of money, either by conversion into cash, or by their acceptance as cash by those entitled, the allowance is premature." Compare Matter of Garth, 10 App. Div. 100; 41 N. Y. Supp. 1022.

⁶² Matter of Morris, 10 St. Rep. 701.

⁶³ Matter of Leinkauf, 4 Dem. 1; Matter of Douglas, 60 App. Div. 64; 69 N. Y. Supp. 687.

⁶⁴ Matter of Depew, 6 Dem. 54.

and income allowed herein to a sole executor or administrator, unless there are more than three; in which case, the compensation, to which three would be entitled, must be apportioned among them according to the services rendered by them respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator.”⁶⁵ The intention of the statute, even before the amendment, was assumed to be that the value of the estate, for the purpose of computing commissions, was to be determined, not as of the date of decedent's death, but at the close of the administration, that is, on the final accounting, and, consequently, that the increase of the estate, pending administration, was to be included in the valuation.⁶⁶ Trustees are entitled, without doubt, to commissions on the income of funds invested by them;⁶⁷ they are not limited to the principal fund. If the annual income or annuities exceed \$100,000, double or triple commissions are awardable; but where the accounting is of income only, the fact that the principal exceeds that sum is no ground for allowing double commissions on its income which is less than that amount.⁶⁸ So, too, where the

⁶⁵ Co. Civ. Proc., § 2730, as amended 1893; consolidating former § 2736, as amended 1892. The words in *italics* were inserted by the amendment of 1892, and supersede the ruling that, in determining whether the value of the personal estate amounts to \$100,000, reference must be had to the estate as it existed at the time of decedent's death, and not at the time of the accounting, and, consequently, that accumulations of income could not be added to the principal, so as to make up the sum of \$100,000. (Slosson v. Taylor, 2 Dem. 257; 4 Civ. Proc. Rep. 280; Waters v. Faber, 2 Dem. 290.) The rents and profits of the estate result, it was said, from its management and use by the trustees, and did not constitute a part of the property left by the decedent, on which the commissions were computable. (Savage v. Sherman, 24 Hun, 307.)

⁶⁶ In Matter of Blakeney (1 Connoly, 128; 23 Abb. N. C. 32), the inventory value of the assets was \$96,000. By the executors' accounts, on their accounting, the assets were then of the value of \$101,000. Held, that each executor was entitled to full commissions. This was sustained in principle by the decision in Matter of Hayden

(54 Hun, 197; affd., 125 N. Y. 776), that the section had no application to a case where the trust had not been fully executed, the executors having resigned. On an examination of the authorities, Mr. Abbott, in a note to the Blakeney case (23 Abb. N. C. 38), states the rule thus: "Although executors, as such, may not be entitled to charge commissions on the value of real estate of which they have charge, all the property of the estate which comes into their hands in money, and is paid out by them, as well as all personalty upon the inventory, is to be regarded, when presented upon the accounting, as the basis for determining whether several executors are entitled to full commissions." In Matter of Leggatt (4 Redf. 148), the personal assets did not amount to \$100,000, but the rents of real estate collected and paid out amounted to more than that sum, and the accounting included the rents, *with the concurrence of all the parties*. Held, the executors were entitled to three several commissions.

⁶⁷ Matter of Mason, 98 N. Y. 527, and cases *infra*.

⁶⁸ Matter of Willets, 112 N. Y. 289; explained and applied in Matter of McAlpine, 126 N. Y. 285; 37 St. Rep. 6.

trusts are separated, the basis for computing commissions is the value of each trust separately considered; hence, although the entire estate exceeds \$100,000, full commissions cannot be allowed, if the assets belonging exclusively to each trust do not equal that amount.⁶⁹ In ascertaining whether the "personal estate," after deducting debts, exceeds \$100,000, the proceeds of real estate, equitably converted by the will, are to be regarded as personal estate for this purpose;⁷⁰ and the same may be said of land bought in by the executors upon foreclosure of a mortgage belonging to the estate.⁷¹ It will be noted that the value of the estate of the decedent must be \$100,000 or more, "over all his debts." Where, therefore, the purchase price of lands, sold by the executor, included the amount of a mortgage incumbrance upon the land, the mortgage was to be regarded as a debt of the decedent, and the equity of redemption only should be taken account of.⁷² While the subject of a specific bequest — *e. g.*, shares of stock — does not form a basis for charging the statutory commissions, it is nevertheless held that its value is to be taken into consideration, in ascertaining whether the estate amounts to \$100,000, entitling each executor to full commissions.⁷³

§ 1000. Compensation on different letters.— "Where successive or different letters are issued to the same person, on the estate of the same decedent, including a case where letters testamentary or letters of general administration are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation, in one capacity only, at his election; except that where he has received compensation in one capacity, he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity."⁷⁴ It will be observed that this provision applies only to a case where two sets of "letters are issued," and, therefore, would not extend to an executor, acting also as testamentary trustee, not having received letters in the latter capacity.

⁶⁹ *Matter of Johnson*, 170 N. Y. 139.

⁷⁰ *Smith v. Buchanan*, 5 Dem. 169; *Matter of McLaren*, 6 Misc. 483; 27 N. Y. Supp. 289. Compare *Savage v. Sherman*, 24 Hun. 307.

⁷¹ *Matter of Franklin*, 26 Misc. 107; 56 N. Y. Supp. 858. See *Matter of Ross*, 33 Misc. 163; 68 N. Y. Supp. 373.

⁷² *Matter of St. John*, N. Y. Daily Reg., June 10, 1884. Compare *Cox v.*

Schermerhorn, 18 Hun. 16. Funeral expenses and expenses of administration are not debts in reckoning the amount of the assets. (*Matter of Franklin*, *supra*.)

⁷³ *Matter of Jones*, N. Y. Law J., May 11, 1893.

⁷⁴ Co. Civ. Proc., § 2730, as amended 1893; consolidating former § 2738. See § 423, *ante*.

§ 1001. **Commissions on trust income.**— Where the subject of the accounting is the principal fund, *and* the income, the income is to be regarded as an addition to the principal, and the commissions are to be computed upon the sum of the two, that is, the aggregate of capital and income as received once and paid out once.⁷⁵ Where the accounting is of the income only, commissions are chargeable at the same rate as are allowed on the principal of the estate.⁷⁶ The income which the trustee is required by the will to receive and distribute among beneficiaries, constitutes an altogether new fund, on which commissions will be separately allowed. The novelty of the fund is the controlling fact.⁷⁷ As a general rule, the amount of commissions on the income is a charge, not upon the principal of the estate, but upon the interest of the beneficiary;⁷⁸ that is, a trustee holding a fund under a trust to pay the net income annually to a beneficiary, may, on paying over the income, deduct and retain full commissions each year from the income received; and in such a case there is no occasion for an *annual* judicial settlement of his account.⁷⁹ A different rule might apply where the trustee is required to accumulate the income, or if he allowed it to accumulate in his hands for several years, and then accounted and paid over a gross sum to the beneficiary.⁸⁰ An exception to the general rule also arises where the intention of the testator was that the commissions should be paid as an administrative expense.⁸¹ The right, however, of a trustee to make periodical rests in his accounts, and at such times, even without

⁷⁵ *Betts v. Betts*, 4 Abb. N. C. 324. See *Slosson v. Naylor*, 2 Dem. 257.

⁷⁶ *Matter of Mason*, 98 N. Y. 527.

⁷⁷ *Matter of Meserole*, 36 Hun, 298. See *Morgan v. Hannas*, 13 Abb. Pr. (N. S.) 361; *Fisher v. Fisher*, 1 Bradf. 335; *Brush v. Smith*, 1 Dem. 477; *Matter of Pirnie*, 1 Tuck. 119; *Betts v. Betts*, 4 Abb. N. C. 324; *Frame v. Willets*, 4 Dem. 368; overruling *Andrews v. Goodrich*, 3 id. 245. See also *Matter of Johnson*, 170 N. Y. 139. Full commissions on annual rests are not allowable *merely because*, without the order of court or requirement of statute, rests have been made for the purpose of charging the trustee with interest. (*Tucker v. McDermott*, 2 Redf. 321.) See *Cram v. Cram*, id. 246; *Ward v. Ford*, 4 id. 34.

⁷⁸ *Cammann v. Cammann*, 2 Dem. 211; overruling *Matter of Mount*, 2 Redf. 405, and citing *Stubbs v. Stubbs*, 4 Redf. 171; *Pinckney v. Pinckney*, 1

Bradf. 269; *Booth v. Ammermann*, 4 id. 129; *Lansing v. Lansing*, 45 Barb. 182; *Drake v. Price*, 5 N. Y. 430; *Whitson v. Whitson*, 53 id. 481.

⁷⁹ *Matter of Mason*, 98 N. Y. 527. But the fact that the income was received and distributed monthly does not warrant a charge of full commissions monthly. (*Matter of Selleck*, 111 N. Y. 284.) Where a trust is created solely for the support of the *cestui que trust*, with no disposition as to the remainder, and the *cestui que trust* dies before the final accounting of the executors, they are entitled as trustees to commissions only upon the amount expended for such support. (*Matter of Bennett*, 16 Misc. 199; 38 N. Y. Supp. 945; *sub nom.* *Matter of Clinton*, 74 St. Rep. 534; *affd.*, 12 App. Div. 132.)

⁸⁰ *Matter of Mason*, *supra*.

⁸¹ *Reynolds v. Reynolds*, 3 Dem. 82.

presenting his accounts for settlement, to withhold his lawful commissions, is not limited to cases where by statute, or by general rule, or special order of court, such periodical rests are required or permitted, but extends, also, to cases where, by the direction of his testator's will, or for the proper administration of his testator's estate, he is required to, and does, make periodical payments.⁸²

§ 1002. **Basis for computing commissions.**—We remark, in the first place, that an award of statutory commissions is not regulated by the law as it existed at the time the services were rendered, but by the rule existing at the time of the award;⁸³ and, in the next place, that sums of *money*, received and paid out, are the basis of computation. The statute gives the commissions "for receiving and paying out all sums of money;" hence the proceeds of lands, whether by way of rents,⁸⁴ or by a sale under authority, passing through the hands of an executor or trustee, are to be considered in computing the commissions, but the value of real property, as such and unsold, is not to be taken into account.⁸⁵

⁸² Hancox v. Meeker, 95 N. Y. 528.

⁸³ Matter of Harris, 4 Dem. 463.

⁸⁴ As to rents of land occupied by life tenant, see Matter of Washbon, 38 St. Rep. 619.

⁸⁵ Phoenix v. Livingston, 101 N. Y. 451. In that case, as the fee in the real estate vested at once in the remainderman, the trustees taking only an estate commensurate with their trust, which simply terminated, and was never transferred or paid over.—Held, therefore, their commissions must be computed upon the amount received and paid out, and not on the value of the real estate unsold at the termination of the trust. See Wagstaff v. Lowerre, 23 Barb. 209; Stevenson v. Lesley, 70 N. Y. 512; Matter of Baker, 35 Hun. 272; Savage v. Sherman, 24 id. 307; Matter of McLaren, 6 Misc. 483; 27 N. Y. Supp. 289; Matter of Bennett, 16 Misc. 199; 38 N. Y. Supp. 945; *sub nom.* Matter of Clinton, 74 St. Rep. 534; *affd.*, 12 App. Div. 132; Matter of Tucker, 29 Misc. 728; 62 N. Y. Supp. 1021. In Matter of Tilden (44 Hun. 441), it was held, that executors were not entitled to commissions upon the value of real estate, the title to which was in testator's sons under the will, and which they partitioned among themselves.

the executors uniting in the deed by reason of the will conferring upon them certain powers in reference thereto, but not the power of partition or division. To the same effect, Matter of Ross, 33 Misc. 163; 68 N. Y. Supp. 373. So an administrator, though concurring in a sale by a trustee appointed by the court to execute a power in the will, is not entitled to share the commissions for the sale. (Matter of Paton, 41 Hun. 497.) See Matter of McKay, 37 Misc. 590; 75 N. Y. Supp. 1069. Where an executor sells testator's real property under a power in the will, personally and not as an executor, he should not include the proceeds of sale in his official account, nor are the same chargeable with commissions. (Matter of Brown, 5 Dem. 223.) See McKee v. Weeden, 1 App. Div. 583; 37 N. Y. Supp. 465. Where, although the legal title to real estate and a power of sale are given to executors, it is evident from the terms of the will, that the power was given to them only to be exercised for the purposes of a trust conferred upon them, and not to be exercised by them as executors (except for the payment of debts or legacies), commissions can be allowed to them thereon, only in their capacity as trustees, and where they apply for

Where, however, property or securities are turned over to a party who accepts them as a payment of money, the commissions are earned.⁸⁶ Assets other than money, which are specifically bequeathed, and which the executor delivers specifically to the legatee, are not the subject of commissions;⁸⁷ nor is any property, inventoried but not actually sold, though a sale will ultimately be necessary.⁸⁸

In computing the one-half commissions "for receiving," to which a representative, who qualified after moneys or securities had been received by his co-representative, is entitled, the securities are to be valued by the highest market quotations on the day he qualified.⁸⁹ The amount of a debt due the representative, and

leave to resign the trust, no commissions will be allowed to them as trustees, upon the proceeds of land sold under such a power. (Matter of Curtiss, 9 App. Div. 285.)

⁸⁶ Matter of Mason, 98 N. Y. 527; McAlpine v. Potter, 126 id. 285; Cairns v. Chaubert, 9 Paige, 160; Matter of Kellogg, 7 id. 265; Foley v. Egan, 13 Abb. Pr. (N. S.) 362, note; Matter of Moffat, 24 Hun, 325; Matter of Ross, 33 Misc. 163; 68 N. Y. Supp. 373. In Smith v. Buchanan (5 Dem. 169), the executors had sold part of testator's lands to his children, taking from them receipts for the purchase price, which were applied upon their share in the estate of their father:—Held, in legal effect, to be substantially a sale and conveyance of the same, as if the payment had been made in cash, so that the executors were entitled to have commissions computed on the amount of such purchase price.

⁸⁷ Schenck v. Dart, 22 N. Y. 420; Hawley v. Singer, 3 Dem. 589; Matter of Robinson, 37 Misc. 336; 75 N. Y. Supp. 490. But see Matter of Hawley, 104 N. Y. 250; and same case on a rehearing before the surrogate, 5 Dem. 82. In Matter of Egan (7 Misc. 262; 27 N. Y. Supp. 1009), it was intimated (erroneously, we think), that the statute awarding commissions did not apply to a temporary administrator, and hence that property specifically bequeathed should be considered in estimating his commissions. Commissions are not to be computed upon specific legacies, although converted into money. (Farquharson v. Nugent, 6 Dem. 296.) In Hall v. Tryon (1 id. 296), testator left a personal es-

tate including certain corporate bonds, which he bequeathed to his executors in trust, to collect and pay the income to certain life beneficiaries, at whose death the executors were directed to divide and deliver the said bonds and accrued income among and to certain persons named. The executors were also given a discretionary power to sell any of the bonds. On an accounting, during the lifetime of the life beneficiaries, none of the bonds having been sold, the executors asked half commissions on the value of the bonds, as constituting a sum of money received by them. Held, that the bonds, in respect to the principal thereof, were specific legacies, and that no commissions were allowable on their value. Where the share of one of the residuary legatees was provided for by a specific devise of land, the executor was not allowed commissions upon it. (Burtis v. Dodge, 1 Barb. Ch. 77.)

⁸⁸ Cairns v. Chaubert, 9 Paige, 160; Matter of McAlpine, 15 St. Rep. 532; Matter of Bennett, 16 Misc. 199; 38 N. Y. Supp. 945; *sub nom.* Matter of Clinton, 14 St. Rep. 534; *affd.*, 12 App. Div. 132. Compare Matter of Curtiss, 9 id. 285.

⁸⁹ Betts v. Betts, 4 Abb. N. C. 324; Rowland v. Morgan, 3 Dem. 289. See Foley v. Egan, 13 Abb. Pr. (N. S.) 362, note; Matter of Baker, 35 Hun, 272; and *ante*, § 1001. Commissions are not chargeable upon receipts and disbursements having only a constructive, and not an actual, existence. Accordingly, where testator recited that he had made, and might continue to make, advances to his children, etc., and had or might be-

allowed him on the accounting, are properly included in the sum on which his commissions are calculated.⁹⁰ So, where he is charged with loss resulting from his neglect to make regular investments of a fund, he is entitled to commissions on the amount charged against him.⁹¹ Where an executor sells real estate, subject to mortgages, which were personal liabilities of the decedent, he is entitled to commissions on the whole purchase price, including the amount of the mortgages, and is not limited to commissions on what remains after deducting the amount of the mortgages therefrom.⁹²

Legacies are not subject to a charge for commissions, unless indirectly, by way of abatement, where the estate is not sufficient to pay the commissions. On a regular accounting, the whole amount of receipts and disbursements forms the basis of charging commissions, which are deducted, and the legacies are then paid out of the surplus remaining after the payment of the debts and expenses of administration.⁹³

Reinvestments of principal are not ground for allowing commissions;⁹⁴ if they were, the principal would soon be impaired.

Payment of dower, admeasured by a judgment of the Supreme Court, is not an executorial duty under the will, and no commissions can be allowed on the payment.⁹⁵

§ 1003. **Apportioning commissions.**—Where there are several co-executors or co-administrators, the commissions should be com-

come liable to pay certain sums for them, and directed the amount of such payments, etc., to be deducted from their respective shares of his estate.—Held, that commissions must be computed upon the amount of the several shares after making the deductions provided for in the will. (*Hill v. Nelson*, 1 Dem. 357.)

⁹⁰ *Matter of Mount*, 2 Redf. 405. See *Hosack v. Rogers*, 9 Paige, 461.

⁹¹ *Matter of Mount*, 2 Redf. 405. See *Morgan v. Morgan*, 4 Dem. 353; *Gillespie v. Brooks*, 2 Redf. 349. Surviving executors are not entitled to commissions upon a sum paid to personal representatives of a deceased executrix, for arrears of commissions due to her. (*Betts v. Betts*, 4 Abb. N. C. 324.) And where testamentary trustees have been allowed commissions on so much of the *corpus* of the trust fund as has been received by them they are not entitled to further commissions on sums received by the *cestui que trust* who was also an ex-

ecutrix and applied by her to her own use as beneficiary under the trust. (*Stevens v. Melcher*, 152 N. Y. 551.)

⁹² *Cox v. Schermerhorn*, 18 Hun. 16. But see *Baucus v. Stover*, 24 id. 109. (revd. on another ground, 89 N. Y. 1); and *Matter of St. John*, *ante*, § 999, note 72.

⁹³ *Westerfield v. Westerfield*, 1 Bradf. 198.

⁹⁴ *Morgan v. Hannas*, 13 Abb. Pr. (N. S.) 361. In *Matter of Hayden* (125 N. Y. 776; affg. 54 Hun. 197), the representative continued the testator's business;—Held, that the amounts paid out for expenses of the business, but subsequently repaid, in the general aggregate receipts, constituted a reinvestment of the principal of the fund in his hands, on which he was not entitled to commissions for his services. Followed, *Beard v. Beard*, 140 N. Y. 260; 55 St. Rep. 408.

⁹⁵ *Matter of Lawrence*, 37 Misc. 702.

puted upon the aggregate sums received and paid out by any and all of them, and not upon the amount received and paid out by each individually;⁹⁶ and the surrogate may apportion the commissions among them according to the services rendered by them respectively. If he fails to do so (except in case of an estate over one hundred thousand dollars in value), and the account is finally settled without apportionment, it seems that each is entitled to an equal share, irrespective of the relative services rendered.⁹⁷ Although commissions are intended to compensate executors for their services, care, and responsibility, and should be apportioned accordingly, yet because one executor voluntarily, and perhaps by design, takes possession of all the assets and transacts practically all the business, it does not follow that he should receive all, and his co-executor none, of the commissions.⁹⁸

§ 1004. Apportionment of three commissions.—In dividing the three commissions between the executors, according to the services rendered by them, each should be awarded the proportion thereof which the evidence shows he fairly earned; and although this cannot be ascertained to a mathematical certainty, it is the duty of the surrogate to make the apportionment in view of the situation of the estate, and the residence and relation of the parties to it, and in consideration of the burden of the labors that fell upon each.⁹⁹ The intention of the statutory provision for three commissions was that they should be given only when the trust has been fully administered. Consequently, where all three executors resigned before their duties were finished, three commissions will not be given to one of them who had alone managed the estate up to the time of his resignation: he is only entitled to receive one full commission on sums paid out for debts and legacies,—nothing

⁹⁶ *Valentine v. Valentine*, 2 Barb. Ch. 430; *Betts v. Betts*, 4 Abb. N. C. 324. But where the personalty is given to one class of persons and the proceeds of realty to another class, and each executor has solely administered as to one kind of property and rendered a separate account thereof, each executor is entitled to commissions on the fund he represents and each class of persons should bear the expense of accounting as to the fund in which it is interested. (*Matter of Mansfield*, 10 Misc. 296; 31 N. Y. Supp. 684.)

⁹⁷ *White v. Bullock*, 4 Abb. Ct. App. Dec. 578.

⁹⁸ *Matter of Dunkel*, 5 Dem. 188.

But where one of two trustees has had almost the entire management of the trust estate, it is proper to award to him two-thirds of the commissions allowed to both trustees. (*Matter of Curtiss*, 9 App. Div. 285.)

⁹⁹ *Smith v. Buchanan*, 5 Dem. 169; *Matter of Franklin*, 26 Misc. 107; 56 N. Y. Supp. 838. Before the amendment of 1881, providing for an apportionment of commissions, no discrimination could be made among them, although one of them performed most of the labor. See *Matter of Harris*, 4 Dem. 463; *Matter of Van Nest*, 1 Tuck. 130; *Böhde v. Bruner*, 2 Redf. 333; *Matter of Pike*, id. 255.

by way of commissions on the body of the estate.¹ Where, however, two surviving executors, the third having died, pending the administration, completed the trust, three full commissions will be allowed, on the accounting of the survivors, to be apportioned among the latter and the representative of the deceased executor, although, by this means, each of the surviving executors will receive commissions in excess of full commissions, by reason merely of the death of their co-representative.² But the statute does not apply to a case where the representatives were appointed to succeed each other and did not act simultaneously in the administration of the trust.³ This power to apportion commissions does not include the power totally to abate any executor's commission, except, perhaps, in case of misconduct resulting in loss, or where the net estate proves to be less than one hundred thousand dollars.⁴

§ 1005. When commissions are payable.—The commissions are allowed only by order of the surrogate, and on the *settlement* of the account; those claiming them have no authority to appropriate sums to their own use, as commissions, until they are so allowed,⁵ except in the case of periodical payments of trust income.⁶ If they do so, it is a misappropriation, and they are chargeable with interest, from the date of the withdrawal to the date of the decree;⁷

¹ Matter of Hayden, 54 Hun, 198; *affd.*, 125 N. Y. 776.

² Welling v. Welling, 3 Dem. 511; followed in Matter of Garrison, N. Y. Law J., July 28, 1890. See Matter of Newland, 7 Misc. 728; 28 N. Y. Supp. 496.

³ Thus, in Matter of Kennedy (N. Y. Law J., June 13, 1891), the testator appointed three executors, one of them being his wife, and provided, in case of the death of any of them other than his wife, for the appointment of another in place of the deceased executor. The wife predeceased the testator. The other two executors qualified and entered upon the administration of the estate. One of them afterward died, and in his place another qualified and acted. The estate was of the value of \$100,000 in excess of the decedent's debt. Three full commissions were disallowed.

⁴ Matter of Kenworthy, 63 Hun, 165; 44 St. Rep. 275. In that case, one of three executors was allowed nothing, the others being allowed full commissions, on the ground that they had performed all the work of the administration. Held, error; that hav-

ing duly qualified and having done some acts in administration, the former was "entitled" to compensation. "The basis for her commissions is the amount of the estate. I can see, no other meaning to the words 'full compensation.' This 'compensation' is by means of commissions; full compensation, therefore, means 'full commissions.'" (Per Pratt, J.)

⁵ Freeman v. Freeman, 4 Redf. 211; Whitney v. Phoenix, *id.* 180; Wheelwright v. Wheelwright, 2 *id.* 501; Matter of Willard, 29 St. Rep. 949; 9 N. Y. Supp. 555; Matter of Richardson, 2 Misc. 288; 23 N. Y. Supp. 978. The commissions are to be deducted as of the date of the settlement of the account, and not as of the date of filing it. (Haskin v. Teller, 3 Redf. 316.) Until they are fixed by the decree, the right to them is merely inchoate, and they cannot be assigned. (Matter of Worthington 141 N. Y. 9; 56 St. Rep. 561.)

⁶ See *ante*, § 1001.

⁷ Wheelwright v. Rhoades, 28 Hun, 57; 11 Abb. N. C. 382; Carroll v. Hughes, 5 Redf. 337; Matter of Peyser, 5 Dem. 244.

but where there is no intentional violation of duty, and no loss or injury to the estate is shown, interest will not be charged thereon,⁸ particularly where the taking of commissions was by the consent of the beneficiaries.⁹ But they are not bound to part with possession or control of funds necessary to meet their commissions, until their claim thereto has been determined by the surrogate.¹⁰

ARTICLE SEVENTH.

THE DECREE AND ITS EFFECT.

§ 1006. **Decree on judicial settlement.**—To settle the accounts of a representative, is to ascertain what is justly due by him to the several persons who are entitled to share in the distribution of the moneys in his hands, after defraying the expenses of the trust.¹¹ The main purpose of a judicial settlement is the distribution of the surplus, and some good reason must be given for omitting to make provision for such distribution in the decree proposed for signature.¹² It is, of course, otherwise in the case of an intermediate account. A decree which merely settles the account of the representative by fixing the amount of the balance in his hands subject to distribution, but which does not direct the distribution or name the distributees, or provide any mode of ascertaining them, or the shares due them, respectively, cannot be made the foundation of an action by one claiming to be entitled to one of such distributive shares.¹³

§ 1007. **Decree must contain summary of account.**—"Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled, or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree."¹⁴

§ 1008. **Direction for payment and distribution.**—Where an account is judicially settled, "and any part of the estate remains, and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons

⁸ *Beard v. Beard*, 140 N. Y. 260. In *Whitney v. Phoenix* (*supra*), simple interest was charged.

⁹ *Matter of Ross*, 33 Misc. 163; 68 N. Y. Supp. 373; *Matter of Franklin*, 26 Misc. 107; 56 N. Y. Supp. 858.

¹⁰ *Wheelwright v. Wheelwright*, *supra*.

¹¹ *People v. Coffin*, 7 Hun. 608. See *Seaman v. Duryea*, 11 N. Y. 324.

¹² *Matter of Roux*, N. Y. Surr. Decis. 1889, p. 603; *Matter of Quinn*, N. Y. Law J., May 2, 1890.

¹³ *Johnson v. Richards*, 3 Hun. 454.

¹⁴ *Co. Civ. Proc.*, § 2551.

so entitled, according to their respective rights. In case of administration in intestacy the decree must direct immediate payment and distribution to creditors, next of kin, husband or wife of the decedent, or their assigns, where the administrator has petitioned voluntarily for judicial settlement of his account as, and in the case, provided in subdivision two of section twenty-seven hundred and twenty-eight of [the Code]. If any person, who is a necessary party for that purpose, has not been cited or has not appeared, a supplemental citation must be issued," as heretofore mentioned.¹⁵ "Where the validity of a debt, claim, or distributive share, is admitted, or has been established, upon the accounting, or other proceeding in the Surrogate's Court, or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same."¹⁶

§ 1009. Direction to deliver specific property.—In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution, in lieu of the money value of the property: "1. Where all the parties interested, who have appeared, manifest their consent thereto by a writing filed in the surrogate's office. 2. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to the parties entitled thereto. The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons, appointed by the surrogate for the purpose."¹⁷

§ 1010. Direction to retain money for undetermined claim.—"Where an admitted debt of the decedent is not yet due, and the creditor will not accept present payment, with a rebate of interest:

¹⁵ Co. Civ. Proc., § 2743, as amended 1898. This amendment precludes a decree of distribution upon an accounting of an executor, under the subdivision referred to. (Matter of Lawson, 36 Misc. 96; 72 N. Y. Supp. 645, and cases cited in § 919, note 39, *ante*.) A decree which distributes the estate of a decedent should adjudge that the payment of the amounts to be distributed be made by the individual and not as executor or administrator. (Matter of Monell, 28 Misc. 308; 59 N. Y. Supp. 981.)

¹⁶ Co. Civ. Proc., § 2743, as amended 1895. See § 2811.

¹⁷ Co. Civ. Proc., §§ 2744, 2811. The application, by the new Code, of this regulation to testamentary trustees, as well as executors and administrators, sustains Carman v. Cowles, 2 Redf. 414. The former ruling that an administratrix could not, through the decree on an accounting, secure the setting apart to her of articles which she might, as widow, have claimed to be exempt in her favor (Cornwell v. Deck, 2 Redf. 87), is now superseded by section 2724, as amended 1893 (former § 2721). See § 510, *ante*.

or where an action is pending between the executor or administrator, and a person claiming to be a creditor of the decedent;¹⁸ the decree must direct that a sum, sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, be retained in the hands of the accounting party; or be deposited in a safe bank or trust company, subject to the surrogate's order; or be paid into the Surrogate's Court, for the purpose of being applied to the payment of the claim, when it is due, recovered or settled; and that so much thereof, as is not needed for that purpose, be afterward distributed according to law."¹⁹

And where, on the judicial settlement of a *testamentary trustee's account*, a controversy respecting the right of a party to share in the money or other personal property to be paid, distributed, or delivered over, "remains undetermined after the determination of all other questions upon which the distribution of the fund, or the delivery of the personal property depends, the decree must direct that a sum, sufficient to satisfy the claim in controversy, or the proportion to which it is entitled, together with the probable amount of the interests and costs, and, if the case so requires, that the personal property in controversy be retained in the hands of the accounting party; or that the money be deposited in a safe bank or trust company, subject to the surrogate's order, for the purpose of being applied to the payment of the claim, when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterward distributed according to law."²⁰

§ 1011. Direction as to paying minor's and unknown person's share.

— The Code gives very particular instructions as to the mode of

¹⁸ Such a provision is proper, even though the action has not been commenced, owing to inability to serve process upon the representative. (*Matter of Rasch*, 26 Misc. 459; 55 N. Y. Supp. 434.)

¹⁹ Co. Civ. Proc., § 2745. See *Giles v. De Talleyrand*, 1 Dem. 97; *Du Bois v. Brown*, id. 317; *Matter of Brown*, 3 Civ. Proc. Rep. 39; *Greene v. Day*, 1 Dem. 45; *Matter of Orser*, 4 Civ. Proc. Rep. 129. The section does not apply to actions involving claims in favor of the estate. (*Matter of Truslow*, 37 Misc. 189; 74 N. Y. Supp. 944.) Where a lessor, since deceased, covenants to pay her lessee "for the

building remaining on the premises at the expiration of the term," it does not make her a debtor to the lessee until the term has actually expired, and where she dies before that time the court has no authority on the judicial settlement of the accounts of her administrators to require them to retain in their hands the probable amount of their claim under Co. Civ. Proc., § 2745, authorizing such act "where an admitted debt of the decedent is not yet due." (*Matter of Henshaw*, 37 Misc. 536; 75 N. Y. Supp. 1047.)

²⁰ Co. Civ. Proc., § 2812.

paying and investing a legacy or a distributive share due to an infant,²¹ or to a person who is unknown.²²

§ 1012. **Direction as to paying unclaimed legacy.**—The decree “must also direct the executor or administrator to pay to the county treasurer a legacy or distributive share which is not paid to the person entitled thereto, at the expiration of two years from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree. The money, so paid to the county treasurer, can be paid out by him only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction.”²³

§ 1013. **Conclusive effect of decree for payment and distribution.**—With respect to directions in the decree for the payment and distribution of the surplus, the statute declares that the decree is conclusive upon each party to the proceeding, for the judicial settlement of the account, who was duly cited or appeared; and upon every person deriving title from such a party.²⁴ The usual provision, that the executor or administrator pay over the balance found in his hands, is not a payment so as to exonerate the fund distributable, as against the person to whom it is made payable. The decree gives to the distributee a remedy against the executor personally, for his proportion of the fund found to be in the

²¹ Co. Civ. Proc., § 2746. See § 792, *ante*.

²² Co. Civ. Proc., § 2747. See *People v. Chapin*, 101 N. Y. 682.

²³ Co. Civ. Proc., § 2748. See *Koch v. Woehr*, 3 Dem. 282. Notice of the application for payment of a distributive share must be given to the other next of kin. (*Matter of Murray*, 44 App. Div. 640.) As to payment of shares of absentees to next of kin, see *Matter of Sullivan*, 51 Hun, 378. Where a legatee died before the legacy was payable and no administrator of his estate had been appointed,—Held, that a decree for payment to his next of kin, under Co. Civ. Proc., §§ 2747, 2748, was not appropriate, but on an accounting by the executor the amount should be ordered paid into court. (*Matter of Morgan*, 1 Misc. 71; 54 St. Rep. 236.) Administrators are not relieved from their liability to the next of kin for the sums due to each as distributive shares of the estate, by the fact that just before entry of the decree upon final accounting they paid the amount

found due to the surrogate, taking his receipt as paid to the next of kin, if the surrogate fails to pay over to those entitled, since such payment is not a payment into court, which, if at any time required, is to be made to the county treasurer. (*Matter of Te Culver*, 22 Misc. 217; 49 N. Y. Supp. 820.) The consul-general of Italy has the right, under the treaty with that country, upon giving a proper receipt, to demand and receive the distributive shares in an estate belonging to persons in his country which have been deposited in court. (*Matter of Tagaglio*, 12 Misc. 245; 33 N. Y. Supp. 1121.) See *ante*, § 470, note 45.

²⁴ Co. Civ. Proc., §§ 2743, 2811. An executor who has accounted and been discharged remains liable to account to persons interested in the estate who were not made parties to the accounting and to refund them their share of moneys misapplied by him. (*Matter of Lamb*, 10 Misc. 638; 32 N. Y. Supp. 225.) The general subject of the effect of surrogates' decrees is treated in c. XXI, *post*.

hands of the latter. But this remedy is cumulative, and does not impair, in the least, the remedy against the fund itself. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the claims of the latter.²⁵

A surrogate's decree on an executor's accounting does not discharge him as executor, and terminate the responsibilities of his sureties, merely because the will expressly gives the assets to him in trust, and the decree directs him to retain the balance found to be in his hands, and invest it, and keep it invested according to the trust expressed in the will.²⁶

²⁵ Clapp v. Meserole, 38 Barb. 661; of the decree must be to terminate
affd., 1 Abb. Ct. App. Dec. 362. See executorial functions as to this fund,
Mosher v. Hubbard, 13 Johns. 510. as well as to inaugurate the functions

²⁶ Cluff v. Day, 124 N. Y. 195; 26 of a trustee. (Ib.) As to continuing
Abb. N. C. 300. To terminate his liability of sureties in executor's bond,
holding as executor, and charge him see § 466, *ante*.
thereafter solely as trustee, the effect

CHAPTER XX.

GUARDIANSHIP.

TITLE FIRST.

GENERAL GUARDIANS.

ARTICLE FIRST.

APPOINTMENT AND GENERAL POWERS.

§ 1014. Concurrent jurisdiction of surrogate and other courts.—

The Code contains a general clause, giving the Surrogate's Court jurisdiction "to appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and *in the cases specially prescribed by law*,¹ to direct and control their conduct, and settle their accounts;" which jurisdiction must be exercised in the cases, and in the manner prescribed by statute.² General guardians of minors may be appointed by the Supreme Court, etc., under the General Rules of Practice, or by the surrogate, under the Code.³ Appointment in the former mode is regulated by General Rules 52, 53, and 54.⁴ The Supreme Court, as the successor of the Court of Chancery, independently of the Code and General Rules, acts as the guardian of all infants, and this is regarded as one of its important functions, and this power of the Supreme Court is paramount to

¹ The italics conform to *Morgan v. Hannas* (13 Abb. [N. S.] 361), and are a substitute for "as prescribed by law," in the original.

² Co. Civ. Proc., § 2472, subd. 7; *Matter of Bolton*, 159 N. Y. 129. Among the incidental powers conferred upon a surrogate, are included the power to enjoin, by order, a guardian, to whom a citation or other process has been duly issued from his court, from acting as such, until the further order of the court; and to require, by order, a guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him, by statute, or by the Surrogate's Court, under au-

thority of a statute. (Co. Civ. Proc., § 2481, subds. 4, 5; which extend also to executors, administrators, and trustees.) See *Thomson v. Mott*, 5 Redf. 574.

³ The power of appointing the guardian of an infant can only be exercised by the courts having authority in such cases, or by the infant's father or mother. (*Fullerton v. Jackson*, 5 Johns. Ch. 278; *Hoyt v. Hilton*, 2 Edw. 202; *Matter of Lichtenstadter*, 5 Dem. 214.)

⁴ Whether "the court," mentioned in Rule 52, may be any other than the Supreme Court, *quære*.

that of the surrogate; and the fact that the surrogate has appointed a guardian of the person or estate, or both, does not interfere with the power of the Supreme Court to control the custody of the minor.⁵

§ 1015. **Extent of surrogate's power to appoint.**—"The Surrogate's Court has the like power and authority to appoint a general guardian, of the person or of the property, or both, of an infant, which the chancellor had on the 31st day of December, 1846."⁶ It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian, of the property only, of an infant married woman.⁷

§ 1016. **What surrogate has jurisdiction.**—The Code permits the appointment of a general guardian for, and on the application of, an infant, of the age of fourteen years or upward, by the Surrogate's Court of the county in which he resides; or if he is not a resident of the State, by the Surrogate's Court of the county in

⁵ *Wilcox v. Wilcox*, 14 N. Y. 575. See *Strubbe v. Kings County Trust Co.*, 60 App. Div. 548; 69 N. Y. Supp. 1092. It was held, in the early cases, that the guardian, whether appointed by the surrogate or in any other way, is deemed an officer of the Supreme Court, within the rule that he may be summarily proceeded against by that court and removed, and compelled to account there; and that the surrogate had not concurrent jurisdiction with the Supreme Court to remove or change a guardian appointed by that court, or to compel such a guardian to account, either before or after removal. See *Disbrow v. Henshaw*, 8 Cow. 349; *Ex p. Crumb*, 2 Johns. Ch. 439; *Matter of Andrews*, 1 id. 99; *Matter of Dyer*, 5 Paige, 534; *People ex rel. Pruyne v. Watts*, 122 N. Y. 238; *Matter of White*, 40 App. Div. 165; 57 N. Y. Supp. 862; *affd.*, 160 N. Y. 685. In the last case it was held, that where the Supreme Court, upon the petition of the infant, appointed the father guardian of his person and estate, it may, upon notice to both, revoke the appointment, against the wish and without the consent of the infant, and appoint a trust company guardian.

⁶ That is, the day before the Constitution of 1846 took effect, whereby the Court of Chancery was abolished.

The reason for thus providing, instead of making the power coincident with that of the Supreme Court, is given in Mr. Commissioner Throop's note to Co. Civ. Proc., § 2821.

⁷ Co. Civ. Proc., § 2821; confirming *Matter of Herbeck* (16 Abb. Pr. [N. S.] 214), which held that the husband of a female infant, though himself an adult, does not, since the Married Women's Acts, acquire control of her property by marriage, and that the Surrogate's Court has, therefore, authority to appoint a guardian of the estate of a married female infant; and it was intimated that an existing guardianship of a female infant is not, since those acts, terminated as to her property, by marriage. Such is now the law by statute. (L. 1896, c. 272, § 54.) It had been previously held, that the marriage of a female ward terminated the guardianship (*Brick's Estate*, 15 Abb. Pr. 12); but this ruling must now be deemed superseded, so far as guardianship of the estate is concerned. The statute requires that where the petitioner is a *nonresident married woman*, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence. (Co. Civ. Proc., §§ 2822, 2827.)

which any of his property, real or personal, is situated.⁸ The jurisdiction of the surrogate depends on the fact of the residence of the minor within his county;⁹ not on the domicile or legal residence, but on the actual residence.¹⁰

§ 1017. Temporary guardianship.— The same facts, as to residence or location of property, determine the jurisdiction of the Surrogate's Court, to appoint a general guardian of an infant, *under fourteen*,¹¹ but, in such case, the appointment is only temporary; the application must be made by a relative, or some other person in behalf of the infant, and the surrogate must nominate, as well as appoint, the guardian.¹² On reaching the age of fourteen years, the infant may, of course, apply, for the appointment of another guardian, to the surrogate of the county of his then residence, and such appointment will supplant the guardian previously appointed and terminate his office, without the entry of a formal order to that effect.¹³

§ 1018. Surrogate's power as affected by prior appointments.— The Code permits proceedings by the surrogate in either of the following cases: (1) Where a general guardian, such as is applied for, has not been duly appointed, either by a court of com-

⁸ Co. Civ. Proc., § 2822. In *Matter of Hosford* (2 Redf. 168), it was decided, before the present Code, that the surrogate had not jurisdiction to appoint a guardian of the person and estate of a minor, resident in another State, even if having property here. But see *contra*, *Andrews v. Townshend*, 53 N. Y. Super. (J. & S.) 522.

⁹ *Brown v. Lynch*, 2 Bradf. 214. Compare *Dutton v. Dutton*, 8 How. Pr. 99; *Matter of Hubbard*, 82 N. Y. 90; *Matter of Wildberger*, 25 Misc. 582; 55 N. Y. Supp. 1135.

¹⁰ *Matter of Pierce*, 12 How. Pr. 532; *Matter of Bartlett*, 4 Bradf. 221; *Matter of Hughes*, 1 Tuck. 38. In the last case, it was held, that a relative, not being guardian, could not change the legal residence, so as to affect the surrogate's jurisdiction. See § 143a, *ante*.

¹¹ *Matter of Daniels*, 71 Hun. 195; 24 N. Y. Supp. 506. In that case the will of the father of an infant who had resided in Connecticut appointed the child's maternal uncle in that State, with whom she had resided after her mother's death, as guardian: the will having been set aside for incom-

petency of the testator the uncle sent the child to its maternal grandmother in New York.—Held, that the change having been made without due authority, and the child having equally near relatives in Connecticut, she did not become a resident of New York, and that an order appointing a guardian in the latter State should be reversed.

¹² Co. Civ. Proc., § 2827. The term of office of a guardian, for an infant under fourteen, expires when he attains the age of fourteen years. (Co. Civ. Proc., § 2828.) After attaining that age, he is not, however, entitled, as of course, to elect a new guardian (*Matter of Nicoll*, 1 Johns. Ch. 25; *Matter of Dyer*, 5 Paige. 534); but the guardian continues to retain all his powers and authority, and is subject to all the duties and liabilities of a guardian, until his successor is appointed and has qualified, or until his letters are revoked; and his sureties are responsible accordingly. (Co. Civ. Proc., § 2837.)

¹³ *Matter of Sullivan*, N. Y. Law J., Aug. 1, 1890; *Matter of Monell*, *id.*, Oct. 28, 1891.

petent jurisdiction of the State, or by the will or deed of his father or mother, admitted to probate or authenticated, and recorded, as prescribed in section 2851 of the Code. (2) Where a general guardian, so appointed, has died, become incompetent or disqualified; or refuses to act; or has been removed; or where his term of office has expired.¹⁴

§ 1019. Nomination by infant over fourteen.— If the infant is of the age of fourteen years or upwards, the application must be by his or her written petition, duly verified, setting forth the facts upon which the jurisdiction of the court depends, and praying for a decree appointing a general guardian, naming him,¹⁵ either of the person or of the property of the infant, or both, as the case requires; and, if necessary, that the persons, entitled by law to be cited upon such an application, may be cited to show cause why such a decree should not be made. The petition “must also state whether or not the father and mother of the petitioner are known to be living. If either of them is known to be living, and the petition does not pray that the father, or, if he is dead, that the mother, may be appointed the general guardian, it must set forth the circumstances which render the appointment of another person expedient; and must pray that the father, or, if he is dead, that the mother, of the petitioner should be cited to show cause why the decree should not be made.”¹⁶ The petition should show which of the relatives reside in the county, and, also, the amount of the infant’s property in this State, so as to enable the court to fix the penalty of the bond.¹⁷ The surrogate has power to revoke the appointment of a guardian, based on a petition which omits these particulars.¹⁸

¹⁴ Co. Civ. Proc., §§ 2822, 2827. Where the case is within subdivision second, the petition must pray that the person formerly appointed general guardian may be cited, unless it is shown that he is dead. (Co. Civ. Proc., § 2823.)

¹⁵ Co. Civ. Proc., § 2826. This does not confer upon an infant of fourteen years, or upward, plenary authority to emancipate himself, at pleasure, from parental control. The provisions of that section afford no support for the claim that such an infant, having no testamentary or general guardian, has an absolute right, even though his parents are living, to demand from the Surrogate’s Court the appointment of a guardian, and of whatever guard-

ian he may be pleased to nominate, provided only that the nominee be, in the surrogate’s judgment, a proper person to execute the trust. The surrogate has a discretion to determine whether the interests of the infant will be promoted by the appointment of any guardian. (Ledwith v. Ledwith, 1 Dem. 154.)

¹⁶ Co. Civ. Proc., § 2823.

¹⁷ Johnson v. Borden, 4 Dem. 36.

¹⁸ Matter of Feely, 4 Redf. 306. Where application for the guardianship of infants was made by their maternal grandmother, and the petition did not disclose the fact that the paternal grandfather was, at the time, living and residing in the county, and letters were issued to the petitioner

§ 1020. **Citation.**— The Code contains a clause to the effect that, where it is prescribed that a petition must pray that a person, or that creditors, etc., may be cited for any purpose, all those persons are necessary parties to the special proceeding.¹⁹ By an examination of the foregoing provisions, with respect to the contents of a petition for the appointment of a general guardian, it will appear that a citation is in some cases essential. In others, however, it may be dispensed with. It is, however, specially provided that a citation, issued to the father of the petitioner, must be served at least ten days before it is returnable.²⁰

§ 1021. **Notice to relatives, when discretionary.**— It is made the duty of the surrogate to "inquire and ascertain, as far as practicable, what relatives of the infant reside in his county; and he may, in his discretion, cite any relative or class of relatives of the infant, residing in that county or elsewhere, to show cause why the prayer of the petition should not be granted."²¹ In this respect, the surrogate's course of procedure is just as undefined by statute, and just as discretionary, as that of the Supreme Court; and having once obtained cognizance of the subject-matter, by the residence of the minor and application for guardianship, his jurisdiction is as broad as that of such court.²² But, though notice of the hearing to the relatives is within the discretion of the surrogate, yet it is deemed necessary, for the purpose of having the rights of the infant properly attended to,²³ and to enable them to appear, if they think proper, not as parties, but for the purpose of giving the surrogate the requisite information as to the value of the infant's property, and as to the propriety of the appoint-

without notice to the grandfather, the letters were revoked upon the application of the latter. (Ib.) Failure to cite the grandfather of the infant, residing without the State, is no ground for setting aside the appointment of the infant's aunt as guardian. (Matter of Bennett, 24 Week. Dig. 233.)

¹⁹ Co. Civ. Proc., § 2518. See § 89, *ante*. Letters issued to a general guardian need not show on their face that a citation was issued to the former general guardian, as the absence of such recital is not proof that the citation was not in fact issued and served. (Prentiss v. Weatherly, 68 Hun. 114; 22 N. Y. Supp. 680; *aff'd.*, 144 N. Y. 707.)

²⁰ Co. Civ. Proc., § 2823. This seems to apply only where the infant petitions, *i. e.*, where he is over fourteen years. See Co. Civ. Proc., § 2827.

²¹ Co. Civ. Proc., §§ 2823, 2827. See *Ledwith v. Ledwith*, 1 Dem. 154. This, and the other provisions of section 2823, apply "where the petitioner is a married woman; except that her husband must also be cited, and that the surrogate may, in his discretion, make a decree, appointing a guardian of her property, without citing her father or her mother." (Co. Civ. Proc., § 2824.)

²² Matter of Dawson, 3 Bradf. 130.

²³ *Underhill v. Dennis*, 9 Paige, 202; *White v. Pomeroy*, 7 Barb. 640.

ment of the applicant or person named in the petition.²⁴ Especially is such notice requisite, where the application is made by a person not connected with the infant by blood or affinity.²⁵ An omission by the surrogate to make proper inquiries as to who are the relatives, or to cause the near relatives to be notified, is a ground for setting aside his appointment.²⁶

§ 1022. Hearing and decree.—“Upon the return of the citation, the surrogate must make such a decree in the premises as justice requires. He may, in his discretion, hear allegations and proofs from a person not a party. Where a citation is not issued, the surrogate must, upon the presentation of the petition, inquire into the circumstances. For the purpose of such an inquiry, or of an inquiry into the amount of security to be required of the guardian, he may issue a subpoena, requiring any person to attend before him, to testify respecting any matter involved therein. If he is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property, he must make a decree accordingly, except that a guardian of the person of a married woman shall not be appointed. In a proper case, he may appoint a general guardian in one capacity, without a citation; and issue a citation, to show cause against the appointment of a general guardian, in the other capacity.”²⁷ Where a general guardian of the property of an infant is appointed, “the surrogate must inquire into the infant’s circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property.”²⁸

²⁴ Kellinger v. Roe, 7 Paige, 362; Cozine v. Horn, 1 Bradf. 143.

²⁵ Morehouse v. Cooke, Hopk. 226.

²⁶ Underhill v. Dennis, 9 Paige, 202; Matter of Feely, 4 Redf. 306. Where a surrogate has appointed a general guardian of an infant, without notice to the relatives of the infant residing in the county, and it appears that the relatives would have opposed such appointment, had notice been served upon them, the Supreme Court will, upon application, remove such guardian and appoint a new one. (Matter of Rickard, 15 Abb. Pr. [N. S.] 6.) S. P., Smith v. Smith, 2 Dem. 43. Notice need not be given to an infant under fourteen for an appointment of a general guardian, but notice should be given to his nearest of kin. (Mat-

ter of Van Vranken, 20 St. Rep. 387.) In Matter of Church (N. Y. Law J., Nov. 28, 1890), the petition for the appointment of a guardian for an infant under fourteen years of age, showed that an aunt, an uncle, and a great-uncle resided within the county. —Held, that the omission to cite them was irregular, though not a jurisdictional defect. But the omission to cite a person named guardian in the deceased father’s will was such a defect, though such person had not qualified or had letters issued to him as a testamentary guardian.

²⁷ Co. Civ. Proc., § 2825.

²⁸ Co. Civ. Proc., § 2829. The original statute expressly directed that, in cases of application for minors under fourteen, the surrogate must

§ 1023. **Infant's right of appointment not absolute.**—The infant's right of appointment is not absolute, whether his parents are living or dead. The surrogate must determine whether the nominee is a proper person to execute the trust.²⁹ If an infant over fourteen years of age neglects to nominate a person for the guardianship, it seems that the surrogate has no power to do so.³⁰ Upon an application by a person in behalf of an infant under fourteen years, the surrogate, as already mentioned, must nominate, as well as appoint, a temporary guardian.³¹ In making the appointment, the surrogate's power and discretion are entirely unlimited, except by such known and established principles as govern the conscience of all courts of equity, and are not under the control of the relatives in any respect,³² and his power is to be exercised in accordance with what appears to be for the best interests of the minor, taking into view not merely his temporary welfare, but the state of his affections, attachments, his training, education, and morals,³³ and also the expressed wishes of the deceased parents.³⁴ Although a father is entitled by right of nature to guardianship of his child, still, where the best interests of the child demand it, it is the court's duty to award the custody to other hands.³⁵ Since the Married Woman's Act, there is no

assign a day for the hearing; but this might be the day on which the petition was presented if he determined that notice to the relatives need not be given. And this was presumed to be the case, where there was nothing to show that this course was not taken. (*People v. Wilcox*, 22 Barb. 178.)

²⁹ *Ledwith v. Ledwith*, 1 Dem. 154.

³⁰ *Sherman v. Ballou*, 8 Cow. 304.

³¹ *Co. Civ. Proc.*, § 2827.

³² *Matter of Dawson*, 3 Bradf. 130.

³³ *Foster v. Mott*, 3 Bradf. 409; *Smith v. Smith*, 2 Dem. 43. The mother of an infant of ten years, and also a friend of its deceased father, entitled to a small estate, petitioned separately for the guardianship of his person and property, and it appeared that the infant had, for three years, resided with, and been cared for by, the latter petitioner, to whom the father had informally intrusted him; that the father had been for several years separated from his wife for her fault; and that she was engaged in a disreputable business while the other petitioner was a suitable person. The surrogate denied the mother's petition. (*Burmester v. Orth*, 5 Redf. 259.)

³⁴ *Foster v. Mott*, *supra*; *Underhill v. Dennis*, 9 Paige, 202; *Bennett v. Byrne*, 2 Barb. Ch. 216; *Matter of Pierce*, 12 How. Pr. 532; *Cozine v. Horn*, 1 Bradf. 143; *Smith v. Smith*, 2 Dem. 43. The objection that the surrogate has appointed his own relative as guardian does not go to the jurisdiction. (*Underhill v. Dennis*, 9 Paige, 202.) See *Matter of Van Wageningen*, 69 Hun, 365; 52 St. Rep. 669.

³⁵ *Griffin v. Sarsfield*, 2 Dem. 4; *Johnson v. Borden*, 4 id. 36. Considerations affecting the health and welfare of a child may justify a court in withholding the custody of it temporarily, even from its legal guardians; and they are so purely matters of discretion with the court of original jurisdiction that the appellate court will not review the conclusions thereon, unless some manifest error or abuse of discretion is made to appear. (*Matter of Welch*, 74 N. Y. 299.) As to discretion of the surrogate in making the appointment, see *Matter of Vandewater*, 115 N. Y. 669. Letters of guardianship may be refused to a father on the ground that his habits are such as to demoralize and endanger the safety and future

objection to the appointment of a mother who has remarried and is living with a second husband.³⁶ Where the father and mother are both living, the statute declares the latter "to be the joint guardian of her children with her husband, with equal powers, rights, and duties, in regard to them, with the husband."³⁷ The surrogate is not restricted, in his appointment, to relatives of the infant; he may appoint a competent stranger. But other things being equal, a relative will be preferred to a stranger.³⁸

The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons,³⁹ but a joint

condition of the children. (Matter of Watson, 10 Abb. N. C. 215; Matter of Raborg, 3 St. Rep. 323.) S. P., Matter of Meech, 1 Connolly, 536. Under ordinary circumstances, the mother, after the decease of the father, is entitled to the custody of her infant children; but the security, good conduct, and well-being of the children are the important considerations to be regarded, and, where those ends can only be best accomplished by depriving the mother of their custody, it is the uniform practice of the courts to do so. (Matter of Schroeder, 17 Week. Dig. 71.) The mother, in the absence of the father, has the right to influence and direct the conduct, residence, education, occupation, and associates of her infant child. (Matter of Barré, 5 Redf. 64.) In a contest between husband and wife for the custody of a daughter of six and a son of five years, where there is no objection to the mother personally, it is for the welfare of the children to leave them with her. An inquiry as to the husband's ill-treatment of the mother is pertinent in such case. (Matter of Pray, 60 How. Pr. 194.)

³⁶ Matter of Hermance, 2 Dem. 1. The cases of *Holley v. Chamberlain* (1 Redf. 333) and *Swartwout v. Swartwout* (2 id. 52) are obsolete on this subject. Where an infant of the age of fourteen years, or upwards, petitions for the appointment of a general guardian, and it appears that his father is a resident of a distant State, and that there exists such a feeling of antagonism between the two as to induce the belief that the petitioner's welfare will be best subserved by the appointment of another person, the claims of the father will be disre-

garded. (*Johnson v. Borden*, 4 Dem. 36.)

³⁷ Laws 1893, chap. 175, amending 2 R. S., chap. 8, tit. 3, § 1; Laws 1896, chap. 272, § 51.

³⁸ *Morehouse v. Cooke*, Hopk. 226. Nonresident relatives are not ineligible. (Matter of Dawson, 3 Bradf. 130.) See Matter of Zeller, 25 Misc. 137. The inheritance of real property, by an infant, from his father, creates no preference in favor of the paternal over the maternal relatives. (*Underhill v. Dennis*, 9 Paige, 202.) In a contest between the stepmother and the aunt of an infant, for letters of guardianship, where the infant had no property, and the stepmother had nothing except what she could earn, but the aunt had a moderate income for life, the guardianship was awarded to the stepmother, to avoid the separation of the infant from a brother in the charge of the stepmother, and to carry out the wish of the infant's deceased father. (Matter of De Marcellin, 4 Redf. 299; affd., 24 Hun. 207.) The sole executor of the estate of a deceased father is not a proper person to be appointed the general guardian of his orphan child, as it might lead to a gross wrong. (Matter of Rickard, 15 Abb. Pr. [N. S.] 6.) This rule was reaffirmed in Matter of Lane, N. Y. Law J., June 6, 1893. A corporation may receive letters of general guardianship of an infant's property. (*Ledwith v. Ledwith*, 1 Dem. 154; L. 1885, c. 425; L. 1900, c. 552 [banking corporations]; L. 1901, c. 443, as amended by L. 1902, c. 360 [trust companies].)

³⁹ Co. Civ. Proc., § 2821. See *People v. Kearney*, 31 Barb. 430.

guardianship of an infant's person should not be made.⁴⁰ The surrogate may, as a condition of awarding the custody of an infant to an applicant for letters, require the latter to permit access to his ward by such persons as the court may designate.⁴¹

§ 1024. What constitutes appointment.—A guardian, like an executor or administrator, gets no authority until his letters are signed and delivered, or, at least, are ready for delivery. His appointment results from several steps and culminates and is finished in the delivery of the signed and sealed letters, after their record in the guardian's book, to the guardian. Entries in the court's minutes do not constitute an appointment any more than an order for judgment, in the minutes of the court, constitutes the judgment.⁴²

§ 1025. Conclusive effect of an appointment.—Where the petition contains sufficient facts to give the surrogate jurisdiction of the person of the infant, and he proceeds regularly and appoints a guardian, the appointment is valid until it is reversed or vacated by a direct proceeding for that purpose; and although the infant never resided in the county of such surrogate, an action to vacate the appointment cannot be maintained.⁴³

§ 1026. Two or more guardians.—The trust of two or more guardians of the same infant is, in its nature, joint and several, and they may act separately or in conjunction. They are jointly responsible for joint acts, and each is solely responsible for his own acts and defaults, in which the others did not participate, and the fact that they gave a joint and several bond to the surro-

⁴⁰ Matter of Annan, 74 Hun, 19; 26 N. Y. Supp. 258; 143 N. Y. 623.

⁴¹ Derickson v. Derickson, 4 Dem. 295; s. c. as Matter of Derickson, 3 How Pr. (N. S.) 21. But on an application made by a person other than the father of an infant that such person be appointed guardian of the person of the infant and a trust company guardian of the infant's estate, the court has no power to grant the application of the father (who has been adjudged an habitual drunkard), that the order of appointment shall provide that the guardian of the estate shall advise him of all matters which may affect the infant's estate, and that the guardian of the person shall allow him to see his child at all suitable times, and shall consult with him in reference to the management

of said child. (Matter of Lindley, 1 Connoly, 500; 9 N. Y. Supp. 291.)

⁴² Potter v. Ogden, 136 N. Y. 384, 401; 49 St. Rep. 829.

⁴³ Dutton v. Dutton, 8 How. Pr. 99. And see Matter of Pierce, 12 id. 532. In Matter of Sherman (N. Y. Law J., May 31, 1892), on an application to the surrogate of New York for guardianship of the person, it appeared that letters of general guardianship had already been granted by the surrogate of Saratoga county, but it was alleged that the person to whom such letters had been issued had removed the infant from New York county, where he resided, for the purpose of making the application in that county. Held, that the jurisdiction of the Saratoga surrogate could not be questioned collaterally in this proceeding.

gate, with the same sureties, for the discharge of their trust, does not vary their liability.⁴⁴ The guardianship of a judicially appointed guardian, as well as of a testamentary guardian, is deemed an authority coupled with an interest; and where two guardians are appointed, and one of them dies, it continues to the survivor.⁴⁵

§ 1027. Oath of office and official bond.—The guardian must file with the surrogate, before letters are issued to him, an official oath or affirmation to the effect that he will well, faithfully, and honestly discharge the duties of his office.⁴⁶ A guardian of the property must also execute, and file with the surrogate, his bond to the infant, for the faithful discharge of his trust, etc.;⁴⁷ and the surrogate has a discretion to require an official bond from the general guardian of an infant's person.⁴⁸ The form and condition of such a bond, and the rules pertaining to its renewal, the liabilities incurred thereunder, and actions thereupon, have been generally presented in the chapter on official bonds.⁴⁹

⁴⁴ Kirby v. Turner, Hopk. 309. See *ante*, § 602.

⁴⁵ People v. Byron, 3 Johns. Cas. 53.

⁴⁶ Co. Civ. Proc., § 2594.

⁴⁷ Co. Civ. Proc., § 2830; *ante*, § 478.

As to the form of security, see Rule 54 of the General Rules of Practice. The surrogate may dispense with a bond, on appointment of a trust company as guardian. (L. 1885, c. 425.) The provisions of Co. Civ. Proc., § 2595,—allowing the surrogate to accept a less bond on deposit of securities,—were extended to the case of guardians by L. 1885, c. 516. A guardian of an infant, giving security upon his appointment in one county, must deposit a bond before he can obtain possession of his ward's estate in another county. (Flagg v. Harbeck, 6 Dem. 289; Rieck v. Fish, 1 id. 75.) So, too, in case of payment to a successor of a deceased guardian, by the executor of the latter, of moneys in the hands of the first guardian at the time of his death. (Van Zandt v. Grant, 67 App. Div. 70.)

⁴⁸ Co. Civ. Proc., § 2831.

⁴⁹ See *ante*, § 456 *et seq.* See, also, the following decisions, relating to requiring security from guardians, and the liability of the sureties in their bonds: Matter of Hedges, 1 Edw. 57; Matter of Thorne, id. 507; Ferris v. Brush, id. 572; Genet v. Tallmadge, 1 Johns. Ch. 561; People v. Byron, 3

Johns. Cas. 53; Muir v. Wilson, Hopk. 512; Clark v. Montgomery, 23 Barb. 464; Matter of Callahan, 1 Tuck. 62; Matter of Hamlen, id. 408; Matter of Patterson, 39 St. Rep. 849. An accounting by a guardian is not a prerequisite to an action against the sureties upon his bond, in those cases in which the extent of his liability has been otherwise as definitely determined as it could be by accounting. (Girvin v. Hickman, 21 Hun. 316.) Nor is the issue and return of an execution necessary, where a decree has been made fixing the guardian's liability. (Allen v. Kelly, 55 App. Div. 454; Van Zandt v. Grant, 67 id. 70.) The appointment of, and the security to be given by, a special guardian appointed to sell an infant's real property, are regulated by General Rules 57–59. As to the liability of the sureties on such a guardian's bond, see Center v. Finch, 22 Hun. 146. A guardian, being insolvent, his sureties must be prosecuted before a motion is made for an attachment against him. (Matter of Callahan, 1 Tuck. 62.) A guardian's bond was ordered prosecuted when there had been a palpable breach of its condition, and the guardian had died leaving no will, and there was no administration of his goods in this State. (Matter of Hamlen, 1 Tuck. 408.) Where, upon the failure of a general guardian to pay to his

§ 1028. **Powers and duties of guardians.**—Any person who takes possession of an infant's property takes it in trust for the infant, and will be held to the same degree of responsibility as if he had been formally appointed to the office of guardian.⁵⁰ Every general guardian,⁵¹ whether testamentary or appointed, is required safely to keep the things that he may have in his custody belonging to his ward, and the inheritance, and not to make or suffer any waste, sale, or destruction of such things or inheritance, but to keep up and sustain the houses, gardens, and other appurtenances to the ward's lands, by and with the issues and profits thereof, or with such other moneys of the ward as are in his hands; and to deliver the same to the ward, when he comes to full age, in as good order and condition, at least, as the guardian received the same, inevitable decay and injury only excepted; and to answer to his ward for the issues and profits of real estate received by him by a lawful account; and if the guardian makes or suffers any waste, sale, or destruction of the inheritance, he shall lose the custody of the same and the ward, and shall forfeit to the ward thrice the sum at which the damages shall be taxed by the jury.⁵²

ward the amount fixed by the surrogate's decree, the surety of the guardian is compelled to pay the same, such payment does not satisfy the decree, but the surety is subrogated to all the rights of the ward under the decree, and to the extent of the amount paid by him on account of such decree, he is entitled to issue execution against the person of the guardian. (*Rapp v. Masten*, 4 Redf. 76.)

⁵⁰ *Cromwell v. Kirk*, 1 Dem. 599.

⁵¹ Also, every "guardian *in socage*."

⁵² L. 1896, c. 272, § 53, re-enacting 2 R. S. 153, §§ 20, 21. "A guardian *in socage* has, so far as the exigencies of the case at bar demand, the same powers and duties over his ward's estate as a general guardian. A general guardian has the power, and in some instances it is an imperative necessity and duty, to apply personal property of his ward to the payment of a mortgage on land to which his ward succeeds. (*Banks v. Taylor*, 10 Abb. Pr. 199; *Ainsworth v. Aldrich*, 15 Week. Dig. 199.) Ordinarily, the administrators would not be allowed the credit of such payment, but, inasmuch as one of them is the guardian *in socage* of the infants, I am of the opinion that so much of their personal property as

is a proportionate part of their share in the payment should be allowed. The amount of the contribution of the life tenant and remaindermen should be computed and the administrators charged with the excess of the infants' proportion, with interest." (*Per Ransom, S.*, in *Matter of Farrell*, N. Y. Law J., July 1, 1892.)

As to the powers of a guardian in respect to property, see *Banks v. Taylor*, 10 Abb. Pr. 199; *Matter of Rickard*, 15 Abb. (N. S.) 6; *White v. Parker*, 8 Barb. 48; *Hassard v. Rowe*, 11 id. 22; *Swartwout v. Oaks*, 52 id. 622; *Thacker v. Henderson*, 63 id. 271; *Poultney v. Randall*, 9 Bosw. 232; *Heyt v. Hilton*, 2 Edw. 202; *Knothe v. Kaiser*, 2 Hun. 515; *Willick v. Taggart*, 17 id. 511; *Wilcox v. Van Schaick*, 19 id. 279; *Jackson v. Sears*, 10 Johns. 435; *Genet v. Tallmadge*, 1 Johns. Ch. 561; *Thompson v. Brown*, 4 id. 619; *Field v. Schieffelin*, 7 id. 150; *Copley v. O'Neil*, 1 Lans. 214; *Low v. Purdy*, 2 id. 422; *Bostwick v. Atkins*, 3 N. Y. 53; *Chapman v. Tibbets*, 33 id. 289; *Emerson v. Spicer*, 46 id. 594; affg. 55 Barb. 428; *Torry v. Black*, 58 N. Y. 185; revg. 65 Barb. 414; *Van Epps v. Van Densen*, 4 Paige, 64; *Putnam v. Ritchie*, 6 id.

§ 1029. **Application of infant's property.**—A guardian takes the responsibility of encroaching upon the capital of a trust fund, of which his ward is entitled to the income; he must make out as

390; *Burtis v. Brush*, 1 Redf. 448; *Carman v. Cowles*, 2 id. 414; *Torry v. Frazier*, id. 486; *Matter of Jackson*, 1 Tuck. 71; *De Peyster v. Clarkson*, 2 Wend. 77; affg. *Hopk.* 424; *Pond v. Curtiss*, 7 Wend. 45; *Bayer v. Phillips*, 17 Abb. N. C. 425; *Matter of Kopp*, 2 N. Y. Supp. 495; *Matter of Terry*, 31 Misc. 477.

A general guardian has no authority, even with the consent of the infant and by authority of the surrogate, to invest the funds of the infant in real property so as to change its character for the purpose of descent upon the death of the infant during minority. (*Matter of Bolton*, 159 N. Y. 129.) See *Matter of Decker*, 37 Misc. 527; 76 N. Y. Supp. 315. Nor has he power to invest in trade or speculation. (*Warren v. Union Bank of Rochester*, 157 N. Y. 259.) Nor in bank stock, nor in a foreign corporation. (*Matter of Decker*, *supra*.) As to investment of proceeds of sale under a power, paid to the guardian, see *L.* 1901, c. 166.

As to demands, compromises, and suits, see *White v. Parker*, 8 Barb. 48; *Thomas v. Bennett*, 56 id. 197; *Tuttle v. Heavy*, 59 id. 334; *Weed v. Ellis*, 3 Cai. 253; *Hauenstein v. Kull*, 59 How. Pr. 24; *Jackson v. Sears*, 10 Johns. 435; *Swarthout v. Curtis*, 4 N. Y. 415; *Chapman v. Tibbets*, 33 id. 289; *Evertson v. Evertson*, 5 Paige, 644; *Voessing v. Voessing*, 4 Redf. 360; *Matter of Jackson*, 1 Tuck. 71; *Matter of Chittenden*, id. 251; *Prentiss v. Weatherly*, 68 Hun. 114; 22 N. Y. Supp. 680; affd., 144 N. Y. 707; *Coughlin v. Fay*, 68 Hun. 521; 22 N. Y. Supp. 1095.

As to imposing restrictions upon ward's property by contract, see *Curry v. Keil*, 19 App. Div. 375.

A general guardian may sue for and recover money received by defendant by collecting the rents and profits of the land of the ward (*Field v. Schieffelin*, 7 Johns. Ch. 150, 154; *Thacker v. Henderson*, 63 Barb. 271; *Pond v. Curtiss*, 7 Wend. 45; *White v. Parker*, 8 Barb. 48, 52; *Chapman v. Tibbets*, 33 N. Y. 289); for this is not an action relating to real property within Co. Civ. Proc., § 1666, which

allows such actions to be in the infant's name. (*Coakley v. Mahar*, 36 Hun. 157.)

As to whether a general guardian may maintain an action in his own name upon the official bond of his predecessor to recover for the misappropriation of the infant's estate, see *Perkins v. Stimmel*, 114 N. Y. 359.

As to dealings with the ward, see *Limburger v. Rauch*, 2 Abb. Pr. (N. S.) 279; *Gale v. Wells*, 12 Barb. 84; *Low v. Purdy*, 2 Lans. 422; *Seaman v. Duryea*, 11 N. Y. 324; *Evertson v. Evertson*, 5 Paige, 644.

As to purchase by guardian individually, section 1679 only applies to guardians *ad litem*. See *Boyer v. East*, 161 N. Y. 580; *Munsell v. Munsell*, 33 Misc. 185; *Kullman v. Cox*, 26 App. Div. 158; *Dugan v. Denyse*, 13 id. 214; *O'Donoghue v. Boies*, 92 Hun. 3; *O'Brien v. General Synod*, etc., 10 App. Div. 605.

As to the custody, residence, and support of the ward, see *Clark v. Montgomery*, 23 Barb. 464; *Elliot v. Gibbons*, 30 id. 498; *Matter of Kane*, 2 Barb. Ch. 375; *Rait v. Rait*, 1 Bradf. 345; *Harring v. Coles*, 2 id. 349; *Ex p. Dawson*, 3 id. 130; *Matter of Bartlett*, 4 id. 221; *People ex rel. Brooklyn Industrial School v. Kearney*, 21 How. Pr. 74; *Hill v. Hanford*, 11 Hun. 536; *Wilcox v. Wilcox*, 14 N. Y. 575; *Wood v. Wood*, 5 Paige, 596; *Cook v. Lee*, 6 id. 158; *Clark v. Clark*, 8 id. 152; *Voessing v. Voessing*, 4 Redf. 360; *Seiter v. Straub*, 1 Dem. 264; *Matter of Wentz*, 9 Misc. 240.

As to payment and investment of legacies to infants, see § 792, *ante*.

As to payment of infant's distributive share, to general guardian, see Co. Civ. Proc., § 2746; § 792, *ante*; id., § 2796; *L.* 1879, c. 389; § 833, *ante*.

As to appearance by general guardian, in Surrogate's Court, for infant, see Co. Civ. Proc., § 2530; § 108, *ante*.

As to enforcement of decree against guardian, see Co. Civ. Proc., § 2555; c. XXI, *post*.

As to effect of certain appeals by guardian, see Co. Civ. Proc., §§ 2578, 2579; c. XXIV, *post*.

clear a case, for the subsequent sanction of his course, as he would have been required to do had he applied in advance for authority to adopt it.⁵³ A guardian may be allowed, in a proper case, for necessities furnished to the infant before his appointment as guardian.⁵⁴ The surrogate may, upon the petition of the general guardian, or of the infant, or of any relative or other person in his behalf, upon notice to such persons, if any, as he thinks proper to notify, direct the application, by the guardian, of the infant's property, to the support and education of the infant, of such a sum as he deems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.⁵⁵ The rule, already referred to, that in proceedings against executors or administrators to compel the payment of a legacy or distributive share, payment can be decreed only where the legacy or share is not disputed, has no application to the case of a guardian; hence, on the application of a third person for a direction that a guardian pay for the ward's board furnished under an agreement with the guardian, the fact that the guardian disputes the claim does not oust the court of jurisdiction to make the direction.⁵⁶

⁵³ Oakley v. Oakley, 3 Dem. 140; Matter of Wandell, 32 Hun. 545; Matter of Clements, N. Y. Daily Reg., Sept. 1, 1883. See Matter of Plumb, 52 Hun. 119. Upon the accounting of a widow as general guardian of the property of her son, where it appears that she was in moderate circumstances and there is an absence of any facts indicating a purpose on her part to relieve the son and his estate from liability for the latter's support, she is entitled to an allowance for his past maintenance. (Matter of Winsor, 5 Dem. 340; citing Matter of Bostwick, 4 Johns. Ch. 100; Wilkes v. Rogers, 6 Johns. 566; Matter of Kane, 2 Barb. Ch. 375; Harring v. Coles, 2 Bradf. 349; Bruin v. Knott, 9 Jur. 979; Voessing v. Voessing, 4 Redf. 360; Browne v. Bedford, 4 Dem. 304; Furman v. Van Sise, 56 N. Y. 435; Beardsley v. Hotchkiss, 96 id. 201; Hyland v. Baxter, 98 id. 610.)

⁵⁴ Matter of Miller, 34 Hun. 267; Shepard v. Stebbins, 48 id. 247; 17 St. Rep. 900; Matter of Ogg, 1 Connoly, 10; Matter of Wright, id. 281. See Matter of Haslehurst, 4 Misc. 366. A general guardian of a stepdaughter has a legal right to contract with the stepfather for her support, and on

settlement of his accounts the guardian is entitled to be allowed such reasonable sum as has been in good faith paid by him for that purpose. (Matter of Ackerman, 116 N. Y. 654; s. c. with opinion, 26 St. Rep. 666.) Where a ward boards in the family of her guardian, and, in fact, renders services of value, those services should be allowed as a claim to reduce the charges for board. (Matter of Clark, 36 Hun. 301.)

⁵⁵ Co. Civ. Proc., § 2846; which supersedes decisions to the contrary, in Matter of Parker, 1 Barb. Ch. 154; and Morgan v. Hannas, 13 Abb. Pr. (N. S.) 361. In determining the amount to be allowed, expenditures made by the guardian, prior to his appointment, may be considered. (Hovell v. Noll, 10 Misc. 546; 31 N. Y. Supp. 439.) The Code does not provide for an application to the court for the payment of a debt already incurred for the infant. (Welch v. Gallagher, 2 Dem. 40.)

⁵⁶ Matter of Kerwin, 59 Hun. 589; 37 St. Rep. 436. This case is not an authority, however, for the proposition that the surrogate has jurisdiction to order payment of a claim for services rendered by a third person in

ARTICLE SECOND.

ACCOUNTING OF GENERAL GUARDIANS.

§ 1030. **Annual inventory.**—The supervision and control, which surrogates exercise over guardians to whom they have issued letters, includes, besides the judicial settlement of the guardians' accounts, on the cessation of their office, another species of accounting, analogous to the intermediate accounting of executors, administrators, and testamentary trustees; though, unlike the latter, guardians' accounts are required to be rendered and examined at stated periods, so long as they continue to act.⁵⁷

"A general guardian of an infant's property, appointed by a Surrogate's Court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the Surrogate's Court the following papers: (1) An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items remaining in his hands; a statement of the manner in which he has disposed of each article or item not remaining in his hands; and a full description of the amount and nature of each investment of money made by him. (2) A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account."⁵⁸ With the inventory and account so filed must be filed an affidavit, by the guardian, or by an agent or attorney, who is cognizant of the facts, stating, in substance, the facts, as required by the statute.⁵⁹

caring for the ward's property where the validity of the claim is disputed by the guardian. (*Matter of Stoehr*, 23 N. Y. Supp. 281; s. c. as *Hampton v. Stoehr*, 51 St. Rep. 560.)

⁵⁷ An infant ward may bring a suit to call his guardian to account, or require him to give better security, if the state of the case should call for it. (*Monell v. Monell*, 5 Johns. Ch. 283.) As to accounting of a guardian appointed by the Supreme Court, see *Matter of Muller*, 2 L. Bul. 28.

⁵⁸ Co. Civ. Proc., § 2842. The guardian should file an inventory as soon as his ward's property comes into his hands. He should also keep the ward's money properly invested; should keep the account in a separate book, and should take and keep receipts. (*Matter of Bushnell*, 17 St. Rep. 813; 4 N. Y. Supp. 472.)

⁵⁹ Co. Civ. Proc., § 2843. "The surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an

In providing for annual accounts, the statute does not contemplate the *settlement* of these accounts. These annual accounts are intended to inform the ward and the court of the manner in which the guardian is discharging his trust. The ward or the court may act upon the information thus obtained to remove the guardian, or to obtain further security for the performance of his duties. But there is no provision of the statute for a judicial examination and settlement of the guardian's accounts, at the instance either of the ward or the guardian, while the guardianship still continues and is intended to continue.⁶⁰

§ 1031. Scrutiny of annual inventory and account.—The surrogate is required, in the month of February of each year, and thereafter, until completed, to “examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year.” The examination may be made by the clerk, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take, before the surrogate, and file with the clerk of the court, an oath faithfully to execute his duties, and to make a true report to the surrogate.⁶¹

§ 1032. Remedy, where account, etc., not filed or defective.—If it appears, upon such an examination, that the guardian has omitted to file his annual inventory or account, or the affidavit relating thereto; or if the surrogate is of the opinion that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; “the surrogate must make an order, requiring the guardian to supply the deficiency, and also, in his discretion, requiring the guardian personally to pay the expense of serving the order upon him. Where the guardian fails to comply with such an order, within three months after it is made; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf,

infant issued from this court.” (Ib.)
The above affidavit conforms to Williams v. Purdy, 6 Paige, 166.

⁶⁰ Diaper v. Anderson, 37 Barb. 168; Matter of Hawley, 104 N. Y. 250. See *post*, § 1033. A surrogate cannot compel an attorney of a guardian to

account for moneys of the infant in his hands. (Matter of O'Neil, 1 Tuck. 36.) See Matter of Holland Trust Co., 76 Hun, 323; 27 N. Y. Supp. 687.

⁶¹ Co. Civ. Proc., § 2844. See *id.* as to appointing special examiner.

for the removal of the guardian, and prosecuting the necessary proceedings for that purpose.”⁶²

§ 1033. Judicial settlement of account.—The mere rendering of an account by a guardian is, obviously, not an adjudication of its correctness; and although the statute makes provision for an examination of the annual inventory and account, and for the filing of additional ones, where those filed are not sufficiently full, or not satisfactory; yet the result of this proceeding is not a judicial determination which will bind the parties concerned. To make the accounting conclusive, there must be a citation or appearance for the purpose of having an adjudication upon its correctness. For this purpose the statute provides for a “judicial settlement” of the guardian’s account.⁶³ A compulsory judicial settlement of the account of a general guardian of an infant’s property may be had upon a petition in either of the following cases: (1) By the ward after he has attained his majority. (2) By the executor or administrator of a ward, who has died. (3) By the guardian’s successor, including a guardian appointed after the reversal of a decree, appointing the person so required to account. (4) By a surety in the official bond of a guardian whose letters have been revoked; or by the legal representative of such surety. Citation under this subdivision must be directed to both the guardian and the ward.⁶⁴ In case of the death of a guardian, the Surrogate’s

⁶² Co. Civ. Proc., § 2845. The following rule is in force in New York county: “The surrogate, on the written certificate of the person appointed under section 2844 of the Code, to examine the inventory and accounts of guardians filed in said surrogate’s office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interest of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency; and where it shall appear, by the certificate of said person, that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian’s removal, the surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf, and prosecuting the necessary proceedings for the removal of such

guardian.” (Rule XXI.) See *Ledwith v. Union Trust Co.*, 2 Dem. 439.

⁶³ Co. Civ. Proc., §§ 2847, 2849. The accounts of a guardian, as guardian, cannot be settled in proceedings instituted for a settlement of his accounts as an administrator. (*Banks v. Taylor*, 10 Abb. Pr. 199.)

⁶⁴ The fourth was added by L. 1890, c. 62. Prior to this amendment, a surety on a guardian’s bond could not compel an accounting by his principal (*Matter of Voelpel*, 3 L. Bul. 79); nor could he move to open the decree settling the guardian’s account (*Smith v. Lusk*, 2 Dem. 595); nor move for relief on the ground of fraud on the part of the guardian in charging himself with improper amounts, there being no allegation of collusion on the part of the ward. (*Corbin v. Westcott*, 2 Dem. 559.) A conservator or committee of a lunatic minor, appointed in another State, is not entitled to call a guardian of a minor in this State to account for, and pay over to him, the estate of the minor

Court has the same jurisdiction, upon the petition of his successor or of a surviving guardian or of a guardian's ward, to compel the executor or administrator of the deceased guardian to account, which it would have had against the decedent, on a revocation of his letters.⁶⁵

A compulsory proceeding for an accounting by the general guardian of an infant's person, may be instituted by the general guardian of the infant's property; but upon the presentation thereof, proof must be made, to the surrogate's satisfaction, that the guardian so required to account has received money or property of the ward, for which he has not accounted; or which he has not paid or delivered, to the general guardian of the infant's property.⁶⁶ For this purpose a guardian of the estate only, is deemed to be a general guardian.

§ 1034. Voluntary accounting and discharge of general guardian.

— The guardian may himself petition for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed above, that is, on the ward's dying, or attaining majority, or on the revocation of his letters. "The petition must pray that the person who might have so presented a petition, and also the sureties in his official bond of such guardian, or the legal representatives of such surety, may be cited to attend the settlement."⁶⁷ It is only on the happening of one of the events mentioned that a judicial settlement can be had. No court has jurisdiction, under the Code or other statute, to judicially settle a guardian's account, either on

in his hands. The remedy is by application to the Supreme Court. (Matter of Traznier, 2 Redf. 171.)

⁶⁵ Co. Civ. Proc., § 2606; *ante*, § 921; Matter of Camp, 91 Hun, 204; 36 N. Y. Supp. 1123. The executor or administrator of a deceased general guardian may be required to account for the latter's administration, immediately upon the appointment of the executor or administrator. (Matter of Wiley, 55 Hun, 248; 29 St. Rep. 787.) See *Andrade v. Cohen*, 32 Hun, 225; Matter of Camp, 18 App. Div. 110; 45 N. Y. Supp. 600. And the successor may maintain an action upon the bond of his predecessor to recover the amount found due upon such accounting. (*Van Zandt v. Grant*, 67 App. Div. 70; 73 N. Y.

Supp. 600.) Where a trust fund has been in the hands of a guardian for many years, and was unpaid and unaccounted for at the time of his death, there is no presumption that it is a part of his estate in the hands of his executor, so as to entitle his ward to an order, under Co. Civ. Proc., § 2606, compelling such executor to pay to the ward the amount due her from such trust fund in preference to other creditors, without evidence that decedent's assets in the hands of his executor are a part of, or created by, the trust fund. (Matter of Hicks, 170 N. Y. 195; *revg. Hicks v. Townsend*, 66 N. Y. Supp. 1028.)

⁶⁶ Co. Civ. Proc., § 2848.

⁶⁷ Co. Civ. Proc., § 2849, as amended 1893.

his own or another's application, while the guardianship continues; and an attempted settlement of the kind is void.⁶⁸

§ 1035. **Procedure on judicial settlement.**—The manner of conducting the proceedings, upon a judicial settlement of the account of a general guardian, is precisely the same as that prescribed under similar circumstances with respect to an executor or administrator.⁶⁹ Thus, upon the return of a citation *issued against the guardian*, unless he shows cause, or himself petitions for a settlement, he is to be ordered to account, and must attend from time to time for that purpose. He must produce vouchers for expenditures, except where an executor, etc., would be excused from so doing; and the surrogate may require him to make and file his account, and to submit to examination, and may allow him for property perished or lost without his fault. Where there are two or more wards, a separate account should be filed for each.⁷⁰

§ 1036. **Limitation of proceeding.**—As it is the duty of a guardian to invest the moneys of his ward, the fund, in contemplation of law, remains invested, and in a situation at any time to be delivered over. After the ward comes of age, the guardian is to be considered the trustee of the ward, and until the trust is repudiated, or, in some way, the guardian claims a title to the fund in defiance of the trust, there is no beginning of the running of the Statute of Limitations. Hence, the fact that the petitioning ward came of age more than six years before filing the petition is no ground for refusing to grant a citation.⁷¹ Aside from this,

⁶⁸ Matter of Hawley, 104 N. Y. 250, and cases cited.

⁶⁹ Section 2727 and sections 2733 to 2738, both inclusive, and sections 2741 and 2744 of the Code [now §§ 2727, 2729, 2730, and § 2744], "apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. The accounting party must annex to every account produced and filed by him an affidavit, in the form prescribed in this article for the affidavit to be annexed by him to his annual inventory and account. A guardian designated in this title is entitled to the same compensation as an executor or administrator." (Co. Civ. Proc., § 2850.)

⁷⁰ Matter of Bostwick, N. Y. Law J., Feb. 3, 1893.

⁷¹ Matter of Camp, 50 Hun. 388; 21 St. Rep. 308; and same case, in a subsequent proceeding, 126 N. Y. 377; 37

St. Rep. 767. In Matter of Lewis (36 Misc. 741; 74 N. Y. Supp. 469), the proceeding was held barred after the lapse of ten years. In Matter of Barker (4 Misc. 40), it appeared that, after coming of age, a ward had a conversation with her guardian concerning the latter's accounts, and the guardian stated that she had expended the entire fund. The guardian had been guilty of no fraud or concealment; the accounts had always been open to the inspection of the ward, and it was proven that she was in a measure familiar with their contents. Held, that there was a repudiation of the trust relation, and that the Statute of Limitations began to run against the ward from that time. But *query*, whether the relation existing between guardian and ward after the latter had attained majority was not such a trust as not to be

the practice in equity was to allow a ward one year's time to investigate the guardian's accounts; on the ground that when he first comes of age he is still too much under the influence of the guardian to protect himself.⁷²

§ 1037. **Subject-matter of accounting.**—The surrogate's authority to compel a guardian to account is limited to an account of his proceedings under the power given him by his letters; and is commensurate, in fact, with acts or neglects of duty occurring during the period of his official authority, and cannot be extended back to previous transactions, *e. g.*, to a claim for money received by him, before his appointment, from a foreign guardian of the ward, with directions to appropriate it to his benefit, but which remained in his hands at the time of his appointment.⁷³ Neither can the guardian be allowed for services rendered for the ward before he was appointed guardian; and a promise of the ward to pay for them, made after he became of age, does not make them proper matters of charge on such accounting.⁷⁴ But, under the statute, the surrogate is authorized to ascertain the quantity, quality, and condition of the ward's property in the hands of the guardian, and to decree and adjudge the time when, the persons to whom, and in what manner it shall be paid or delivered over.⁷⁵ Interest is chargeable in the accounts of a guardian, upon

affected by the Statute of Limitations, nor any bar, by analogy, to the statute. See *Matter of Van Derzee*, 73 Hun. 532; 26 N. Y. Supp. 121. A ward may, by conduct after reaching majority, ratify an illegal investment. (*Matter of Klunck*, 33 Misc. 267; 68 N. Y. Supp. 629.)

⁷² *Matter of Van Horne*, 7 Paige, 46; *Douglas v. Low*, 36 Hun. 497. The last case was an action to set aside, for fraud, the surrogate's decree on the guardian's accounting; the fraud alleged being that the plaintiff, the ward, was induced to authorize an attorney to appear for him and consent to a discharge, and that there was false and fraudulent evidence given. The complaint was held good, on demurrer.

⁷³ *Rait v. Rait*, 1 Bradf. 345. See *Matter of Plumb*, 24 Misc. 249; 53 N. Y. Supp. 588; *Matter of Mulligan*, 6 Misc. 546; 27 N. Y. Supp. 435.

⁷⁴ *Clowes v. Van Antwerp*, 4 Barb. 416. Taxes paid on ward's property, without his knowledge, after he became of age are not to be included

in the account. (*Matter of Kopp*, 17 St. Rep. 832.)

⁷⁵ *Seaman v. Duryea*, 10 Barb. 523; *affd.*, 11 N. Y. 324. But a Surrogate's Court has no power to direct a general guardian to pay over to the ward a sum, to the possession of which the guardian is personally entitled, as life tenant, the interest of the ward being merely that of remainderman; and the fact that the guardian has lost the money will not confer jurisdiction to make such direction. (*Matter of Camp*, 126 N. Y. 377; 37 St. Rep. 767.) Without the guardian's consent, the surrogate has not jurisdiction to deduct the gross value of his life interest and to direct the payment of the balance. (*Ib.*) As to allowance for payments for legal services for the estate, see *Rait v. Rait*, 1 Bradf. 345; *Matter of Decker*, 37 Misc. 527; 76 N. Y. Supp. 315; for proceedings to obtain possession of the ward, *Matter of Grant*, 56 App. Div. 176; 67 N. Y. Supp. 654; *affd.*, 166 N. Y. 640; *Matter of Pruyn*, 68 App. Div. 584; 73 N. Y. Supp. 859; and for the support

the same principles that have heretofore been explained in respect to the accounts of executors and administrators, except that he is not entitled to the same exemption for considerable sums kept in hand, on account of the exigencies peculiar to the settlement of an estate which is subject to large debts and claims. The court has power to allow to a guardian necessary expenditures made for the support of the infant even before the guardian was appointed, especially where he, being the parent, was unable to support the ward himself.⁷⁶

§ 1038. Expenses and compensation.— The Revised Statutes provided that guardians should be allowed for their reasonable expenses, and the same rate of compensation for their services as provided by law for executors;⁷⁷ and this was construed as referring, not to the old rate of compensation fixed by the original Revised Statutes, but to the rate of commissions allowed to executors and administrators by subsequent amendments of the law.⁷⁸ The section of the Revised Statutes cited was repealed in

and education of the ward by the parent's labor, see *Harring v. Coles*, 2 Bradf. 349; *Matter of Kane*, 2 Barb. Ch. 375; *Matter of Parker*, 1 id. 154. And see also *Matter of Wilber*, 27 Misc. 53; 57 N. Y. Supp. 942; *Matter of Klunck*, 33 Misc. 267; 68 N. Y. Supp. 629. The guardian's giving the ward an opportunity to examine his books, and informing her from time to time, after she came of age, of the balance, is not a settlement of the accounts. (*Rapalje v. Hall*, Sandf. Ch. 399.) One who was substituted as guardian, on removal of another, gave a receipt to the surrogate, admitting that, as guardian of the minor, he had received from the surrogate a certain sum of money.—Held, that it was competent for him, on his accounting, to prove that the receipt was given for certain contracts for the purchase of lands, which were, in fact, worth less than the sum specified in the receipt. (*White v. Parker*, 8 Barb. 48.) Where the guardian, after the ward attained his majority, had a settlement with him, and assigned a mortgage to the ward for the amount found due, and the ward gave a receipt that he had received the assignment of the mortgage "as equivalent" to the amount found due.—Held, that, upon the accounting of the guardian, the surro-

gate had no jurisdiction to try the question of the validity of the settlement, and that upon the question of the acceptance of the mortgage by the ward, in satisfaction of the amount due him, the receipt was conclusive, and could not be contradicted by parol evidence. (*Downing v. Smith*, 4 Redf. 310.) See also *Matter of Gill*, 3 Hun, 20. In *Matter of Pruyne* (68 App. Div. 584; 73 N. Y. Supp. 859), a residuary legatee, who was guardian of testator's infant child, was directed to establish a trust fund in favor of such child, which was never done, the personal estate being insufficient. The guardian remained in possession of the realty as residuary legatee, and regarded the trust fund as invested therein. Held not entitled to credit in his account for taxes paid on the trust fund as guardian.

⁷⁶ *Matter of Wright*, 1 Connolly, 281; 22 St. Rep. 83; 4 N. Y. Supp. 343, and cases cited. See also *Matter of Ogg*, 1 Connolly, 10; 20 St. Rep. 867; *Matter of Bushnell*, 17 id. 813; *Welch v. Gallagher*, 2 Dem. 40.

⁷⁷ 2 R. S. 153, § 22; *Matter of Carman*, 21 St. Rep. 254; 4 N. Y. Supp. 690.

⁷⁸ *Foley v. Eagan*, 13 Abb. Pr. (N. S.) 361, n. And see *Dakin v. Demming*, 6 Paige, 95.

1880;⁷⁹ but by the amendment of section 2850 of the Code, in 1882, it was declared that a general guardian is entitled to the same compensation as an executor or administrator.⁸⁰

§ 1039. **Extra services.**—A guardian will not be allowed, any more than an administrator, an extra compensation for services, although not strictly within the line of his duties. Thus, where the guardian is an attorney and counselor-at-law, he cannot charge for professional services rendered in the affairs of his ward, or where he is a mechanic, he cannot charge for repairs made by him, but is restricted to the statutory allowance. Neither an order of a surrogate, before the services are rendered, directing the performance thereof, and fixing the extra compensation, nor an order ratifying and allowing it, will legalize the charge.⁸¹

§ 1040. **Computation of commissions.**—The amount of commissions can only be determined upon the judicial settlement of the guardian's accounts, and this can be had, as we have seen, only when the ward becomes of age, or the guardianship is otherwise terminated, and a new guardian is appointed, or the ward dies.⁸²

⁷⁹ L. 1880, c. 245.

⁸⁰ In a case where an executor would be refused commissions.—*e. g.*, maladministration—a general guardian will be denied compensation. (Matter of Kopp, 17 St. Rep. 832.) S. P., Matter of Bushnell, id. 813. In an action for a settlement of a guardian's accounts in the Supreme Court, an allowance of \$250 as and for the expenses of the accounting were allowed. (Matter of Carman, *supra*.) Such expenses are not in the nature of costs and allowance in an action at law. (Ib.) Where, however, objections to the accounts are justified, the estate of the ward should not be charged with the expenses of the proceeding (Matter of Frank, 1 App. Div. 39; *s. c.* as Matter of Schneider, 36 N. Y. Supp. 972); but, on the contrary, the guardian is chargeable with costs. (Matter of Decker, 37 Misc. 527; 76 N. Y. Supp. 315.)

⁸¹ Morgan v. Hannas, 49 N. Y. 667. See § 556, *ante*.

⁸² Matter of Hawley, 104 N. Y. 250. A guardian is entitled to commissions on amounts received by him after the ward has arrived at full age and become entitled to the possession of the fund, until his duties are terminated by a final judicial settlement of his

accounts. (Hawley v. Singer, 3 Dem. 589.) While a Surrogate's Court has no power to open and reconsider, on the ground of legal error, an adjudication already made, still, where full commissions have been inadvertently awarded on a fund as received and paid out, when in truth it had been received and not paid out, such a tribunal may, in a subsequent accounting, take cognizance of the fact, and decline to award half commissions again for paying out. (Ib.) As to whether a testamentary guardian, who is also executor, is entitled to charge double commissions upon the principal of the ward's estate, see Matter of Hawley, 104 N. Y. 250. *It seems*, however, that if such double commissions are allowable, they may be charged upon the value of property which the testator directed not to be sold, but to be divided by the executors and given to the legatees. (Ib.) On a rehearing before the surrogate by direction of the Court of Appeals, the claim to commissions on the stock was allowed. (Hawley v. Singer, 5 Dem. 82.) The surrogate also held that where commissions have been allowed a guardian by the surrogate, in proceedings in which the guardian has acted in complete good faith, but, as

As in the case of executors and administrators, the commission is computed on money received and paid out. Where the guardian has received money, but has not paid it out otherwise than by turning it over to his successor, or has paid out money which he did not receive, except by succeeding to the trust turned over to him by a predecessor, he is only allowed half commissions, upon the same principle which has been explained in a previous chapter on accounting by executors and administrators. In other words, he is to be paid a full commission only on moneys which he has actually both received and paid out, not upon portions of the fund which may have come into his hands in the form of an investment previously made by a predecessor, or which he turns over, as a part of the trust fund, to his successor in the trust.⁸³ But where a temporary guardian is not removed, or does not voluntarily resign, but his retiring from office is at the instance of the ward, after her reaching fourteen years of age, who petitions for the appointment of a successor, he is entitled to full commissions upon the entire principal of the fund handed over to his successor.⁸⁴

§ 1041. Commissions on annual statement.—As the guardian is required by law to render annual accounts, he may be allowed full commissions on each annual account rendered by him; and, at his final accounting, he may be allowed interest on the balances due him on his annual accounts.⁸⁵ But, on accounting periodically, he should be allowed, upon the first annual statement, or passing of his accounts, one-half commissions upon all moneys received by him, other than principal received from investments made by him, and half commissions on all moneys paid out by him, other than moneys invested or reinvested by him in securities, leaving the residue of his half commissions to be computed upon the fund which has come to his hands, and which remains invested or unexpended at the time of the accounting, for future adjustment when expended, or when finally accounted for; and, upon subsequent statements, half commissions should be computed in the same manner, upon all sums received as interest or income, or as further additions to the capital of the estate, since the last ac-

is subsequently ascertained, wrongfully and under a void accounting, the court will not, upon subsequently allowing such guardian his proper commissions, charge him with interest upon the sums previously allowed.

⁸³ *Foley v. Egan*, 13 Abb. Pr. (N. S.) 361, note.

⁸⁴ *Phillips v. Lockwood*, 4 Dem. 299.

⁸⁵ *Morgan v. Hannas*, 49 N. Y. 667; s. c. more fully, 13 Abb. Pr. (N. S.) 361; revg., in effect, 39 Barb. 20. S. P., *Matter of Bell*, N. Y. Law J., Feb. 16, 1893. Compare *Matter of Decker*, 37 Misc. 527; 76 N. Y. Supp. 315. As to annual rests in trustees' accounts, see *ante*, § 1001.

counting, and half commissions upon all sums expended except as investments.⁸⁶

ARTICLE THIRD.

RESIGNATION OF GUARDIANS, AND REVOCATION OF LETTERS.

§ 1042. **Petition of guardian.**—A guardian, whether appointed by will or deed, or solely by letters issued by a Surrogate's Court, may, at any time, present to the Surrogate's Court a petition, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the ward may be cited to show cause why such a decree should not be made. The surrogate may, in his discretion, entertain or decline to entertain the application.⁸⁷ If he entertains it, he must issue a citation, as prayed for in the petition; and he may also require notice of the application to be given to such other persons, and in such a manner as he deems proper.⁸⁸

§ 1043. **Proceedings on return of citation.**—“Upon the return of the citation, a guardian *ad litem* for the ward must be appointed; and the surrogate may also, in his discretion, allow any person to appear and contest the application, in the interest of the ward. Upon the hearing, the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, and that the interests of the ward will not be prejudiced by the resignation of the guardian, the surrogate must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged.”⁸⁹

§ 1044. **Decree for discharge, on accounting, etc.**—Upon the guardian's fully accounting, and paying all money which is found to be due from him to the ward, and delivering all books, papers, and other property of the ward in his hands, either into the Surrogate's Court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharg-

⁸⁶ Matter of Kellogg, 7 Paige, 265. See Matter of Decker, *supra*. The guardian's omission to claim commissions is no reason why he should be deprived of them, when a strict legal claim, *e. g.*, for interest, is made against him, which he did not, at the time of such omission, expect would be made. (Rapatje v. Hall, 1 Sandf. Ch. 399.)

⁸⁷ Co. Civ. Proc., §§ 2835, 2859. In case of a guardian appointed by will or deed, the application must be made to “the Surrogate's Court, having jurisdiction to require security from him.” (Co. Civ. Proc., § 2859.) See *id.*, § 2853.

⁸⁸ Co. Civ. Proc., § 2836.

⁸⁹ Co. Civ. Proc., § 2836.

ing him accordingly.⁹⁰ Notwithstanding such discharge of a guardian, his successor or the ward may compel a judicial settlement of his account, as heretofore mentioned,⁹¹ "in the same manner and with like effect, as if the decree discharging him had not been made. With respect to all matters connected with his trust, his sureties continue to be liable, until his account is judicially settled accordingly."⁹² This proceeding by the retiring guardian to settle his account is tentative only and the decree entered therein should merely declare the balance due, without any direction as to its payment. His successor or ward may compel another judicial settlement of his account as though no decree had been made.⁹³

§ 1045. Grounds for removing guardian.—The following are specified in the Code,⁹⁴ as causes for removal of a general guardian, by the surrogate: "1. Where the guardian is disqualified by law, or is, for any reason, incompetent⁹⁵ to fulfill his trust. 2. Where, by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness,⁹⁶ improvidence, or want of understand-

⁹⁰ Co. Civ. Proc., § 2836. The decree is conclusive. (*Matter of Hood*, 90 N. Y. 512.) As to advances to the ward, in excess of income, see *Smith v. Bixby*, 5 Redf. 196; *Kelagher v. McCahill*, 26 Hun. 148.

⁹¹ See § 1033, *ante*. Formerly, the personal representatives of a deceased guardian could not be called upon to account by the Surrogate's Court on petition of the ward. (*Farnsworth v. Oliphant*, 19 Barb. 30.)

⁹² Co. Civ. Proc., § 2837. As to personal liability of a guardian for the costs of an accounting, see *Cromwell v. Kirk*, 1 Dem. 599; *Matter of Frank*, 1 App. Div. 39; *Matter of Decker*, 37 Misc. 527; 76 N. Y. Supp. 315.

⁹³ *Matter of Wright*, 2 Connolly, 108; 20 N. Y. Supp. 86. Where it appears that the desire for the substitution of another guardian is mutual, and that the interests of the ward will be promoted by so doing, the court will apportion the costs of proceedings to that effect between the guardian and ward. (*Ib.*)

⁹⁴ Co. Civ. Proc., § 2832.

⁹⁵ It was held, in *Damarell v. Walker* (2 Redf. 198), that the "incompetency," for which a surrogate may remove a guardian, has relation not merely to the mental condition and moral status of the guardian, but the court might take into consideration the relative social and pecuniary position of the guardian and the infant, as affecting the interests of the latter in respect of nurture, care, education, and safety. Insolvency is a cause of removal. (*Matter of Cooper*, 2 Paige, 34.) In respect to what constitutes incompetency, consult also the rules applicable to executors and administrators. (*Ante*, § 429, *et seq.*)

⁹⁶ *Matter of Moore*, 18 Week. Dig. 42. A guardian who has become so intemperate as to be occasionally insane should be removed, and his wife, being subject to his control, is an equally improper person to manage the estate. (*Kettletas v. Gardner*, 1 Paige, 488.)

ing, he is unfit for the due execution of his office.⁹⁷ 3. Where he has willfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or an order, or any provision of law, relating to the discharge of his duty. 4. Where the grant of letters to him was obtained by a false suggestion of a material fact.⁹⁸ 5. Where he has removed, or is about to remove, from the State. 6. In the case of the guardian of the person, where the infant's welfare will be promoted by the appointment of another guardian."⁹⁹ The surrogate will not revoke letters of guardianship unless one of these grounds is shown, even though it would seem to be for the best interests of the infant to do so.¹ Hence, a neglect to file an annual inventory, unless in disobedience of an order requiring it, is not ground for removing the guardian.²

§ 1046. Application for removal, how and by whom made.—“The ward, or any relative or other person in his behalf, or the surety of a guardian, may, at any time, present to the Surrogate's Court a written petition, duly verified, setting forth the facts, and praying for a decree, revoking letters of guardianship, either of the person, or of the property, or both; and that the guardian com-

⁹⁷ Where a guardian of an infant wife sold property to the infant's husband and took back a mortgage from the two, the court canceled the security and removed the guardian. (Matter of Cooper, 2 Paige, 34.) See also Matter of O'Neill, 1 Tuck, 34.

⁹⁸ To justify a revocation of letters of administration or of general guardianship, upon the ground that the same were “obtained by false suggestion of a material fact” (under Co. Civ. Proc., § 2685, subd. 4; § 2832, subd. 4), it must be made to appear that the suggestion was made to the tribunal by which the letters were granted. It is not enough to show false representations to a party to the proceeding for the purpose of inducing his consent to the granting of such letters. (Corn v. Corn, 4 Dem. 394; s. c. as Estate of Corn, 3 How. Pr. [N. S.] 357; 9 Civ. Proc. Rep. 243.) See O'Brien v. Neubert, 3 Dem. 156; Proctor v. Wamaker, 1 Barb. Ch. 302. The words “in his behalf,” in this section, refer to “the ward,” and not to “any relative;” the intention of the section being to enable any person to apply for a revocation of letters of guardianship, as where no

relative of the infant is willing to make the application. As to whether a suppression of facts is equivalent to “a false suggestion of a material fact,” under subdivision 4 of that section, *quære*. (Bolling v. Coughlin, 5 Redf. 116.) See *ante*, § 433.

⁹⁹ The expressed preference of the wards for a particular person (*e. g.*, a maternal aunt), and the likelihood that a lack of harmony would ensue from a contest between themselves and the present guardian of their persons, if justifying a belief that the welfare of the infants requires it, warrant a substitution of guardians. (Matter of Byrnes, N. Y. Law J., Oct. 25, 1890.)

¹ Corn v. Corn, *supra*. A testamentary guardian cannot be removed on the ground that a member of his family has an evil influence upon the ward; for the statute only prescribes removal in case of misconduct in the execution of the trust rendering the guardian unfit. (Mackay v. Fullerton, 4 Dem. 153; s. c. as Matter of King, 2 How. Pr. [N. S.] 307.)

² Ledwith v. Union Trust Co., 8 Dem. 439.

plained of may be cited to show cause why such a decree should not be made.”³ Upon the presentation of the petition, “the surrogate must inquire into the matter; and, for that purpose, he may issue a subpoena to any person, requiring him to attend and testify in the premises. If the surrogate is satisfied that there is probable cause to believe that the allegations of the petition are true, he must issue a citation to the guardian complained of.”⁴

§ 1047. Temporary suspension of guardian.—Upon issuing the citation, “the surrogate may, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the guardian and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in ” the Code,⁵ with respect to a decree revoking letters.⁶

§ 1048. Proceedings on return of citation.—Upon the return of the citation, if the material allegations of the petition are established, the surrogate is required to make a decree revoking the guardian’s letters accordingly; except that where the basis of the application for removal is the guardian’s alleged refusal or neglect to obey a direction as to his duty, or the fact that letters have been obtained by false suggestion, the surrogate must dismiss the proceedings, under the like circumstances and upon the like terms, as prescribed in sections 2686, 2687, of the Code, where a similar complaint is made against an executor or administrator.⁷ A mere allegation in the petition of conclusions of fact, though it may be sufficient to give the surrogate jurisdiction to issue the citation, is not enough to justify judicial action, and the petition should be dismissed, unless the guardian appears and answers without objection.⁸

§ 1049. Decree revoking letters.—The revocation of letters is effected by a decree of the Surrogate’s Court, to that effect. It

³ Co. Civ. Proc., § 2832.

⁴ Co. Civ. Proc., § 2833. The extent of the inquiry is entirely discretionary with him. (Matter of Plumb, 21 St. Rep. 107.)

⁵ In §§ 2603, 2604. See § 448, *ante*.

⁶ Co. Civ. Proc., § 2834. And see *id.*, § 2481, subd. 4; *ante*, § 52. A surrogate has no power to suspend a general guardian, and direct him at

the same time to pay a gross sum to the infant, to be disbursed by him. (Matter of Plumb, 52 Hun, 119.)

⁷ Co. Civ. Proc., § 2833.

⁸ Matter of Plumb, 21 St. Rep. 107. In that case, no objection being made to the form of the petition.—Held, that the objection was waived, and an order of reference was affirmed.

will follow, of course, where a guardian is removed for any of the causes previously mentioned in this chapter; so, where he fails to renew his official bond,⁹ or where he resigns and is discharged. Upon the entry of the decree of revocation, the guardian's powers cease; and the surrogate may, thereby, direct him to account, and pay and deliver over money or property of the estate; but previous acts, in good faith, are protected.¹⁰ The surrogate may, thereupon, appoint a successor, "as if the letters had not been issued," and the powers of such successor, as to compelling accounting, etc., are prescribed.¹¹ The guardian's powers are, of course, revoked by his death; and the surrogate has, thereupon, the same jurisdiction, on the petition of his successor, or of a surviving guardian, or of the ward, etc., to compel the decedent's representative to account for and deliver over the trust property, which is in his possession or under his control, which he would have, as against the decedent, if his letters had been expressly revoked.¹² An appeal from a decree revoking the letters does not stay its execution, and the same rule applies where the decree removes or suspends a guardian.¹³

TITLE SECOND.

FOREIGN GUARDIANS AND ANCILLARY LETTERS.

§ 1050. **Foreign guardianship.**—The appointment of a guardian for the person or the property of an infant is an act of jurisdiction dependent upon the situation of the person or the property within the territory of the State, not upon the fact of citizenship.¹⁴ In the absence of any statutory sanction to foreign guardianships, money due to an infant cannot be legally collected by a guardian, judicially appointed in another State from that where the collection or payment is to be made.¹⁵ Thus, a guardian appointed out of the State is not entitled to receive, from executors or ad-

⁹ Co. Civ. Proc., §§ 2599, 2601; § 462, *ante*.

¹⁰ Co. Civ. Proc., §§ 2603; Phillips v. Liebmann, 10 App. Div. 128; 41 N. Y. Supp. 1020.

¹¹ Co. Civ. Proc., § 2605. In *People v. Wamsley* (15 Abb. Pr. 323), it was held, that the surrogate might appoint the successor without regard to whether the ward resided, at the time, in the surrogate's county.

¹² Co. Civ. Proc., § 2606. See *ante*, §§ 923a, 1044. Upon the coming of age of a ward whose general guardian has died, his executor should be di-

rected by the surrogate, in the exercise of the authority conferred by Co. Civ. Proc., § 2606, to pay the fund into court, as permitted under section 2603, and not to pay it over to the ward without providing for the payment of claims. (*Matter of Hicks*, 54 App. Div. 582; 66 N. Y. Supp. 1028.)

¹³ Co. Civ. Proc., § 2583.

¹⁴ *McLoskey v. Reid*, 4 Bradf. 334. See *Matter of Hosford*, 2 Redf. 168.

¹⁵ *McLoskey v. Reid*, *supra*. And see *Trimble v. Dzieduzyiki*, 57 How. Pr. 208.

ministrators here, the portion of the infant,¹⁶ or to be recognized by the courts of this State.¹⁷

§ 1051. Petition for ancillary letters, where infant resides in the United States.—The Code,¹⁸ however, provides that “where an infant, who resides without the State and within the United States, is entitled to property within the State, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the State or Territory where the ward resides,¹⁹ and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the Surrogate’s Court having jurisdiction, a written petition, duly verified,²⁰ setting forth the facts, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed, and has given the security required” as above; which must be authenticated in the mode prescribed in the Code,²¹ for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration.

§ 1052. Same; where infant resides in foreign country.—Where an infant resides within a foreign country, and is entitled to per-

¹⁶ *Morrell v. Dickey*, 1 Johns. Ch. 153; *Williams v. Storrs*, 6 id. 353; *McLoskey v. Reid*, *supra*. Where the English Court of Chancery, when refusing to award the custody of the minor to the American guardian, decreed that the guardian should transmit the income of the minor’s property to England, to be disposed of under the direction of that court, the surrogate refused permission to the guardian to transmit the funds abroad. (*Matter of Dawson*, 3 Bradf. 130.) And, in *Matter of Billey* (1 Tuck. 422), the surrogate declined to order payment of a legacy to a foreign guardian, though the will provided that money or property which might, under it, become vested in a minor, might be delivered to any foreign guardian.—a guardian having been appointed for the infant legatee in this State.

¹⁷ *West v. Gunther*, 3 Dem. 386. In *Matter of Hanneman* (N. Y. Law J., April 11, 1890), the attorney in fact of a foreign general guardian applied

to the surrogate for an order directing the city chamberlain to pay to him money, deposited to the credit of the infants pursuant to a decree of the surrogate. Held, the payment would not be ordered until original or ancillary letters were obtained here.

¹⁸ Co. Civ. Proc., § 2838.

¹⁹ Where a nonresident father, having taken out letters of guardianship in another State, of an infant residing in this State, petitioned for ancillary letters of guardianship here, the application was denied on the ground that the original letters were not granted within the State where the ward resided. (*Griffin v. Sarsfield*, 2 Dem. 4.)

²⁰ A petition verified by an attorney of the foreign guardian, where there is no proof of the power of the attorney to act, other than his own declaration, is not sufficient. (*Matter of Whittemore*, 1 Connolly, 155; 9 N. Y. Supp. 296.)

²¹ In § 2704, as amended 1897.

sonal property within this State, or to maintain an action or a special proceeding here respecting such property, a general guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the Surrogate's Court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of the infant. The person so authorized must present a verified petition, setting forth the facts, and accompany it with the exemplified copies of the records and other papers showing his appointment;²² or, where he has not been appointed by any court, with other proof of his authority to act as such guardian, in the foreign country, and also with proof that, pursuant to the laws of that country, he is entitled to the possession of the ward's personal estate.

§ 1053. Decree granting letters.—Where the surrogate is satisfied, upon the papers presented, that the case is within the statute, "and that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner, he may make a decree admitting the exemplified copies of the foreign letters to be recorded, and granting ancillary letters accordingly. Such a decree may be made without a citation; or the surrogate may cite such persons as he thinks proper, to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire whether any debts are due from the ward's estate to residents of the State; and, if so, he must require payment thereof."²³

§ 1054. Security by ancillary guardian.—Where the foreign guardian appointed within the United States has given, in the foreign jurisdiction, "security²⁴ in at least twice the value of the personal property, and of the rents and profits of the real property of the ward," ancillary letters are issued to him here without security and without oath of office. But in the case of a guardian

²² Co. Civ. Proc., § 2838, as amended 1897. (L. 1897, c. 492.) "Exemplified copies of the records, * * * must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the cer-

tificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul." (Ib.)

²³ Co. Civ. Proc. § 2839.

²⁴ In *Matter of Fitch* (3 Redf. 457), the foreign guardian had entered into a mere covenant, with sureties, not under seal, for the faithful performance of his trust. Held, insufficient. See *Matter of Cordova*, 4 Redf. 66.

appointed in a foreign country, giving of security is not a condition precedent to a grant of ancillary letters.²⁵

§ 1055. Powers of ancillary guardian of property.—Ancillary letters authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property, of the ward; to dispose of them in like manner as a domestic guardian of the property; "to remove them from the State; and to maintain or defend any action or special proceeding in the ward's behalf." If the letters are issued on the petition of a guardian appointed in a foreign country, they authorize the person appointed, "to demand and receive the personal estate of the ward, and to dispose of it in like manner as a guardian of property appointed [as above], and to maintain or defend any action," etc. But in neither case do such letters authorize him "to receive, from a resident guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a Surrogate's Court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a Surrogate's Court of a county within the State, upon an allegation that the infant was a resident of that county; except by the special direction, made upon good cause shown, of the Surrogate's Court from which the principal letters were issued; or unless the principal letters have been duly revoked."²⁶

§ 1056. Foreign guardianship of the person.—The extent to which the court will recognize the authority of a judicially appointed foreign guardian over the person of the ward, when brought within our jurisdiction, is a matter within the discretion of the court, to be exercised in view of the circumstances of the case, and with due regard both to the doctrines of comity and the interests of the infant on our soil.²⁷

²⁵ Co. Civ. Proc., § 2840. See *Matter of Hunt*, 24 Civ. Proc. Rep. 239; 68 St. Rep. 828.

²⁶ Co. Civ. Proc., § 2840. This section applies to letters issued before September 1, 1880, "by a Surrogate's Court of the State, to a guardian appointed by a court of another State, or a Territory of the United States, upon a presentation of an exemplified transcript of the record of his appointment." (Co. Civ. Proc., § 2841.) It was said, in the *Matter of Fitch* (3 Redf. 457), that letters of guardianship will not be issued to a foreign

guardian of a nonresident infant, with a view to the removal of the latter's property from the State, except upon the application of such foreign guardian himself, and unless it appears that the removal of the ward's property out of this State will not conflict with the ward's ownership.

²⁷ Compare *Nugent v. Vetzera*, L. R., 2 Eq. 704; *McLoskey v. Reid*, 4 Bradf. 334; *Matter of Biolley*, 1 Tuck. 422; *Townsend v. Kendall*, 4 Minn. 412; *Johnstone v. Beattie*, 10 Clark & F. 114.

§ 1057. **Revocation of ancillary letters.**—Although the Code does not expressly authorize the revocation of ancillary letters, yet such power exists, and will be exercised when facts are subsequently presented showing that the ward's interests will be put in jeopardy by permitting their continuance, and this, although the principal letters have not been revoked. In determining the propriety of investments by a foreign guardian, for the purpose of an application for such revocation, the laws of this State, and the rules established by our courts, affecting the control and management of trust funds, must govern, and not those of the State of the guardian's residence.²⁸

TITLE THIRD.

GUARDIANS BY WILL OR DEED.

§ 1058. **Appointment by, and for, whom.**—The power of a parent to appoint, by deed or will, a guardian of his infant children does not exist in the absence of a statute conferring it; and the Legislature may define, limit, and regulate the authority of guardians, and may prescribe the conditions under which it shall be exercised. The statutes of this State, in reference to testamentary guardians, relate exclusively to domiciliary guardianship under wills or deeds of residents of this jurisdiction.²⁹ The statutory provision authorizing *the father* of a minor unmarried child to appoint, by deed or last will, a guardian for its custody and tuition during minority or for any less time, and authorizing *the mother* to make such appointment, in like manner, in case of the failure of the father to do so, and of his death,³⁰ was radically changed by the Legislature of 1893, by which³¹ a married woman was constituted and declared to be the joint guardian of her children with her husband, with equal powers, rights, and duties in regard

²⁸ Johnson v. Johnson, 4 Dem. 93.

²⁹ Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580.

³⁰ 2 R. S. 150, § 1, as amended L. 1871, c. 32; L. 1888, c. 454. The section of the act (L. 1862, c. 172, § 6) which declared that no man should create a testamentary guardian for his child unless the mother, if living, should signify her consent thereto in writing, was repealed by L. 1871, c. 32. It was intended to dispense with the consent of the mother, and to reinstate the father in his unqualified right to appoint, as it existed

under the Revised Statutes. (Thomson v. Thomson, 55 How. Pr. 494; Fitzgerald v. Fitzgerald, 24 Hun. 370.) For cases under the former statute, see Ruppert's Estate, 1 Tuck. 480; People v. Boice, 39 Barb. 307; People v. Wamsley, 15 Abb. Pr. 323. For the common-law rule, see Fullerton v. Jackson, 5 Johns. Ch. 278; Hoyt v. Hilton, 2 Edw. 202.

³¹ L. 1893, c. 175. In 1896, this act was repealed and its provisions carried into the Domestic Relations Law (L. 1896, c. 272, § 51).

to them with the husband. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child, under the age of twenty-one years and unmarried, was authorized by deed or last will, duly executed, to dispose of the custody and tuition of such child during its minority, or for any less time, to any person or persons. Formerly, a married woman could not appoint a guardian of her child, the issue of her marriage with her living husband;³² and the fact that the marriage had been dissolved by a decree of divorce made no difference.³³ But now the right of adoption is a joint right; neither parent has the exclusive right of appointment while the other is living,³⁴ even with the consent of the latter.³⁵ The "child" may, it seems, include an adopted child,³⁶ but a testator cannot appoint a guardian of another person's child, *e. g.*, his grandchild, as such.³⁷

§ 1059. Powers and duty of guardian.—Where there are no words indicating the duration of the guardianship, it is to be inferred it was intended to create a guardianship for the whole period of the child's minority.³⁸ The power of appointment is not confined to the guardianship of either the person or of the property of the child, if it have any property. The appointee is vested with the powers and is subject to the duties of guardian of such child, with respect of its custody, support, maintenance, and education, out of the estate,³⁹ and of the custody and management of the personal estate, and profits of the real estate; and is valid and effectual against every other person claiming the custody or tuition of such minor, as guardian *in socage* or otherwise;⁴⁰ and is not defeated by a subsequent appointment by the

³² Beardsley v. Hotchkiss, 96 N. Y. 201.

³³ Griffin v. Sarsfield, 2 Dem. 4.

³⁴ Matter of Howard, 5 Misc. 293; Matter of Zwickert, id. 272; 26 N. Y. Supp. 773; Matter of Alexandre, 25 Civ. Proc. Rep. 42; 35 N. Y. Supp. 658; Matter of Schmidt, 77 Hun. 201; 28 N. Y. Supp. 350.

³⁵ Matter of Schmidt, *supra*.

³⁶ See § 815, *ante*.

³⁷ Matter of Lichtenstadter, 5 Dem. 214. Nevertheless, a provision in a will attempting to appoint a guardian of grandchildren may be effectual as creating the person a trustee of the legacy bequeathed to them, and the surrogate may direct payment thereof to him. (1b.) See *McLoskey v. Reid*,

4 Bradf. 334; *Rieck v. Fish*, 1 Dem. 79; *Matter of Moody*, 2 id. 624; *Toler v. Landon*, 3 id. 337. As to the effect of an indorsement upon a certificate of benefit insurance, directing payment to a person as guardian, see *Armstrong v. Warren*, 83 Hun. 217; 31 N. Y. Supp. 665.

³⁸ *Matter of Reynolds*, 11 Hun. 41. As to what language in a will amounts to an appointment of a guardian, see *Corrigan v. Kiernan*, 1 Bradf. 208; *Hagerty v. Hagerty*, 9 Hun. 175.

³⁹ *Clark v. Montgomery*, 23 Barb. 464.

⁴⁰ L. 1896, c. 272, § 52, re-enacting 2 R. S. 150, §§ 2, 3. The persons who are to be deemed "guardians *in socage*" are specified in 1 R. S. 718,

surrogate.⁴¹ He may take the custody and charge of the tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian *in socage* might by law.⁴² Where two persons are named in a will as "joint guardians" of the person and estate of the minor, and one of them refuses to act, all the rights and powers created by the appointment become vested in the other guardian.⁴³

§ 1060. Prerequisites to authority to act.— The Code⁴⁴ forbids a person to exercise, within the State, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the State, and dying after September 1, 1880, "unless the will has been duly admitted to probate,⁴⁵ and recorded in the proper Surrogate's Court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the State, executed after" the same date, "unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed

§§ 5, 7. See *Furman v. Van Sise*, 56 N. Y. 435.

⁴¹ *People ex rel. Brooklyn Industrial Schol v. Kearney*, 31 Barb. 430; 19 How. Pr. 493; 21 id. 74. The appointment of a testamentary guardian operates to prevent the appointment of a guardian by the surrogate, upon the petition of the infant, after he has reached the age of fourteen years. (*Matter of Reynolds*, 11 Hun. 41.)

⁴² L. 1896, c. 272, § 52.

⁴³ *Matter of Reynolds*, *supra*.

⁴⁴ Co. Civ. Proc., § 2851. This section is not applicable to an appointment made before September 1, 1880. (*Matter of Schroeder*, 65 How. Pr. 194.) See also L. 1896, c. 272, § 51.

⁴⁵ It was said, in 2 Kent's Comm. 225, that a will merely appointing a testamentary guardian need not be proved. There was then no statutory provision on this point. The mere filing, with the surrogate, of a duly authenticated will, admitted to probate in another State will not entitle the appointee therein named, to letters of guardianship. The foreign will must first be admitted to probate here in the manner pointed out by the Code. (*Matter of Mehler*, N. Y. Law J., June 23, 1892.) Letters of guardianship should not issue to a nonresident alien, though appointed by will. (*Matter of Taylor*, 3 Redf. 259; *Matter of Zeller*, 25 Misc. 137.)

is presumed to have renounced the appointment; and if a guardian is afterward duly appointed by a Surrogate's Court, the presumption is conclusive."

§ 1061. Oath of testamentary guardian; letters; renunciation.—

Where a will, containing the appointment of a guardian, is admitted to probate, the person appointed must, within thirty days thereafter, take the oath of office;⁴⁶ "otherwise he is deemed to have renounced the appointment. But the surrogate may extend the time so as to qualify, upon good cause shown, for not more than three months.⁴⁷ And any person interested in the estate may, before letters of guardianship are issued, file an affidavit setting forth, with respect to the guardian so appointed, any fact which is made by law an objection to the issuing of letters testamentary to an executor."⁴⁸ A person appointed guardian by will may, at any time before he qualifies, renounce the appointment by a written instrument, under his hand, filed in the surrogate's office.⁴⁹

§ 1062. Requiring security from testamentary guardian.—In the case of a guardian appointed by will or by deed, "the infant, or any relative or other person in his behalf, may present, to the Surrogate's Court in which the will was admitted to probate; or to the Surrogate's Court of the county in which the deed was recorded;" a petition, setting forth any fact, "respecting the guardian, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give a bond, in order to entitle himself to letters; and praying for a decree, requiring the guardian to give security for the performance of his trust." Upon the presentation of such a petition, and proof of the facts therein alleged, to the satisfaction of the surrogate, he must issue a citation accordingly. "Upon the return of the citation, a decree requiring the guardian to give security may be made, in the discretion of the surrogate, in a case

⁴⁶ As prescribed in Co. Civ. Proc., § 2594. See *ante*, § 300.

⁴⁷ That is, three months from the probate of the will. (Matter of Constantine, 22 St. Rep. 883.) Where the appointment is to take effect upon the happening of a contingency, unless he qualifies within the required time, after the happening of the con-

tingency, he is deemed to have renounced. (Ib.)

⁴⁸ Co. Civ. Proc., § 2852. Sections 2636 to 2638 of the Code, both inclusive, apply to such an affidavit and to the proceedings thereupon. (Ib.)

⁴⁹ Co. Civ. Proc., § 2852. This provision is inapplicable to the case of a will proved before September 1, 1880. (*Geoghegan v. Foley*, 5 Redf. 501.)

where a person so named as executor can entitle himself to letters testamentary only by giving a bond; but not otherwise."⁵⁰

§ 1063. Requiring inventory and account to be filed.— Upon the petition of the ward, or of any relative or other person in his behalf, the Surrogate's Court having jurisdiction to require security, as above mentioned, "may, at any time, in the discretion of the surrogate, make an order, requiring a guardian, appointed by will or by deed, to render and file an inventory and account, in the same form, and verified in the same manner, as the inventory and account required to be filed annually by a guardian appointed by a Surrogate's Court."⁵¹ The order may also require such an inventory and account to be filed, in the month of January of each year thereafter.⁵²

§ 1064. Judicial settlement of account.— The Surrogate's Court may also *compel* a judicial settlement of the account of the guardian, in any case where it may compel a judicial settlement of the account of the general guardian; and the proceedings to procure such a settlement are the same as if the guardian had been appointed by the court. By the amendment of 1891, the guardian was authorized to petition *voluntarily* for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where he may be compelled to account, as above.⁵³

§ 1065. Effect of decree.— A decree, made upon the judicial settlement of the account of a guardian appointed by will or by deed, or the judgment rendered upon appeal from such decree, has the

⁵⁰ Co. Civ. Proc., § 2853. An order of the surrogate denying the application for the appointment of the guardians designated in a will, on the objection taken that they were non-residents of the State, and that their pecuniary circumstances were such that they could not furnish adequate security.—Held, not authorized; if the bond offered was not large enough he should prescribe the amount and kind of bond to be given, and upon their giving it, he is bound to issue letters of guardianship, pursuant to Co. Civ. Proc., § 2852. (*Matter of Welsh*, 50 App. Div. 189; 63 N. Y. Supp. 737.)

⁵¹ Co. Civ. Proc., § 2855.

⁵² Co. Civ. Proc., § 2855. Sections 2842 to 2845 of the Code, both in-

clusive, apply to such an inventory and account, and to the filing thereof, as if the guardian had been appointed by the Surrogate's Court. See *ante*, § 1030. So, also, section 2846 of the Code (direction as to infant's maintenance), applies to a guardian appointed by will or deed with the same effect as if such guardian had been mentioned in said section, and the proceedings therein prescribed may be had in the case of any such guardian in the same manner as if he were a general guardian. (Ib., as amended 1896.) See *ante*, § 1029.

⁵³ Co. Civ. Proc., § 2856, as amended 1891. Sections 2733 to 2737, inclusive, and sections 2741 and 2744, are made applicable to this proceeding. See §§ 833, 1035, *ante*.

same force as a judgment of the Supreme Court to the same effect.⁵⁴

§ 1066. **Compensation.**—A guardian appointed by will or deed is declared to be entitled to the same compensation as a general guardian appointed by the court.⁵⁵

§ 1067. **Removal of testamentary guardian.**—The Surrogate's Court may, upon the petition of the ward, or of any relative or other person in his behalf, remove a guardian, by will or deed, in any case where a testamentary trustee may be removed;⁵⁶ and the proceedings are the same as for the removal of a testamentary trustee. Where a citation is issued, upon a petition for the removal of such a guardian, he may be suspended from the exercise of his powers and authority, as if he had been appointed by the Surrogate's Court.⁵⁷ An order of removal will be revoked, at any time, on its appearing that the cause justifying the removal no longer exists, the guardian being otherwise a suitable person.⁵⁸

§ 1068. **Resignation and appointment of successor.**—The guardian may be allowed to resign, by the Surrogate's Court having jurisdiction to require security from him. The proceedings for that purpose and the effect of the decree thereon are the same as where a general guardian's letters are revoked. If the resigning or removed guardian was sole guardian, a successor may be appointed by the court, unless such appointment would contravene the express terms of the will or deed.⁵⁹

⁵⁴ Co. Civ. Proc., § 2857.

⁵⁵ Co. Civ. Proc., § 2856, as amended 1891. A sum of money given by the will for services to be rendered by the guardian, is not a legacy, and if the person designated does not act as guardian he is not entitled to receive it. (Matter of Brigg, 39 App. Div. 485; 57 N. Y. Supp. 390; *affd.*, 165 N. Y. 673.) See § 1, *ante*.

⁵⁶ He can be removed *only* upon the grounds which would justify the removal of a testamentary trustee. (Matter of King, 8 Civ. Proc. Rep. 159, n.; 2 How. Pr. [N. S.] 307; *affd.*, 4 St. Rep. 570; 42 Hun, 607.) See § 449, *ante*. Misconduct of the guardian's son toward the ward, not connived at or countenanced by the guardian, is not sufficient ground for such removal. (Mackay v. Fullerton, 4 Dem. 153.) Before the Code, the surrogate had power to remove a testamentary guardian on grounds which will warrant the removal of a general guardian. (Damarell v. Walker, 2

Redf. 198.) The fact that a will, by which a guardian is appointed for an infant child of the testator, had been admitted to probate, there having been no contest on the question of testamentary capacity, will not preclude the court from passing upon the question of the testator's mental condition, on a subsequent application to remove the guardian. (Ib.) The Supreme Court has authority to remove a testamentary guardian (Matter of Watson, 10 Abb. N. C. 215; Matter of Waldron, 13 Johns. 418; *People ex rel. Brush v. Brown*, 35 Hun, 324; Matter of Welch, 74 N. Y. 299), and the proceeding for that purpose may be instituted by petition. (Matter of Livingston, 34 N. Y. 555; Wilcox v. Wilcox, 14 id. 575; Matter of King, 42 Hun, 607.)

⁵⁷ Co. Civ. Proc., § 2858.

⁵⁸ Damarell v. Walker, *supra*; Matter of Raborg, 3 St. Rep. 323.

⁵⁹ Co. Civ. Proc., §§ 2859, 2860.

CHAPTER XXI.

SURROGATES' DECREES: THEIR EFFECT AND ENFORCEMENT.

TITLE FIRST.

COLLATERAL IMPEACHMENT OF SURROGATES' DECREES.

§ 1069. **Conclusive effect of surrogates' decrees.**—The doctrine of estoppel by former judgment is, of course, applicable to surrogates' decrees, except so far as the statute has expressly defined the extent of the evidential effect of such decrees, or has limited the operation thereof to particular persons. It should be remarked, in the first place, that decrees which admit wills to probate, grant letters testamentary or of administration, direct the sale of real property to pay debts, and, finally, such as judicially settle the accounts of legal representatives, testamentary trustees, and guardians, and direct a distribution of the surplus, are of the nature of judgments *in rem* as distinguished from those *in personam*. They are judicial declarations of the state and condition of some particular thing or subject-matter, by a court of exclusive, or at least of peculiar, jurisdiction; they are not founded on a proceeding against a person or persons, as such, but against the thing or subject-matter itself, and hence the general rule, that they are conclusive against the whole world, and not merely against the parties or their privies, as in the case of judgments *in personam*; provided, always, that the court had competent authority to make them, and that notice, either actual or constructive, was given of the proceeding in which they were pronounced. Statutes which declare the effect, as evidence, of certain classes of decrees will, of course, supersede the general rule, whenever the evidential effect of that class of decrees is called in question, the rule being that when there is such a statute, a decree is conclusive only so far as it is made so by the statute.¹ The statutes declaring the effect, as evidence, of certain decrees in Surrogates' Courts will be mentioned here, with some illustra-

¹ Bank of Poughkeepsie v. Hasbrouck, 6 N. Y. 216, and cases *infra*.

tions of their application to particular facts and circumstances, but without any attempt to encompass the whole of this branch of the law of estoppel.²

§ 1070. **Effect of probate decree, as to personalty.**—The Revised Statutes provided that “the probate of any will of personal property taken by a surrogate having jurisdiction, shall be conclusive evidence of the validity of such will, unless such probate be reversed on appeal or revoked by the surrogate, or the will be declared void by a competent tribunal.”³ By the Code of Civil procedure, this provision is made to read as follows: “A decree admitting to probate a will of personal property, made as prescribed in this article [*i. e.*, article first of title third of chapter eighteen], is conclusive, as an adjudication, upon all the questions determined by the surrogate pursuant to this article, until it is reversed upon appeal, or revoked by the surrogate; except in an action brought under section 2653a of this act to determine the validity or invalidity of such will; and except that a determination made under section 2624 [*i. e.*, upon the construction, validity, or effect of a disposition of personal property, if any, made by the surrogate upon the probate], is conclusive only upon the petitioner and each party who was duly cited or appeared; and every person claiming from, through, or under either of them.”⁴

According to the interpretation given the former statute, “the validity” of the will, of which the probate was evidence, had reference only to the due execution of the instrument, and the freedom and competency of the testator,—because those questions marked the limit of the surrogate’s jurisdiction.⁵ The dif-

² The evidential effect of certain decrees, such, for instance, as that given by Co. Civ. Proc., § 2552, to a decree directing payment by a representative to a creditor, legatee, or distributee, or permitting a judgment creditor to issue execution, has been mentioned elsewhere under the head of the proceeding in which they were granted.

³ 2 R. S. 61, § 29. This provision was held not modified by the subsequent statute (L. 1837, c. 460, § 18), which made the provision of 2 R. S. 58, § 15, relating to reading wills of real property in evidence, applicable to wills of personal property. (Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.) See Colton v. Ross, 2 Paige, 396; Bogardus v. Clark, 4 id. 623; Morrell v. Dickey, 1 Johns. Ch. 153;

Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Campbell v. Logan, 2 Bradf. 90; Bailey v. Hutton, 14 Hun, 3.

⁴ Co. Civ. Proc., § 2626, as amended 1897. In an action under section 2653a, the decree is presumptive, merely, of the due execution and validity of the will. The term “probate” is not employed by the Code of Civil Procedure in a concrete sense; accordingly, this section prescribes the effect of a decree, and not of the probate, as in the Revised Statutes. As to the effect of the decree of a probate court in another State, see Matter of Law, 56 App. Div. 454; 67 N. Y. Supp. 857.

⁵ See Waters v. Cullen, 2 Bradf. 354. Prior to the enactment of section 2653a it was held that a claim that a will of personal property, which has

ference in phraseology will not justify giving any other meaning to the present statutory provision,—the *factum* of the will still being the only issue in a probate proceeding, strictly so-called.⁶ So, the effect given to the former statute, that the probate was conclusive upon everybody, and not merely upon parties to the probate and those claiming under them, is the same as that given to the provision of the present Code. The only exception made is in respect to an adjudication upon “the construction, validity, and effect” of wills, which may now be made by the same decree which admits the will to probate; as to which last adjudication the decree is conclusive only on the petitioner and parties duly cited, or who appeared, and those claiming under them. Upon the question of the *factum* of the instrument, the decree is conclusive against the whole world, with the single exception specified in the statute. The clause in the former statute which declares, in effect, that a will may, notwithstanding probate, be declared void, in matter of substance, “by a competent tribunal,” is omitted from the latter statute, as superfluous; but while the validity of particular provisions of a will may still be litigated, notwithstanding the probate of the instrument, yet, if that question was adjudicated by the decree of probate, the decree is conclusive, except on appeal, on the petitioner and each party cited, or who appeared, and every person claiming from, through, or under either of them, and on those only.⁷ It seems that a will which has once been rejected, may, at the instance of one not a party to the original proceeding, be again presented for probate and the question of its proper execution and validity determined.⁸

§ 1071. **Effect of decree, as to realty.**—In respect to the effect of probate of wills of real estate, the Revised Statutes distinguished between two classes of cases, viz.: (1) Where one or more of the subscribing witnesses to the will were examined upon the

been admitted to probate, was obtained by undue influence and fraudulent representations, must be litigated, and the instrument assailed as invalid on that account, in the first instance in the Surrogates' Courts. (*Smith v. Hilton*, 50 Hun. 236; 19 St. Rep. 340; 2 N. Y. Supp. 820.) To same effect are *Anderson v. Appleton*, 48 Hun. 534; *Clark v. Fisher*, 1 Paige. 171; *Walter v. Fowler*, 85 N. Y. 621; *Hagerty v. Andrews*, 94 id. 195.

⁶ See § 254, *ante*.

⁷ Assuming that the probate was regular, it can be overthrown in a

direct or collateral proceeding by an adjudication of invalidity, by a competent tribunal. But a declaration that the will is void, made by such a tribunal, as contemplated by the statute, does not reverse the probate, but operates to supersede it: because the declaration is based upon the substantial illegality of the provisions of the will. (*Bogardus v. Clark*, 4 Paige, 623.)

⁸ *Matter of Tilden*, 56 App. Div. 277. See *Corley v. McElmeel*, 149 N. Y. 228, 235.

probate; and (2) where it satisfactorily appeared that all the subscribing witnesses were dead, insane, or nonresidents of the State, and, accordingly, other proof than their examination was received. In the first class of cases, besides providing that the will, indorsed with the surrogate's certificate of proof, might "be read in evidence without further proof thereof,"⁹ the statute declared that the record of such will in the surrogate's book, or an exemplification thereof, "shall be received in evidence and shall be as effectual in all cases as the original will would be, if produced and proved, and may in like manner be repelled by contrary proof."¹⁰ In the second class of cases, the will was to be deposited with the surrogate, and does not appear to have been invested with any evidential character; but it was declared that the record of the proofs and examinations taken on the probate, or the exemplifications of such record, "shall be received as evidence upon any trial or controversy concerning the same will, after it shall have been proved, on such trial or controversy, that the lands in question therein have been uninterruptedly held under such will for the space of twenty years before the commencement of the suit in which such trial or controversy shall be had; and shall be of the same force and effect as if taken in open court upon such trial or in such controversy."¹¹ Under these provisions, the utmost effect of the probate was to make it equivalent merely to that of acknowledging or proving the execution of a deed. The evidence was not conclusive.¹² And where none of the subscribing witnesses were examined upon the probate, the effect of the record, or exemplification of the record of the proofs, was still further circumscribed by requiring it to be supplemented by proof of twenty years' adverse possession under the will. This somewhat extended examination of the rule under the Revised Statutes has been made because it is believed that the meaning of the portions of the present Code upon the same subject can be fully apprehended, if at all, only by a comparison with the statutes upon which they are based.

The Code provides, that "a decree, admitting to probate a will of real property, made as prescribed in this (18th) article, establishes, presumptively only, all the matters determined by the

⁹ See Co. Civ. Proc., § 2629, for 235. See *Bogardus v. Clark*, 4 Paige, 623; *Harris v. Harris*, 26 N. Y. 433. § 247, *ante*. As to effect of probate under L. 1870,

¹⁰ 2 R. S. 58, § 15.

¹¹ 2 R. S. 59, § 18.

¹² *Jackson v. Rumsey*, 3 Johns. Cas. Supp. 914.

c. 359, § 11, see *Bensen v. Manhattan R. Co.*, 14 App. Div. 442; 43 N. Y.

surrogate, pursuant to this article, as against a party who was duly cited, or a person claiming from, through, or under him; or upon the trial of an action, or the hearing of a special proceeding, in which a controversy arises concerning the will, or where the decree is produced in evidence, in favor of or against a person, or in a case specified in this section, the testimony taken in the special proceeding, wherein it was made, may be read in evidence, with the same force and effect as if it was taken upon the trial of the action, or the hearing of the special proceeding, wherein the decree is so produced.”¹³ It confirms the former rule, in so far as it makes the decree presumptive only.¹⁴ Its true interpretation appears to us to be a matter not entirely free from difficulty, although the revisers’ note refers to it as based on the section of the Revised Statutes, above quoted, “without material change.” Inasmuch as the only opportunity to apply the doctrine of presumptive evidence seems to be in the course of a litigation, we construe the effect of this provision to be —

First, to make the surrogate’s decree granting probate of a will of real property, presumptive evidence of the due execution of the will and of the freedom and competency of the testator, in any action or special proceeding, as follows: (a) As against one who was duly cited to attend the probate, or a person claiming from, through, or under him; at any stage of the proceedings, and in whatever manner a question may arise, upon which the evidence is available to his adversary. (b) As against any other person; upon the former trial or hearing, where such person seeks to impugn the will in any of the particulars above specified; and

¹³ Co. Civ. Proc., § 2627, as amended 1881, the amendment consisting in omitting the words “where it is proved that the real property in question has been uninterruptedly held, under the will, for at least twenty years before the action was commenced or the special proceeding instituted,” — which followed the words “concerning the will.”

¹⁴ *Norris v. Norris*, 63 How. Pr. 324; *Thorn v. Sheil*, 15 Abb. Pr. (N. S.) 81. The record of the will is presumptive evidence only to its due execution and the mental capacity and freedom from restraint of the testator, not of the validity of a devise therein in any tribunal where the title to the realty may be in issue. The provision of Co. Civ. Proc., § 2616, that the will

must be admitted to probate as “a will valid to pass real property,” means an instrument duly executed which undertakes in terms to convey that species of property. The court’s decision probating a will in those terms has not the effect of an adjudication as to the validity of the devises in the will. (*Matter of Merriam*, 136 N. Y. 58; 48 St. Rep. 897.) To the same effect, *Corley v. McElmeel*, 149 N. Y. 228; 43 N. E. Rep. 628. Compare *Naylor v. Brown*, 32 Misc. 298; *Baxter v. Baxter*, 76 Hun. 98; 27 N. Y. Supp. 834; *Rankin v. Janes*, 10 App. Div. 400; 41 N. Y. Supp. 1129; *Bowen v. Sweeny*, 89 Hun. 359; 35 N. Y. Supp. 400; *affd.*, 154 N. Y. 780.

Secondly, to allow the testimony taken upon the probate to be read in support of the decree, in either case.

The policy of the law is measurably obscure; and its resemblance to the pre-existing regulations is not striking.

§ 1072. Effect of letters testamentary, etc., as evidence.— Except as between different letters on the same estate, letters testamentary, letters of administration, and letters of guardianship "are conclusive evidence of the authority of the person to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked."¹⁵ Surrogates' Courts have sole and exclusive jurisdiction over the subject of granting letters testamentary, and of administration, and, as a part of that jurisdiction, have power to determine, upon sufficient evidence, the facts upon which their action must rest.¹⁶

§ 1073. Conclusive effect of judicial settlement of representatives' accounts.— The Code declares that "a judicial settlement of the account of an executor or administrator, either by the decree of the Surrogate's Court, or upon an appeal therefrom, is conclusive evidence, against all the parties who were duly cited or appeared,¹⁷ and all persons deriving title from any of them at any time, of the following facts, and no others: (1) That the items allowed to the accounting party, for money paid to creditors, legatees, and next of kin, for necessary expenses, and for his services,¹⁸ are correct. (2) That the accounting party has been charged with all the interest of money received by him, and embraced in the account, for which he was legally accountable. (3) That the money charged to the accounting party, as collected, is all that

¹⁵ Co. Civ. Proc., § 259. See Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; Abbott v. Curran, 98 id. 665; Brown v. Landon, 30 Hun, 57; 4 Civ. Proc. Rep. 11; Sullivan v. Tioga R. R. Co., 7 St. Rep. 637; 12 Civ. Proc. Rep. 301. In Crosier v. Cornell Steamboat Co. (27 Hun, 215), it appeared that a petition for letters of administration was verified before "J. P. C., Notary Public." No separate affidavit of verification was appended, but a jurat, thus: "Sworn before me." etc. It did not appear whether the notary was for the county of the surrogate who issued the letters. Held, that the jurisdiction of the surrogate to grant the letters on such a verified petition could not be impeached collaterally, the presumption being that the affidavit was taken within the limits of his jurisdiction. See Skelton v. Scott, 18 Hun, 375; Lowman v. Elmira, etc., R. Co., 85 Hun, 188; 32 N. Y. Supp. 579; More v. Finch, 65 Hun, 404; 20 N. Y. Supp. 164; Czech v. Bean, 35 Misc. 729; 72 N. Y. Supp. 402.

¹⁶ Bolton v. Schriever, 135 N. Y. 65. The subject of impeaching judgments, for the court's lack of jurisdiction to grant it, is mentioned on a subsequent page.

¹⁷ As to those not cited, the representative remains liable to account. (Matter of Lamb, 10 Misc. 638; 32 N. Y. Supp. 225.)

¹⁸ Matter of Prentice, 25 App. Div. 209; 49 N. Y. Supp. 353; affd., 160 N. Y. 568.

was collectible, at the time of the settlement, on the debts stated in the account. (4) That the allowances made to the accounting party, for the decrease, and the charges against him for the increase, in the value of property, were correctly made." ¹⁹

§ 1074. **Application of statute.**— In the first place, observe that the object of the statute was to make certain facts final after they should be adjudged by the surrogate, as against creditors and others, in favor of the executors or administrators, *as such*.²⁰ Consequently, the decree is not a bar to an action brought for the enforcement of a trust of which the accounting parties become trustees, *ex maleficio*, where the matter was not embraced in the accounts, and the question was not litigated on the settlement.²¹ Otherwise, however, where the matters in dispute were passed

¹⁹ Co. Civ. Proc., § 2742. The original of this provision (2 R. S. 94, § 65) did not cure defects in the jurisdiction of the subject-matter of the settlement: the decree being not conclusive, even in the respects enumerated, as to a claim of which the surrogate had not jurisdiction. (Tucker v. Tucker, 4 Abb. Ct. App. Dec. 428.) See *Brown v. Brown*, 53 Barb. 217.

²⁰ *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216. In that case, the payee of a note of the intestate had pledged it, but concealing this fact, he claimed payment from the administrator, representing that it was lost, and the administrator paid him, and, upon his final accounting, had it allowed to himself, upon the distribution. Held, that the payee, who had not presented the demand, nor appeared before the surrogate, was entitled to proceed against the estate, or to recover the money from the administrator, as received to his use. As to the effect of the decree upon the right of the executor to recover an excessive payment on account of a legacy, see *Underhill v. Rodwell*, 18 App. Div. 361; 46 N. Y. Supp. 22.

²¹ *Fulton v. Whitney*, 66 N. Y. 548. For a case where the decree was held not to be a bar to an action, by legatees who were not parties to the accounting, to obtain a construction of the decedent's will, and in effect to review the determination of the surrogate, see *Fisher v. Banta*, 66 N. Y. 468. See also *Matter of Gall*, 42 App. Div. 255; 59 N. Y. Supp. 254. Where, by its terms, the decree was not final,

but assets remained in the hands of the accounting party which he was directed by the decree to thereafter use diligence to collect, a party to the proceeding is not concluded by the decree, in an action brought by him to enforce a claim against the decedent. It is not necessary for him to show in such an action that anything has been or might have been since collected, although this inquiry may become necessary, when an enforcement of the judgment is attempted. (*Sheldon v. Sheldon*, 33 St. Rep. 754; 11 N. Y. Supp. 477.) So, where the accounting is by co-representatives, the decree is no bar to an action by one against the other, for a debt due by the latter to the estate, and which did not enter into the accounting. (*Wurts v. Jenkins*, 11 Barb. 546.) See *Merritt v. Merritt*, 33 Misc. 230; 67 N. Y. Supp. 188. Where both of two representatives were cited to account, but one of them assumed to act alone, and alone accounted and was treated by the court as accounting for the whole estate:—Held, that this was a final settlement of the whole estate, and not a partial settlement of the accounts of only one of its representatives. (*People v. Townsend*, 37 Barb. 520.) See *Matter of Valentine*, 22 N. Y. Supp. 195. A decree directing executors to transfer to themselves as trustees the *corpus* of the trust estate is conclusive as an adjudication of the existence of the trust. (*Matter of Garth*, 10 App. Div. 100; 41 N. Y. Supp. 1022.) See *Brown v. Wheeler*, 53 App. Div. 6.

upon by the decree.²² The decree, and the formal discharge contained in it, relate only to his accounts up to that period; other assets may be realized, and new liabilities incurred;²³ and where, on the accounting, a creditor does not take his share of the fund, the representative retains it in his capacity as such.²⁴ In the second place, a party to an accounting is bound to exhaust the remedies afforded by that proceeding, and any relief which the court might or ought to have granted, cannot afterward be obtained, by action, in another court.²⁵ Thus a claim that an administrator was chargeable upon certain notes made by him and held by the estate at a greater rate of interest than he paid thereon, cannot be raised after a judicial settlement of the account at which the claim could have been raised.²⁶ But a party is not concluded as to a matter which was not properly before the court and not made the basis of any decision, *e. g.*, the construction of a will as to real property, where the accounting deals only with personalty.²⁷ In the next place, where several successive accountings are had, each based upon the one preceding, the validity of each previous accounting being unchallenged by any objection, the last decree is binding and conclusive as to the validity of those preceding it.²⁸ But the rule of estoppel by a former accounting does not apply beyond the question of the funds distributed, and consequently one set of

²² *Shimmel v. Morse*, 57 App. Div. 434; distinguishing *Fulton v. Whitney*, *supra*. See *Rhodes v. Caswell*, 41 App. Div. 229; 58 N. Y. Supp. 470.

²³ *Matter of Hoyt*, 160 N. Y. 607; 55 N. E. Rep. 282; *Matter of Doheny*, 70 App. Div. 370; 75 N. Y. Supp. 24. The last case dealt with the conclusive effect of a decree settling the accounts of temporary administrators upon their subsequent accounting as trustees under the will.

²⁴ *Paff v. Kinney*, 1 Bradf. 1; *Mahoney v. Bernhard*, 45 App. Div. 499. In that case, Barrett, J., said: "It is true that when executors, under a surrogate's decree upon their accounting, turn over to themselves, as trustees, the balance of the estate found to be in their hands, it is tantamount to a discharge with respect to the property so turned over. But the executorial functions are not absolutely terminated thereby; and we cannot at all agree to the appellant's proposition that thus 'the executors become non-existent.' They were in legal indentment discharged *pro tanto*." Compare *Paff v. Kinney*, 5 Sandf. 380.

A final decree against an administrator, adjudging money in his hands to be due and payable to parties entitled, runs against him personally and *de bonis propriis*. (*Laney v. Laney*, 47 St. Rep. 99; 19 N. Y. Supp. 518.) So, too, an execution upon such decree. (*Matter of Waring*, 7 Misc. 502; 28 N. Y. Supp. 393; *Matter of Quackenbos*, 38 Misc. 66. See § 468, *ante*.)

²⁵ *Laney v. Laney*, 47 St. Rep. 99; 19 N. Y. Supp. 518. But see *Matter of Whitbeck*, 22 Misc. 494; 50 N. Y. Supp. 932.

²⁶ *Matter of Gilbert*, 104 N. Y. 200.

²⁷ *Corse v. Chapman*, 153 N. Y. 466; *Washbon v. Cope*, 144 id. 287; 63 St. Rep. 716; *Trustees of Amherst College v. Ritch*, 151 N. Y. 282. Compare *Matter of Perkins*, 75 Hun. 129; 26 N. Y. Supp. 958; *Brown v. Wheeler*, 53 App. Div. 6; 65 N. Y. Supp. 436.

²⁸ *Matter of Tilden*, 98 N. Y. 434; *Matter of Douglas*, 60 App. Div. 64; 69 N. Y. Supp. 687; *Matter of Union Trust Co.*, 65 App. Div. 449. See *Matter of Clapp*, 30 Misc. 395; 63 N. Y. Supp. 1096.

legatees is not precluded by the former decree from seeking an equalization of funds not distributed, so as to correct an error of law made on the former proceeding, although the effect would be to protect the trustee from personal loss.²⁹

§ 1075. **As to payments to creditors and others.**—The decree establishes not only the fact that the payments were made, but that they were rightfully made. The validity of the debt, and the right of the party to whom it is paid, are adjudged, as well as the fact of payment.³⁰ Hence a judgment creditor, who was a party to the accounting, is barred by the decree from bringing thereafter a creditor's suit to impeach as fraudulent the settlements made by the representative, and embraced in the account.³¹ So, also, a decree settling the accounts of executors and charging them with a certain mortgage which they are declared to hold in trust for certain purposes directed by the will, directing payment of the interest thereon to the beneficiaries under the trust, estops not only the beneficiaries, who were parties to the proceeding, from subsequently questioning the propriety of the transactions by which the trustees became possessed of such mortgage,³² but as well the executors, from seeking to evade their liability to account.³³ And the same principle applies to a decree confirming a sale of lands under a power, and directing distribution of the proceeds.³⁴

²⁹ Bowditch v. Ayrault, 63 Hun. 23; 17 N. Y. Supp. 281; 128 N. Y. 222.

³⁰ Wright v. Meth. Epis. Church, Hoffm. 202; Altman v. Hofeller, 152 N. Y. 498.

³¹ Rose v. Lewis, 3 Lans. 320. The allowance made by a surrogate, for the costs and counsel fees on an accounting, is not conclusive in an action by the attorney, to recover for his services and disbursements. (Mygatt v. Wilcox, 1 Lans. 55; affd., 45 N. Y. 306.) Where money has been paid upon an erroneous decree which is afterward reversed, the payor may, after demand and refusal, maintain an action to recover the amount paid. (Scholey v. Halsey, 72 N. Y. 578.) A decree settling an account, which includes a bill only partly paid, protects the accounting party only as to that so paid. (Matter of White, 6 Dem. 375.) An interested party who was present at an accounting, in the absence of proof to the contrary, will be presumed to have knowledge of the

presence of items in the account, in the distribution of its balance, of which he is a participant. (Robinson v. Robinson, 2 St. Rep. 666.) A decree upon an accounting adverse to a claim is a bar to a subsequent action thereon. (Baldwin v. Smith, 91 Hun. 230; 36 N. Y. Supp. 159; Sexton v. Sexton, 64 App. Div. 385; 72 N. Y. Supp. 213.)

³² Matter of Denton, 103 N. Y. 607; Matter of Hawley, 100 id. 206; Ellsworth v. Hinton, 47 Hun. 625. See Matter of Willets, 112 N. Y. 289.

³³ Kager v. Brenneman, 47 App. Div. 63; 62 N. Y. Supp. 339.

³⁴ Burkard v. Crouch, 169 N. Y. 399; Shimmel v. Morse, 57 App. Div. 434; Mutual Life Ins. Co. v. Schwaner, 36 Hun. 373; affd., 101 N. Y. 681; Rhodes v. Caswell, 41 App. Div. 229; 58 N. Y. Supp. 470. As to the application of the doctrine of equitable estoppel to prevent impeachment of decrees generally, see Matter of Lyman, 14 Misc. 352; 36 N. Y. Supp. 117;

§ 1076. **Sureties concluded.**— The sureties on the accounting party's bond are not necessary parties to the judicial settlement of their principal's accounts, and are not usually actual parties; but, in the absence of fraud, or collusion, they are concluded by the decree, for, by the terms of their contract, they are privy to the proceeding.³⁵ The decree is conclusive as evidence only.³⁶ Sureties upon an administration bond, as well as the principal, are estopped from questioning the authority of the surrogate to grant the letters, or the liabilities of the sureties for the acts of their principal, in the execution of his duties as administrator, or the order made by the surrogate fixing his liability;³⁷ nor will they be allowed to question the jurisdiction for a defect in the order removing their principal.³⁸ A decree discharging an administrator and his sureties is assailable by any party aggrieved, either by motion to set it aside or by proceedings on appeal; and in neither case is it necessary that the sureties have notice of the proceedings.³⁹

§ 1077. **Direct impeachment of decrees.**— It may be well to repeat, that the doctrine of estoppel, whether statutory or otherwise, has no application to a proceeding instituted for the express purpose of revoking or modifying the decree in the court which granted it, or to appeals therefrom.⁴⁰ One of the incidental powers conferred upon Surrogates' Courts is the power to open, vacate, modify, or set aside their own decrees — a power, however, which can only be exercised "in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers."⁴¹ As a general rule, where an account of an executor

Duryea v. Mackey, 151 N. Y. 204; Williams v. Whittell, 69 App. Div. 340; 74 N. Y. Supp. 820; Boyer v. Decker, 5 App. Div. 623; 40 N. Y. Supp. 469; Matter of Irvin, 24 Misc. 353; 53 N. Y. Supp. 715.

³⁵ See § 469, *ante*.

³⁶ See Hood v. Hayward, 48 Hun. 330; 124 N. Y. 1; Wright v. Fleming, 12 id. 469; Stiles v. Burch, 5 Paige. 132; Altman v. Hoffeller, 152 N. Y. 498; Martin v. Hann, 32 App. Div. 602; 53 N. Y. Supp. 186.

³⁷ Field v. Van Cott, 15 Abb. (N. S.) 349; People v. Falconer, 2 Sandf. 81; Cadwell v. Colgate, 7 Barb. 253; Thayer v. Clark, 4 Abb. Ct. App. Dec. 391; Scofield v. Churchill, 72 N. Y. 565; Keegan v. Smith, 60 App. Div. 168; 70 N. Y. Supp. 260.

³⁸ Harrison v. Clarke, 20 Hun. 404.

³⁹ Deobold v. Oppermann, 111 N. Y. 531; 20 St. Rep. 81.

⁴⁰ Campbell v. Logan, 2 Bradf. 90; Kerr v. Kerr, 41 N. Y. 272; Post v. Mason, 26 Hun. 187; *affd.*, 91 N. Y. 539.

⁴¹ Co. Civ. Proc., § 2481, subd. 6; Matter of Richardson, 81 Hun. 425; 30 N. Y. Supp. 1008. See §§ 52, 54 *et seq.*, *ante*. The power which a surrogate has to set aside a decree which he had no power to make (Vreedenburg v. Calf, 9 Paige, 128), is to be distinguished from his general power to grant new trials. (People v. Justices, etc., 1 Johns. Cas. 180.) Surrogates' Courts have always had the power to reopen a decree settling an account to correct a mistake, by

has been judicially settled, it may be presumed that he has accounted for all property that came into his hands; and a party who seeks to compel a further accounting should present a clear case before the application will be granted.⁴² It is said that the power of a surrogate to open a decree made by him should be cautiously exercised, and not simply for the purpose of reviewing his decision; and his discretion in respect thereto is reviewable on appeal. Laches, in moving to open the decree, may be the ground of refusing the application.⁴³ Where the decree has been affirmed

amendment,—*e. g.*, to require a further account, in respect to a sum received by the accounting party, with which he had charged himself at less than the real amount. (*Sipperly v. Baucus*, 24 N. Y. 46.) But see *Matter of Mount*, 27 Misc. 411; 59 N. Y. Supp. 176. The causes for which surrogates' decrees may be vacated under section 2481 are analogous to those enumerated in sections 1282 and 1283, and governed by the limitation imposed therein, except where fraud and collusion are made the ground of the application. In the latter cases, those limitations have no application. (*Matter of Tilden*, 98 N. Y. 434; with opinion below, 1 How. Pr. [N. S.] 409; *Melcher v. Stevens*, 1 Dem. 123; *Matter of Henderson*, 157 N. Y. 423; *Matter of Flynn*, 136 id. 287; 49 St. Rep. 388.) A notice to vacate a decree, on the ground that the decision does not state the facts and conclusions separately, cannot be allowed after the expiration of one year from its filing. (*Matter of Hesdra*, 4 Misc. 37; 23 N. Y. Supp. 846.) Heirs who were not parties to an accounting cannot have the decree opened on the ground that the account may be used against them under section 1848. (*Matter of McCunn*, 15 St. Rep. 712.) The fact that one of the next of kin of a testator was not cited in proceedings for probate is "sufficient cause" within Co. Civ. Proc., § 2481, for opening the decree of probate as to such next of kin. (*Matter of Odell*, 1 Misc. 390; 23 N. Y. Supp. 143; *Matter of Harlow*, 73 Hun. 433; 26 N. Y. Supp. 469.) So, too, as to one who, though cited, was sick and had no knowledge of the hearing. (*Matter of Traver*, 9 Misc. 621; 30 N. Y. Supp. 851.) But otherwise as to one not required to be cited, where the decree refused probate. (*Matter of Tilden*, 56 App. Div. 277.) A

creditor of the estate who has presented his claim, may procure a decree opening the final settlement of the account of the administrator, obtained without notice to him, and thereupon proceed against the administrator, without making beneficiaries of the estate parties, though they have received their shares. (*Matter of Gall*, 47 App. Div. 490; 62 N. Y. Supp. 420.) See *Matter of Killan*, 66 App. Div. 312; 72 N. Y. Supp. 714. The petition and account of an executor are in the nature of pleadings, and, when properly verified, the statements contained in the accounts are, unless questioned, to be regarded as true; a decree will not be set aside, therefore, on motion, for failure to prove facts, when they are there sufficiently stated. (*Matter of Baity*, 2 Connolly, 485.) See § 1081, *post*, notes 59 and 60. A decree upon an accounting may, however, be vacated because of a false statement by the administrator, in his petition therefor, that he was the husband and sole next of kin, without revoking his letters of administration. (*Matter of Patterson*, 146 N. Y. 327; 66 St. Rep. 639.)

⁴² *Matter of Soutter*, 105 N. Y. 514. See *Matter of McManus*, 35 Misc. 678; 72 N. Y. Supp. 409. A decree should not be opened for the purpose of including in the account disbursements made after it was filed. (*Matter of Arkenburgh*, 38 App. Div. 473; 56 N. Y. Supp. 523.)

⁴³ *Story v. Dayton*, 22 Hun. 450; *Strong v. Strong*, 3 Redf. 477; *Matter of Salisbury*, 6 N. Y. Supp. 932; *Decker v. Elwood*, 3 Sup. Ct. (T. & C.) 48; *Yale v. Baker*, 5 id. 10. After the lapse of years,—in this case nine,—a surrogate's decree should not be opened for an alleged mistake, except upon clear evidence. (*Matter of Deyo*, 36 Hun. 512.) S. P., *Matter of Waack*, 5 N. Y. Supp. 522; *Matter of*

upon appeal, and remitted by that court for further proceedings, the surrogate cannot open the decree and grant a rehearing for alleged error in law, but must give effect to the judgment of the appellate court.⁴⁴

§ 1078. When decree may be impeached collaterally.—The conclusive effect of a decree necessarily depends upon the power of the court to pronounce it. A decree, which transcended the jurisdiction of the court to make, may be attacked in all courts, either

Stevens, 6 id. 635. The application to vacate the decree, if based on the infancy of the party applying, or the existence of irregularities in the course of the proceeding, should, if two years have expired from the entry of the decree, be made within one year after the minor arrives at the age of twenty-one years. (Matter of Tilden, 98 N. Y. 434.) The time to appeal from a surrogate's decree having expired, *it seems* that an error in substance cannot be corrected therein by him, on motion. (Matter of Seaman, 63 App. Div. 49; 67 N. Y. Supp. 376; Matter of Coogan, 27 Misc. 563; 59 N. Y. Supp. 111.) See Matter of Cook, 68 Hun. 280; 22 N. Y. Supp. 969. In Matter of Baker (N. Y. Law J., July 15, 1892), the decree which directed the fund in question to be distributed by the executor was made without notice to the attaching creditor. Subsequently, a motion was made by the executor on notice to all the parties in interest to modify said decree by striking out such direction and providing for the deposit of the fund in a trust company to await the determination of the conflicting claims of the attaching creditor and the other claimant of the fund. This was denied. An application was then made by the attaching creditor, and the sheriff holding the attachment, to have their right of claim to the money attached determined, and for leave to intervene for the purpose. Per Ransom, S.: "As the attachment was issued prior to the entry of the decree, I have concluded to open the decree for the purpose of hearing the parties respecting the disposition of the fund in controversy, although I am not at all satisfied that the same relief could not be given without disturbing the decree. (Russell v. Ruckman, 3 E. D. Smith, 427, 428.) I was previously of the opinion that I did not have the power which I am now exercising,

but further consideration of the subject has convinced me that I was in error. (Co. Civ. Proc., § 655, subd. 1; O'Brien v. Glenville Wool Co., 50 N. Y. 134; Russell v. Ruckman, *supra*; Hall v. Brooks, 89 N. Y. 33; Baker v. Brown, 64 Hun. 627; Backus v. Kimball, 27 Abb. N. C. 364, 365.)" See Matter of Pierson, 19 App. Div. 478; 46 N. Y. Supp. 557. A decree settling an executor's account will not be opened and modified, upon the application of the executor, on the ground that he included in his account a sum which was not assets, where it appears that he had, in fact, received such sum with knowledge of all the facts, and his mistake, if any, was one of law. (Matter of Watts, 2 Connolly, 415.) S. P., Matter of Beach, 3 Misc. 393; 24 N. Y. Supp. 717; Matter of Monteith, 27 Misc. 163; 58 N. Y. Supp. 379. Where executors distributed, in kind, assets consisting of things in action, guaranteeing their collection, and subsequently had a final accounting and distribution of the remainder of the estate.—Held, that the decree on the accounting should not be opened on account of a loss on the things in action, but the parties concerned must resort to the guaranty. (Redmond v. Ely, 2 Bradf. 175.)

⁴⁴ Reed v. Reed, 52 N. Y. 651. See Matter of Westerfield, 61 App. Div. 413; 70 N. Y. Supp. 641. After an appeal has been perfected from the decree settling the account, the surrogate has no power to open the decree and send the issues back to the referee for further testimony. (Matter of May, 6 N. Y. Supp. 357; 24 St. Rep. 888.) But an affirmation of the decree does not deprive persons interested, who were not parties to the appeal, or the right to have the decree set aside for fraud. (Matter of Hodgman, 82 Hun. 419; 31 N. Y. Supp. 263.)

directly or collaterally, as being void for want of jurisdiction.⁴⁵ Before a surrogate can acquire jurisdiction of the subject-matter, the statute requires that certain facts must exist, such as the death of a person whose estate is sought to be administered, or his residence in the county of the surrogate, or the location of assets in that county. The statute⁴⁶ provides, that "the Surrogate's Court obtains jurisdiction in every case, by the existence of the jurisdictional facts prescribed by the statute, and by the citation or appearance of the necessary parties." If, by the nonexistence of any jurisdictional fact, the court had not jurisdiction of the subject-matter, his decree is not merely voidable, subject only to be reversed on appeal or by a direct proceeding for that purpose, but it is absolutely void, and no rights can be founded thereon.⁴⁷

§ 1079. **Evidence of jurisdictional facts.**— When the authority of a surrogate's decree is attacked in a collateral proceeding, for want of jurisdiction over the subject-matter, or the parties, allegations of the jurisdictional facts in the petition or pleadings upon which the decree or order is based, are evidence of the existence of those facts; and a recital in a decree of the due citation of the necessary parties is presumptive proof thereof.⁴⁸ The rule is stated to be, that "when certain facts are proved to a court or officer, having only special and limited jurisdiction, as a ground for issuing process, and there is a total defect of evidence as to any essential fact, the process will be void; but where the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose."⁴⁹ In the one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication.⁵⁰ In granting a

⁴⁵ See *Washbon v. Cope*, 144 N. Y. 287; 63 St. Rep. 716; *Matter of Armstrong*, 72 App. Div. 286.

⁴⁶ Co. Civ. Proc., § 2474.

⁴⁷ *Dakin v. Demming*, 6 Paige, 95; *Tucker v. Tucker*, 4 Abb. Ct. App. Dec. 428; *Dudley v. Mayhew*, 3 N. Y. 9; *Van Deusen v. Sweet*, 51 id. 378; *Roderigas v. East River Savings Inst.*, 76 id. 316, and cases *infra*.

⁴⁸ Co. Civ. Proc., § 2473.

⁴⁹ *Staples v. Fairchild*, 3 N. Y. 41 (per Jewett, Ch. J.); *S. P. Potter v. Ogden*, 136 N. Y. 384, 396.

⁵⁰ In *Potter v. Purdy* (29 N. Y. 106), which was an appeal from a

justice's judgment. *Mullin, J.*, writing the opinion of the court, said: "When in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having peculiar qualifications, or occupying some peculiar relation to the parties or the subject: such acts, when done, are in the nature of adjudications which, if erroneous, must be corrected by a direct proceeding for that purpose; and, if not corrected, the subsequent proceedings which rest upon them are not affected, however

citation upon a verified petition which alleges all the necessary jurisdictional facts which the statute requires in the particular case, the surrogate acts judicially, and the rule is, therefore, that his jurisdiction thus adjudged by him cannot be impeached *collaterally*. It can be attacked only directly in a proceeding for that purpose, or by appeal. In one case, though by an equally divided court, it was held that, where letters of administration were issued by a surrogate, upon due statutory proof of the death of the person, administration of whose estate was applied for, and it afterward turned out that such person was not dead at the time, a debtor of the alleged intestate was protected in paying the debt to the administrator so appointed.⁵¹ And so, inasmuch as the surrogate, upon probate proceedings, has jurisdiction and is bound to inquire whether decedent was an inhabitant of his county at the time of his death, his decision that such was the case cannot, in the absence of fraud or collusion, be questioned *collaterally*.⁵²

erroneous such adjudication may be." And see *Bumstead v. Read*, 31 Barb. 661; *Bolton v. Brewster*, 32 id. 389; *Monell v. Denison*, 17 How Pr. 401; *Miller v. Brinkerhoff*, 4 Den. 119; *People v. Sturtevant*, 9 N. Y. 263, and cases *infra*. "There is no branch of the law more difficult of solution than to define when, and under what circumstances the proceedings of inferior as well as superior courts may be attacked, and when they are a protection to persons acting under them."

* * * There are some general rules that are well settled; one is that the proceedings of courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject-matter; another is that if the court or officer has jurisdiction of the subject-matter, then the exercise of that jurisdiction, however irregular or erroneous, is conclusive until reversed." (Per Church, Ch. J., *Roderigas v. East River Savings Inst.*, 76 N. Y. 316.) See *Matter of Farnam*, 75 id. 187; *Matter of Hood*, 90 id. 512; *Post v. Mason*, 26 Hun. 187; *Woodward v. James*, 16 Abb. N. C. 246.

⁵¹ *Roderigas v. East River Savings Bank*, 63 N. Y. 460, revg. 48 How. Pr. 166. This decision has given rise to no little discussion, and the conclusions arrived at have not been altogether concurred in. But it is to be sustained by the peculiar language of

our statute conferring the jurisdiction. Dr. Wharton (*Evidence*, § 810) observes that the decision assumes that the surrogate had jurisdiction, which, he says, could not be, "unless under a peculiar and local statute," if there was no deceased person to be administered to. And this was the ground of the decision. Earl. J., expressly states that "as my conclusion in this case is based upon the construction of the statutes of this State regulating the jurisdiction and proceedings of Surrogates' Courts, decisions of other States, made under statutes not the same, can furnish us little aid." The authorities are uniform that, at common law, the jurisdiction of surrogates is confined to granting administration upon the estates of deceased persons, and if a person is alive, the letters are an absolute nullity. (*Jochumsen v. Suffolk Bank*, 3 Allen, 87; *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9.) And see a learned note by Judge Redfield, in *Am. Law Reg.*, April, 1876, p. 212; *ante*, § 342.

⁵² *Bolton v. Schriever*, 135 N. Y. 65; 47 St. Rep. 870. That was an action of ejectment for land in New York city, plaintiff claiming as heirs-at-law of one under whose will, proved before the surrogate in New York county, in 1841, defendant made title as devisee, plaintiffs maintaining that the testator was not a resident of

§ 1080. **The decree must be a judicial act.**— It is always competent for a party to show, in impeachment of the decree, that, as a matter of fact, the surrogate did not exercise his judgment in the matter; that he never acted; that his seal is a forgery,⁵³ and that blank letters, signed and sealed, had been stolen, etc.; in fact, any jurisdictional defect, which does not impeach the surrogate's decision, may be shown, to avoid the force and effect of the decree. It was accordingly held, that where a petition for letters of administration, though alleging all the necessary jurisdictional facts, was not presented to the surrogate personally, that he never saw the petitioner, and never, in fact, acted upon the petition, and had no actual knowledge of it, nor of the issuing of the letters, but the petition was received by a clerk in the office, who filled up and issued a blank which had been signed by the surrogate and left with him, and attached the seal,—the letters were absolutely void. The act of the clerk was not the act of the surrogate, and judicial power cannot be delegated.⁵⁴ To render a decision of the surrogate on a jurisdictional fact conclusive, therefore, it must appear that he decided upon proofs presented to him by the party applying for process. If it appears by the record that no proof was presented—*e. g.*, where the petition for administration alleged the death, “upon the best of the knowledge, information, and belief” of the petitioner—the letters issued thereon are void; such an allegation is not “*proof*” within the meaning of the statute.⁵⁵

§ 1081. **Burden of proof of jurisdictional facts.**— Where, in a collateral proceeding, a surrogate's decree is set up as a ground of right, or, on the other hand, is impeached for want of jurisdiction, the burden of proving jurisdiction on the one hand, or want of jurisdiction on the other, is upon the party so claiming under, or impeaching, the decree.⁵⁶ The rule has always been, that, *prima*

New York county; that he died in Columbia county, and that the surrogate of the former county had no jurisdiction to take proof of the will or issue letters testamentary thereon;—Held, that it was for the surrogate to determine the fact of inhabitancy, before admitting the will to probate, and that his decision could not be attacked collaterally. “We do not intend by this decision to attack the principle or to shake the authority of the first Roderigas case (*supra*), for we simply say it is not necessary to here go so far as that case goes.”

(Per Peckham, J.) See *Conant v. Wright*, 19 Misc. 321; 44 N. Y. Supp. 727.

⁵³ *Wms. on Exrs.* 489, and cases cited.

⁵⁴ *Roderigas v. East River Savings Inst.*, 76 N. Y. 316. And see *Powell v. Tuttle*, 3 id. 396; *Keeler v. Frost*, 22 Barb. 400.

⁵⁵ *Roderigas v. East River Savings Inst.*, *supra*.

⁵⁶ *Welch v. N. Y. Cent. R. R. Co.*, 53 N. Y. 610; *Belden v. Meeker*, 47 id. 307; *Westervelt v. Westervelt*, 46 N. Y. Super. (J. & S.) 298.

facie, the recitals in the record were evidence of the existence of the necessary jurisdictional facts, and that proof of want of jurisdiction, outside the record, was only admissible where there was no record of any proof of such facts having been adduced before the surrogate, or where evidence was offered to show that jurisdiction over the parties was not acquired.⁵⁷ In other words, if the facts necessary to give the surrogate jurisdiction appear to have been alleged in a duly verified petition or answer used in the proceeding before him, and it also appears that the necessary parties were duly cited or appeared, then, "in the absence of fraud or collusion," the jurisdiction is *conclusively* proved, whenever the question is raised *collaterally*.⁵⁸ This rule applies only where the decree is collaterally impeached. It does not, of course, apply to a proceeding brought *directly* for the purpose of revoking or modifying a decree. The surrogate has always had authority to open a decree which he had no power to make,⁵⁹ or which was entered by default, in consequence of a mistake or accident depriving a party of a hearing.⁶⁰

⁵⁷ Substantially the same rule is now declared by statute, which provides that "where the jurisdiction of a Surrogate's Court to make, in a case specified in [section 2472 of the Code] a decree or other determination, is drawn in question collaterally, and the necessary parties were duly cited or appeared, the jurisdiction is presumptively, and, in the absence of fraud or collusion, *conclusively*, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the Surrogate's Court. The fact that the parties were duly cited is presumptively proved, by a recital to that effect in the decree." (Co. Civ. Proc., § 2473.) As to proof *aliquando* the record, see *Van Deusen v. Sweet*, 51 N. Y. 378; *Hard v. Shipman*, 6 Barb. 621, 625. A surrogate should not allow his record proceedings before him to be impeached by affidavits. (*Matter of Luce*, 17 Week. Dig. 35.) A writ of prohibition should not be granted to restrain a surrogate from taking proof of a will where the petition for proof stated the facts necessary to confer jurisdiction, but objection was thereafter made that decedent was a resident of another county. The presentation of the petition gave the surrogate jurisdiction of the subject-matter, and the objection

raised an issue which the surrogate had power to determine as incident to the subject-matter, and his decision if erroneous could be reviewed on appeal, but not assailed collaterally. (*People v. Surrogate of Putnam Co.*, 36 Hun, 218; 16 Abb. N. C. 241.) *Bearns v. Gould* (77 N. Y. 455) was a decision under L. 1870, c. 359, now abrogated.

⁵⁸ *Harrison v. Clark*, 87 N. Y. 572; *Kelly v. West*, 80 id. 139; *Bearns v. Gould*, 77 id. 455. For illustrations, see *Matter of Harvey*, 3 Redf. 214; *Sheldon v. Wright*, 5 N. Y. 497; *Farley v. McConnell*, 52 id. 630; affg. 7 Lans. 428; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *Matter of Kellum*, 50 id. 298; *Colton v. Ross*, 2 Paige, 396; *Beers v. Shannon*, 12 Hun, 161; *Howard v. Moot*, 64 N. Y. 262; affg. 2 Hun, 475; *Wetmore v. Parker*, 52 N. Y. 450; affg. 7 Lans. 121; *Jackson v. Robinson*, 4 Wend. 436; *Sullivan v. Fosdick*, 10 Hun, 173; *Johnston v. Smith*, 25 id. 171.

⁵⁹ *Vreedenburg v. Calf*, 9 Paige, 128; *Campbell v. Logan*, 2 Bradf. 90; *Kerr v. Kerr*, 41 N. Y. 272. See *Melcher v. Stevens*, 1 Dem. 123.

⁶⁰ Co. Civ. Proc., § 2481, subd. 6; *Pew v. Hastings*, 1 Barb. Ch. 452; *Harrison v. McMahon*, 1 Bradf. 283; *Dobke v. McClaran*, 41 Barb. 491. And see *ante*, § 1077. The power of the surrogate under Co. Civ. Proc., § 2481,

§ 1082. **Jurisdiction of parties.**—Though the court had jurisdiction of the subject-matter, its decision binds only those who were properly before it, either actually or constructively, and this ground of objection to the decree may be taken in any proceeding where it is brought in question. The adjudication by the surrogate is conclusive as to all strangers, and as to all parties in interest who were before the court upon the adjudication; and citation or appearance of the necessary parties is *presumptively* proved by a recital to that effect in the decree. But a decree is not absolutely void because *all* the necessary parties were not cited or did not appear. Thus, where the surrogate had jurisdiction of the subject-matter before him, but subsequently discovered persons interested, who were entitled to, but did not have, notice, because their existence was denied by the petition, his decree was held not void, but only inoperative as to the interest of those not served.⁶¹ It should be remarked here, however, that while jurisdiction of the subject-matter once acquired is retained throughout all the proceedings, from the time letters are issued to the final distribution of the residue, and, in this view, the record is a continuous record; yet, in respect to the jurisdiction of *persons*, the rule is, that it must be acquired anew in each particular proceeding which is to divest any title or change the character of the title, or ascertain and settle the respective rights of the persons interested. The failure to give the notice required by law, in any such case, to the persons interested is not (as in proceedings at common law where jurisdiction has once been acquired) a mere irregularity which can be corrected on motion.

§ 1083. **Irregularities and omissions not jurisdictional.**—It has always been held that mere irregularities in the proceeding could not be urged in a collateral proceeding, and this rule has been declared by the Code of Civil Procedure; which provides, that “an objection to a decree or other determination, founded upon an omission therein, or in the papers upon which it was founded, of the recital or proof of any fact necessary to jurisdiction which actually existed, or the failure to take any intermediate proceed-

“to open, vacate, modify or set aside, of Cohoes, 74 N. Y. 387; Matter of Tilden, 98 id. 434.)

of “fraud, newly-discovered evidence, clerical errors, or other sufficient cause.” And the words “other sufficient cause” must be interpreted to mean causes of like nature with those specifically named. (McGaffin v. City
⁶¹ Bailey v. Stewart, 2 Redf. 212. And see Brick v. Brick, 66 N. Y. 144. A surrogate's decree having been adjudged void, by the Supreme Court, it is superfluous for the surrogate to vacate it. (Matter of Espie, 2 Redf. 445.)

ing required by law to be taken, is available only upon appeal. But, for the better protection of any party, or other person interested, the Surrogate's Court may, in its discretion, allow such a defect to be supplied by amendment."⁶² Thus irregularities in serving the citation,⁶³ or omission to take a bond with two or more sureties,⁶⁴ or in the proper penalty,⁶⁵ are not jurisdictional defects, exposing the proceeding to collateral impeachment. So the *manner* prescribed by statute of exercising a power is not jurisdictional, except in respect to statutory prescriptions as to the mode of acquiring jurisdiction. As a regulation of practice, when the surrogate has acquired jurisdiction, a statute is modal, and does not affect the power of the officer.⁶⁶ Neither a literal nor technical construction, inconsistent with the general purpose of the law or well-established principles affecting the administration of estates and the operation and execution of wills, should be given to the statutes which only affect the mode of procedure in the Surrogate's Court.

TITLE SECOND.

PROCEEDINGS TO ENFORCE DECREES UNDER THE REVISED STATUTES.

§ 1084. Remedy by attachment and execution against the person.—A decree or order may award a sum of money to be paid by a party, into court or to some person, or it may direct the performance of some other act. The methods of enforcement under the present Code differ in these two classes of cases; as they did, also, under the former statutes.⁶⁷ To throw light upon the changes made by the scheme adopted in the Code, it will be useful to examine the mode of enforcing decrees and other determinations of Surrogates' Courts under each system.

Before the adoption of the Code of Civil Procedure, the surrogate had power to enforce all lawful orders, process, and decrees of his court, by attachment against the persons of those who neglected or refused to comply with such orders and decrees, or to

⁶² Co. Civ. Proc., § 2474. This section is an adoption of L. 1870, c. 359, § 1, which limited the rule, however, to the Surrogate's Court of New York county.

⁶³ Wetmore v. Parker, 52 N. Y. 450; Pryer v. Clapp, 1 Dem. 387.

⁶⁴ Bloom v. Burdick, 1 Hill, 130.

⁶⁵ Lawrence v. Parsons, 27 How. Pr. 26. Mere error in the amount directed to be paid by an administrator

does not render the order void. (Mundorff v. Wangler, 44 N. Y. Super. [J. & S.] 495.)

⁶⁶ Hartnett v. Wandell, 60 N. Y. 346; affg. Alexander's Will, 16 Abb. Pr. (N. S.) 9.

⁶⁷ The rules established by the Code apply, by its terms, only to a special proceeding commenced on or after the 1st day of September, 1880. (Co. Civ. Proc., § 3347, subd. 11.)

execute such process; which attachments were required to be *in form similar to that used by the court of chancery in analogous cases*.⁶⁸ This extended to orders and decrees for the payment of money, as well as to those for the delivery of specific property, or the performance of other specific acts; and it extended, also, to decrees against guardians.⁶⁹ This power was not derived from the Statute of Contempts applicable to courts of record,⁷⁰ but existed independently of it. Certain sections of the Statute of Contempts were, it is true, applicable to proceedings in a Surrogate's Court;⁷¹ but, in exercising the power above mentioned, the court did not proceed by virtue of that statute, and could not, for the benefit of the injured party, fine for a contempt, for mere nonpayment of money adjudged due by a decree, and then commit for the nonpayment of the fine.⁷² The power was that of chancery, which was exercised by an attachment commanding the sheriff to bring the person charged before the surrogate, to answer for his alleged misconduct. The party charged might be allowed to give bonds to appear. Upon the return of the attachment, if he did not exonerate himself, the surrogate might make an order that he comply with the decree or order in question, and that he be taken and kept in custody until he did so, and paid the fees, unless sooner discharged according to law.

Upon this order, a precept or warrant might be issued to the sheriff, under the seal of the surrogate, commanding him to take the body of the person charged, and keep him in custody until he paid the money or performed the other acts specified. It was proper that the warrant, as well as the rule or order, should show the failure to pay, or do the other act required; but this was not regarded as essential, if it appeared by the other proceedings.⁷³ It was settled that, on a settlement of accounts, the surrogate had power to adjudge the balance due, and decree its payment; and that this decree could be enforced against the person. But it remained a question whether the proper final process was a commitment as for a contempt, or a precept, or an execution.⁷⁴ This question, whether a person taken under final process, for nonpayment of money adjudged due by a decree, was to be deemed committed for

⁶⁸ 2 R. S. 221, § 6, subd. 4; *Dunford v. Weaver*, 84 N. Y. 445; 21 Hun. 349.

⁶⁹ *Seaman v. Duryea*, 11 N. Y. 324.

⁷⁰ *Matter of Watson*, 5 Lans. 466; s. c. in Ct. App., *Watson v. Nelson*, 69 N. Y. 536; *Seaman v. Duryea*, 10 Barb. 532.

⁷¹ *Watson v. Nelson*, *supra*.

⁷² *Ib.*

⁷³ *Seaman v. Duryea*, 10 Barb. 536; *aff'd.*, 11 N. Y. 324.

⁷⁴ See *Watson v. Nelson*, 69 N. Y. 536, 545; *Seaman v. Duryea*, 11 id. 324.

contempt, and, therefore, to be kept in close custody, or whether he was to be deemed taken as upon an ordinary execution against the person, and, therefore, entitled to the jail liberties, and to be discharged from imprisonment under the statute, was, for a time, left in doubt by the authorities.⁷⁵ The confusion in the cases arose in part, at least, from not observing the principle that the power to issue process against the person in this court did not depend solely on the Statute of Contempts, but existed independently of it; the requisite question in each case being, whether it was one of commitment for contempt, or merely a process in the nature of an execution against the person.⁷⁶ It was settled that, where a party was adjudged to have in his possession a specific sum of money, and that he should pay it over, and he refused to do so, the disobedience was a contempt, and the prisoner was not entitled to the liberties. And it was, at length, explicitly declared that where the surrogate's decree, rendered against an executor, adjudged payment by him of a sum of money generally, to a person entitled to a share of the estate, and he failed to pay it, the proper process was an execution against the body, in the form prescribed by the Court of Chancery, upon which the defendant was entitled to the jail liberties.⁷⁷ And if the payment of money generally was directed "by an interlocutory order, a precept of commitment, which was equivalent to an execution in a civil action," was the appropriate process, and the defendant would be entitled to the jail liberties thereupon.⁷⁸ The remedy, by process in the nature of

⁷⁵ See *Matter of Watson*, 5 Lans. 466.

⁷⁶ *People v. Cowles*, 3 Abb. Ct. App. Dec. 507; which was the case of a refusal, by a judgment debtor, to obey an order made in supplementary proceedings, that she apply, to the satisfaction of a judgment, a sum of money belonging to her, which it was duly found that she had in her possession.

⁷⁷ *Watson v. Nelson*, 69 N. Y. 536.

⁷⁸ *Ib.* The *adjudication*, in this case, was that the appellant had no standing in the Court of Appeals, whereupon the appeal was dismissed; but the court took occasion to express its opinion upon the merits, as above. In *People v. Marshall* 1 Abb. N. C. 380), the rule, indicated by the Court of Appeals, as above stated, was explained to be that a mere failure, on the part of a representative, to pay a debt adjudged due by a surrogate's decree, was not a contempt for which

the latter was authorized to impose upon the former a fine, and commit him to close custody for nonpayment thereof; and, it was held, that an administrator might be committed to close custody upon an attachment for disobedience to a decree requiring him to pay over a fund *shown to be in his possession*. In that case, on the return of the attachment, the administrator appeared, and, in answer to interrogatories, alleged that he had the fund in hand, but had not paid it over pursuant to the decree, because there were rival claimants to it. From the language of the opinion of the Court of Appeals, in *Watson v. Nelson* (*supra*), it does not clearly appear that the aggrieved party was not entitled to an attachment to bring the delinquent before the court, but it was said that a commitment to close custody was improper. The court remarked, "We must hold the form of

attachment, was applicable, therefore, to all classes of orders, whether requiring the payment of money or the doing of any other thing. It was the only remedy for disobedience to orders other than those requiring the payment of money, with one exception, to wit, orders requiring the return of an inventory.

§ 1085. **Remedy by action on the bond.**—On the other hand, orders and decrees for the payment of money might be enforced by execution, and by action upon the official bond of a defaulting representative, as well as by attachment,—the remedy by attachment, and that by execution or action on the bond, being distinct.⁷⁹ Where a party elected to proceed, in the first instance, by

commitment to have been unauthorized." But, in *Matter of Sherry* (7 Abb. N. C. 390), the surrogate of New York county, citing the case in the Court of Appeals, refused to issue an attachment for nonpayment of money adjudged to be paid by a decree, saying: "If the petitioner shall be able to show that the executor actually, and not constructively, had sufficient funds in hand, applicable to the payment of petitioner's allowance, at the date of decree, then he will have a *prima facie* case for attachment for contempt, and only then."

⁷⁹ See *Saltus v. Saltus*, 2 Lans. 9; *Sherwood v. Judd*, 3 Bradf. 419. The only case presented by the Revised Statutes, as originally adopted, where the surrogate was authorized to direct the prosecution of an executor's or administrator's bond, was the refusal of the executor or administrator to make and return an inventory, and his consequent removal (2 R. S. 85, § 21); though it was also provided that obedience to an order requiring an executor or administrator to render an account might be enforced in the same manner as an order to return an inventory, and the same proceedings might be had to attach the disobedient party, and his letters might be revoked "with like effect as in those cases." It may be doubted whether this latter provision furnished any warrant for an order directing the prosecution of the bond, on a mere removal for default in rendering an account. With a view, apparently, of remedying the defect, the Legislature immediately passed an act (L. 1830, c. 320, § 23) providing that, in case of the neglect or refusal of an administrator to per-

form any decree "for rendering an account, or upon a final settlement, or for the payment of any debt, legacy or distributive share," the surrogate might cause the bond to be prosecuted, and might apply the moneys collected as directed by the decree. But this statute would seem to have contemplated only the case of a decree for the payment of money, and not a decree for the performance of any other act, such as the rendering an account, etc. In 1837 and 1840, a further and cumulative remedy (see *People v. Guild*, 4 Den. 551) was furnished, for disobedience to an order for the payment of money, by permitting the docketing of such order in the county clerk's office, and the issue of execution thereon, and authorizing, in case of its return unsatisfied, an action on the bond. (L. 1837, c. 460, § 65; L. 1844, c. 104, §§ 1, 2.) But neither of these statutes gave the privilege of prosecuting the bond merely upon the revocation of letters for refusal or neglect to render an account, or to do anything else than pay money. The result, therefore, was, that the only cases in which the bond of an executor or administrator would be ordered to be prosecuted were: (1) where there was a revocation of letters for refusal or neglect to return an inventory; and (2) where there was neglect or refusal to obey an order directing the payment of money. Two courses were, accordingly, open to the party desiring to enforce a decree for the payment of money. He might, on proof of the nonpayment as directed by the decree, apply to the surrogate for an order that the bond be prosecuted as provided by the statute of

action upon the representative's official bond, it was necessary to satisfy the surrogate that the representative had refused or omitted to perform a decree in proceedings for an account, or upon a final settlement, or for the payment of a debt, legacy, or distributive share. Thereupon the surrogate might cause the bond to be prosecuted; and he was required to apply the moneys collected, in satisfaction of the decree, in the same manner as they ought to have been applied by such executor or administrator.⁸⁰

§ 1086. Execution against property.—Where the party elected to proceed by execution, in case of nonpayment, before proceeding against the sureties, he might apply to the surrogate for a certificate, stating the amount of the debt and costs directed to be paid by the decree. This certificate, being filed with any county clerk, was entered on the docket of judgments, and was enforceable by execution, as if it were a judgment of the County Court.⁸¹ If the execution was returned unsatisfied, the surrogate might assign the bond to the creditor or applicant, who could bring an action in his own name, as assignee, and recover the amount awarded him by the surrogate's decree.⁸² This remedy might be had against guardians.⁸³

§ 1087. Action on the decree.—Finally, an action might be brought on a surrogate's decree, to compel payment of any sum thereby adjudged to be due; but it would be barred by the Statute of Limitations, unless commenced within six years, as the court was not a court of record.⁸⁴

1830 (*supra*); or he might, under the statutes of 1837 and 1844 (*supra*), file the decree in the county clerk's office, and issue an execution thereon, and then, in case of its return unsatisfied, he might apply to the surrogate to have the bond assigned to him for the purpose of being prosecuted. These remedies were cumulative, and it was discretionary with the party whether he would proceed, in the first instance, by execution on the decree, or immediately by action on the bond. If the latter course was adopted, the action on the bond was instituted in the name of the people, under the direction of the surrogate, by whom the moneys collected were to be applied. (People v. Townsend, 37 Barb. 520; People v. Laws, 3 Abb. Pr. 450.) In the other case, the party sued in his

own name, as assignee of the bond, and recovered only what was due to him. (Baggott v. Boulger, 2 Duer, 160.)

⁸⁰ 2 R. S. 116, § 19a, inserted by L. 1830, c. 320, § 23.

⁸¹ L. 1837, c. 460, §§ 63, 64.

⁸² See Baggott v. Boulger, 2 Duer, 160; Thayer v. Clark, 4 Abb. Ct. App. Dec. 391.

⁸³ 2 R. S. 152, § 9.

⁸⁴ Paif v. Kinney, 1 Bradf. 1, where it was held, that the court, not being a court of record, although its decree would form the basis of an action at law, yet a suit on it, unless brought within six years, was barred by the Statute of Limitations. But see, now, upon this point, Co. Civ. Proc., §§ 376 and 382, subd. 7.

TITLE THIRD.

PROCEEDINGS TO ENFORCE DECREES UNDER THE CODE.

§ 1088. **Different kinds of orders.**—The adjudications made or entered in writing by the surrogate, in proceedings before him, are either intermediate orders, or decrees—also termed final orders. It is essential to their validity that they should be signed by the surrogate;⁸⁵ and it is required that they be recorded in the proper books.⁸⁶ The final determination of the rights of the parties to a special proceeding in the Surrogate's Court is styled, indifferently, a final order or a decree.⁸⁷ A direction of the court, made or entered in writing, and not included in a decree, is styled an order.⁸⁸

§ 1089. **Enforcement of intermediate or interlocutory orders.**—It is provided that any order, other than a final order or decree, may be enforced in like manner as a similar order, made by the Supreme Court in an action; and the costs are the same as upon such an order, and may be collected in like manner.⁸⁹ The surrogate has power to punish any person for a contempt of his court, civil or criminal, in any case where a court of record may punish a person for a similar contempt, and in like manner.⁹⁰

§ 1090. **Order for costs.**—Motion costs awarded cannot be collected by contempt proceedings, but the order awarding them may

⁸⁵ *McNaughton v. Chave*, 5 Abb. N. C. 225.

⁸⁶ See Co. Civ. Proc., § 2498.

⁸⁷ Co. Civ. Proc., § 2550. For what are orders and what final decrees, see *Matter of McMaster*, 16 St. Rep. 240; 14 Civ. Proc. Rep. 195.

⁸⁸ Co. Civ. Proc., § 2556.

⁸⁹ Co. Civ. Proc., § 2556.

⁹⁰ Co. Civ. Proc., § 2481, subd. 7. See *Matter of Odell*, 6 Dem. 344. For the proceedings to inflict such punishment, see Co. Civ. Proc., § 2266 *et seq.* Thus he has jurisdiction to impose a fine upon a witness committed for contempt in refusing to testify, not exceeding the amount of costs and expenses, and \$250 besides. (*Matter of Jones*, 6 Civ. Proc. Rep. 250.) On appeal from the order dismissing a

writ of *certiorari*, in this case, the order was reversed and the prisoner was discharged on the ground that the commitment was defective. (*People ex rel. Jones v. Davidson*, 35 Hun. 471.) The refusal of one of the accounting trustees, on the hearing, to answer questions put to him, in behalf of a beneficiary, for the purpose of showing impropriety of an investment, as to which no specific objection has been filed, is not a contempt punishable as such. (*Robert v. Morgan*, 4 Dem. 148.) A representative who fails to appear as directed, and show cause why a collateral inheritance tax should not be imposed upon the estate, is punishable as for a contempt. (*Matter of Pelton*, 32 St. Rep. 924.)

be enforced by execution⁹¹ or a stay of proceedings.⁹² But payment of costs awarded against a party by final decree, *e. g.*, a decree granting probate, may be enforced by attachment.⁹³

§ 1091. **Enforcement of decrees or final orders.**—As regards the method of enforcement, decrees may be divided into such as direct (1) the payment of a sum of money, or (2) the performance of some other act, or (3) both. The general plan of the Code, for enforcing decrees of the several descriptions, may be stated as follows:

1. A decree for money may be docketed with the county clerk in any county of the State, and thereupon it becomes a lien upon the real property of the debtor in that county, in like manner as if it were a judgment of the Supreme Court. An execution against the debtor's property may be issued, out of the Surrogate's Court, to the sheriff of any county where the decree is so docketed. If such an execution is returned wholly or partly unsatisfied, sup-

⁹¹ *Matter of Lippincott*, 5 Dem. 299. "A person shall not be arrested, etc., for the nonpayment of costs awarded otherwise than by a final judgment or a final order made in a special proceeding instituted by State writ, except where an attorney, counselor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for nonattendance." (Co. Civ. Proc., § 15.) Where the leave granted is to issue execution against decedent's real property, the provision of Co. Civ. Proc., § 2552, making "an order permitting a judgment creditor to issue an execution," etc., conclusive evidence of assets, is inapplicable; but if the administrator is directed to pay costs, which he omits to do, he is guilty of disobedience to a decree directing the payment of money,—which is conclusive evidence of assets, under that section,—and he is amenable to commitment. An administrator, in such a case, by alleging that he has no assets of the estate, shows no cause why he should not be punished for disobedience; for *non constat* that he has not squandered the same. Co. Civ. Proc., § 15, does not protect him from arrest for nonpayment of such costs. (*Gillies v. Kreuder*, 1 Dem. 349.)

⁹² See Co. Civ. Proc., § 779. In *Seo-field v. Adriance* (2 Dem. 486), the surrogate held that section 779 did

not apply to Surrogates' Courts, but the same surrogate held otherwise in the subsequent case of *Matter of Lippincott* (5 Dem. 299). See Co. Civ. Proc., § 2556.

⁹³ In *Matter of Dillon* (N. Y. Law J., April 1, 1892), it was held, that in the absence of a direction in the decree that the executor pay the costs, he could not be punished for contempt. "An order may be presented directing the executor to pay the costs awarded to the special guardian by the decree admitting the will to probate. Should the executor fail to obey this direction, an application may then be made to punish him for contempt, when his liability will be determined. The insolvency of the estate will be no defense to such an application, as the special guardian's claim is preferred as an expense of administration; and if there are available assets, the executor must apply the same to payment thereof." Where an executor is directed by a decree admitting a will to probate, to pay a certain sum therein awarded as stenographer's fees, he may set up the nonexistence of assets as a reason why he should not be punished for contempt in disobeying the decree. (*Matter of Davidson*, 5 Dem. 224; *Matter of Monell*, 28 Misc. 308; 59 N. Y. Supp. 981.) Failure to pay an amount allowed a special guardian by and under a decree is punishable. (*Matter of Kurtzman*, 2 St. Rep. 655.)

plementary proceedings may be instituted as in an action, or steps may be taken to punish the delinquent for contempt; and, if he is an executor, administrator, or guardian, the issuing of an execution is not a necessary preliminary to the contempt proceedings. Finally, if the debtor is an official who has given a bond, an action thereupon may be maintained *pari passu* with, or in lieu of, any of the foregoing remedies.

2. A decree directing the performance of an act, other than the payment of money, is to be enforced by serving a certified copy on the person required to obey it,⁹⁴ and thereafter punishing him for contempt if he “*refuses or willfully neglects to obey it.*”

3. As to a decree of the third class, the methods of enforcement mentioned under the two foregoing heads are respectively applicable to its different portions. It is proposed to discuss these propositions in detail.

§ 1091a. **Docketing decree for money.**—Where a decree directs the payment of money into court or to a person designated, the surrogate or the clerk is required to furnish a transcript, which may be filed in the county clerk’s office, and docketed in the appropriate docket-book of judgments; and such docketing has the same force and effect, and the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, in the same manner and with like effect as a judgment.⁹⁵ This provision, as to *satisfying* decrees, applies to all decrees, whether docketed or not; they must be satisfied as if they were judgments.⁹⁶

§ 1092. **Money decree enforced in first instance by execution.**—Where the decree directs the payment of money, by a person other than a delinquent representative, guardian, or trustee,⁹⁷ the party

⁹⁴ *Sudlow v. Pinckney*, 1 Dem. 158.

⁹⁵ Co. Civ. Proc., § 2553; *ante*, § 696. Like the corresponding provision of the original statute, the section quoted is obviously intended to give a means of securing and enforcing payment of the decree; and the docketing does not take from its character as a decree of the Surrogate’s Court, nor interfere with an appeal therefrom as such (*Davies v. Skidmore*, 5 Hill, 501. See Co. Civ. Proc., § 2684); but the ruling that the creditor, under the decree, may pursue a remedy by execution, and by attachment against the person, simultaneously (*Townsend v. Whitney*, 75 N. Y. 425; *affg.* 15 Hun, 93), seems to be abrogated. It will be observed

that the satisfaction of such a decree is now to be evidenced in like manner as an ordinary judgment, thus superseding the necessity for a surrogate’s certificate, above mentioned.

⁹⁶ *Matter of Wilcox*, 1 Misc. 55; 21 N. Y. Supp. 780. An administrator may maintain an action in equity to have a decree against his estate declared satisfied, and to recover his advances made to the person in whose favor the decree was made. In this manner he may get the benefit of his counterclaim for matters of which the Surrogate’s Court could not take cognizance. (*Barker v. Laney*, 7 App. Div. 352; 40 N. Y. Supp. 66.)

⁹⁷ Co. Civ. Proc., § 2555, subd. 4.

in whose favor it is made must proceed, in the first instance, by an execution against the debtor's property, in analogy to the method of enforcing an ordinary money judgment.⁹⁸ The Code provides that a decree, directing the payment of money, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the Surrogate's Court, under the seal of the court, and must be made returnable to the court. In all other respects, the provisions of the Code, relating to an execution against the property of a judgment debtor, issued upon a judgment, and the proceedings to collect it, apply to an execution issued from the Surrogate's Court, and its collection;⁹⁹ the decree being for that purpose regarded as a judgment, except that the proceedings supplementary to an execution, "if founded upon such a decree, must be taken as if the decree was a judgment of the County Court, or, in the city of New York, of the Supreme Court.¹ Unless the decree has been docketed, the execution is irregular and will be set aside.²

§ 1093. Decrees enforced by proceedings for contempt.—Where a decree directs the performance of an act, other than the payment of money; or where an execution against property on a money decree has proved unavailing, *i. e.*, is returned unsatisfied; or where the debtor is a representative or guardian, and the surrogate deems it proper to do so; the enforcement may be by serving a certified copy on the party required to pay or perform, and

⁹⁸ Matter of Dissosway, 91 N. Y. 235; Union Trust Co. v. Gage, 6 Dem. 358; People v. Riley, 25 Hun. 587.

⁹⁹ In People *ex rel.* Sackett v. Woodbury (70 App. Div. 416; 75 N. Y. Supp. 236), it was held, that a decree finally settling an administrator's account, and directing him to pay a certain sum to a distributee, or to the Surrogate's Court, being within the cognizance of that court, and a final determination of the rights of the parties, was within the statute, and was governed by section 1377, requiring that, after the lapse of five years from the entry of a judgment, notice of an application for execution thereon must be served on the adverse party, and, therefore, mandamus would not lie to compel the surrogate to issue execution thereon before the service of such notice. It was also held in that case, that the docketing of the decree with the county clerk did not establish

a new date for the starting of the five-year limitation on the issuing of an execution.

¹ Co. Civ. Proc., § 2554, as amended 1895. Execution issues, of course, and leave of the surrogate is not necessary. (Joel v. Ritterman, 2 Dem. 242; Peyser v. Wendt, *id.* 221.) See Matter of Dissosway, 91 N. Y. 235. It is only in cases of judgments entered in other courts, against the representatives, that the surrogate's leave to issue execution is necessary. See § 677 *et seq.*, *ante*.

² Dissosway v. Hayward, 1 Dem. 175. See Co. Civ. Proc., § 1365. An execution issued upon a surrogate's decree, directing an executor to pay a legacy, is not open to objection because it runs against the executor personally. (Peyser v. Wendt, 2 Dem. 221; Matter of Waring, 7 Misc. 502; 28 N. Y. Supp. 393; Matter of Quackenbos, 38 Misc. 66.)

thereafter, in case of *refusal or willful neglect to obey it*, "by punishing him for a contempt of court." The provision of the Code applies to a portion of, as well as to an entire, decree.³ Where the service of a certified copy of the decree is ineffectual, and resort is had to contempt proceedings, they are obviously to be conducted in the manner prescribed in the Code, with respect to "proceedings to punish a contempt of court, other than a criminal contempt."⁴ It is not within the scope of this work to give the details of the practice, where such a course is pursued, but it is important to note what provision is made for final process against the person of one against whom a decree has been rendered in a Surrogate's Court.

§ 1094. Final process against the person.— There is no provision in the Code authorizing the issuing of an *execution against the person*, upon a surrogate's decree. As already noted, "an execution against the property" is allowed upon a duly docketed decree for money, and this may be followed by supplementary proceedings; but where *the person* is proceeded against, the method prescribed is by service of a certified copy of the decree on the person against whom it is rendered, and thereafter, "by punishing him for a contempt of court." An execution against property having been returned unsatisfied,⁵ if the court is satisfied, by affidavit, that a personal demand has been made, and that payment has been refused or neglected, it may issue, without notice, a *warrant to commit* the offender to prison, until the sum of money and the costs and expenses of the proceeding are paid, or until he is discharged according to law.⁶

³ Co. Civ. Proc., § 2555, subds. 1-4. The proceeding by attachment, under the Revised Statutes, was superseded by this section, under which a surrogate may by order punish for contempt a refusal or wilful neglect to obey his decree; and the section applies to the case of an executor whose trust was created, and whose wrongful acts in the trust were done before this statute went into operation, but who was called to account thereafter. (Matter of Snyder, 34 Hun. 302; 103 N. Y. 178.) On this point, see Underhill v. Nichols, 4 Redf. 318; Woodhouse v. Woodhouse, 5 id. 131; Joel v. Ritterman, id. 136. Noncompliance with a surrogate's decree directing the payment of costs only is not punishable as a contempt. (Matter of Humfre-

ville, 154 N. Y. 115; 47 N. E. 1086; Matter of Feehan, 36 Misc. 614; 73 N. Y. Supp. 1126.)

⁴ Co. Civ. Proc., § 2266 *et seq.*

⁵ Except in the case provided for by Co. Civ. Proc., § 2555, subd. 4. While the surrogate may enforce a decree directing the payment of money under subdivision 4, by contempt proceedings, without an execution, it is discretionary with him whether or not to require an execution to be first issued against the executor's property; and ordinarily that course should be pursued. (Matter of Kellinger, 2 McCarty, 68.)

⁶ Co. Civ. Proc., § 2268. A demand upon an executor to pay "the balance due on a decree, and for costs," is insufficient as a foundation to punish the executor as for contempt in failing

§ 1095. **Order to show cause, etc.**— Ordinarily, however, an order to show cause, or a warrant of attachment,⁷ will be issued as a preliminary, and a hearing will be had.⁸ Thereupon, if the decision is adverse to the executor, the court must make a final order, directing that he be “punished by fine or imprisonment,” or both, as the nature of the case requires.⁹ The case supposed is within the section of the Code which requires the court to impose upon the offender a fine sufficient to indemnify the aggrieved party,¹⁰ and imprisonment is to follow until the fine is paid.¹¹ It is not sufficient, to protect the party against proceedings and punishment under this section, to show that an action may, on general principles, be maintained for the same cause, but it must be shown to be a case where the law has specially prescribed an action as the means of redress.¹² And if he shows that an appeal will be taken from the decree, which may result in a reversal, he should not be punished until the time to appeal has expired.¹³ And the delinquent will not be allowed to excuse nonpayment, by

to pay such balance. (Matter of Feehan's Estate, 36 Misc. 614; 73 N. Y. Supp. 1126.)

⁷ Co. Civ. Proc., § 2269.

⁸ Co. Civ. Proc., § 2280. Appearance by an attorney is equivalent to a personal service of the order to show cause. (Austen v. Varian, 16 App. Div. 337; 44 N. Y. Supp. 599.) An executor cannot be regularly adjudged in contempt for failure to make payment as required by a decree settling his accounts, until the time of an adverse party to appeal from the decree has been cut off by the expiration of thirty days after service of a copy of the decree and notice of its entry. (Matter of Kavanagh, 10 N. Y. Supp. 869.)

⁹ Co. Civ. Proc., § 2281. “A warrant of commitment must issue accordingly” (Ib.); except that where the proceeding is by order to show cause, instead of by warrant of attachment, the offender may be committed upon a certified copy of the order, without further process. (Id., § 2283.) Upon appeal the only question is whether the court had jurisdiction. (Matter of Pye, 18 App. Div. 306; 46 N. Y. Supp. 250; *affd.*, 154 N. Y. 773.)

¹⁰ Co. Civ. Proc., § 2284.

¹¹ Co. Civ. Proc., § 2285; Matter of McMaster, 14 Civ. Proc. Rep. 195; *s. c.* as Matter of Bernhard, 16 St. Rep. 241; Matter of Prout, 19 *id.* 318. Where a

trustee has been adjudged to be guilty of a contempt, because of a failure to pay over moneys received by him as trustee, pursuant to an order made upon an accounting, the court may impose as a fine the amount which he has received and failed to pay, and direct him to be imprisoned until he shall pay the fine. (Matter of Morris, 45 Hun. 167.) In that case, the order adjudging the trustee guilty of contempt because of a failure to pay over moneys, expressly adjudicated that his misconduct “was calculated to and did defeat, impair, impede, and prejudice a right or remedy of the petitioner,” and the evidence upon the reference supported that conclusion;—Held, sufficient as an adjudication of injury within section 2284. In Matter of Snyder (34 Hun. 302), the executor was adjudged to be in contempt for refusing to pay over moneys as directed by the decree on his accounting, and was fined and committed till payment, it appearing that before the accounting he had lost in his private business the funds of the estate, and had conveyed his real property to his wife to be out of the reach of his creditors. Followed, Matter of Kurtzman, 2 St. Rep. 655.

¹² Matter of Morris, 45 Hun. 167.

¹³ Matter of Arkenburgh, 15 Misc. 416; 38 N. Y. Supp. 178.

a plea of his prior fraudulent misappropriation of the whole estate or fund, and his consequent inability to pay. His neglect to pay, under such circumstances, is a "willful neglect," and is punishable as a contempt.¹⁴

§ 1096. **Discretion of the court.**—The extraordinary power, to enforce decrees for the payment of money by punishing delinquent parties for contempt, should, however, be exercised in conformity to the liberal spirit of the legislation on the subject of imprisonment for debt.¹⁵ When the surrogate is asked to imprison for contempt one who is shown to have disobeyed a decree of his court, he is not bound to grant the application as of course, but should grant or deny it in his sound discretion.¹⁶ Although mere

¹⁴ Joel v. Ritterman, 5 Redf. 136, and cases *supra*.

¹⁵ Ferguson v. Cummings, 1 Dem. 433.

¹⁶ Matter of Battle, 5 Dem. 447; 10 St. Rep. 167; 13 Civ. Proc. Rep. 27. In that case, the surrogate cited and applied Cochrane v. Ingersoll, 73 N. Y. 613; Doran v. Dempsey, 1 Bradf. 490; Parke v. Parke, 18 Hun. 466; Strobridge v. Strobridge, 21 id. 288; Matter of Snyder, 34 id. 372; *affd.*, 103 N. Y. 178; Baucus v. Stover, 89 id. 1. In Hosack v. Rogers (11 Paige, 603), the chancellor affirmed a refusal of the vice-chancellor to enforce by attachment his decree against an executor to pay a debt due from the testator, it appearing that the executor had improvidently invested and lost the fund. "But the case might have been different," said the chancellor, "had it been a mere interlocutory order directing a trustee, who admitted the trust funds to be actually in his possession, or under his control, to bring the same into court for safe-keeping." In Seaman v. Duryea (11 N. Y. 328), which was an action for false imprisonment under a surrogate's attachment against a guardian, for neglect to pay the amount found due to the ward on an accounting, it does not appear whether the guardian had the possession of the fund. The decision in this case is strongly dissented from in Matter of Bingham (32 Vt. 329 [1859]), which held that the decree was strictly a *debt*, and nothing more. In Doran v. Dempsey (1 Bradf. 490 [1851]), the surrogate refused an attachment against an executor, for nonpayment of a legacy (after execu-

tion on the decree had been returned unsatisfied), it appearing that the executor had no means of paying. "The commitment is one which places the party in close imprisonment, and I have certainly no inclination to execute the law in that way, against a person who does not comply with the decree, because he *cannot* comply with it. Nor do I see that justice or official duty requires me to exercise that power in a case of sheer inability to pay." (Ib.) The surrogate did not decide, however, that he had not the requisite power. In Matter of Frear (15 Abb. Pr. 350 [1863]), a guardian, in answer to a motion for an attachment against him, for neglect to pay to the ward a sum decreed, alleged that, since his appointment, he had met with reverses and was insolvent and unable to pay, and, moreover, that the sureties on his bond had not been prosecuted. The surrogate directed an assignment of the bond, for prosecution against the sureties, "and if this prove unavailing to recover the money, I will then entertain the question of an attachment." In Saltus v. Saltus (2 Lans. 9 [1870]), an attachment was issued, although it did not appear that an execution had been issued on the decree. In Matter of Woodhead (1 Tuck. 92 [1868]), the surrogate, though remarking that the court would not punish an innocent inability to pay, with imprisonment, yet held that where an executor had mingled the assets of the estate with his own funds, and had so maladministered them as to commit a fraud upon the creditors, he could not plead such innocent inability to pay, and a creditor

inability to obey such direction at the time it is sought to enforce it should not suffice of itself to shield the executor from commitment,¹⁷ yet if it appears that the case is one in which if the respondent were in actual confinement for disobedience to the decree, his application for discharge would commend itself to the court, the court may deny the original application for imprisonment.¹⁸

§ 1097. Service of attachment.— A warrant of attachment must be directed to the sheriff of the surrogate's county; and that officer may execute it in any county of the State, and is required to convey the person arrested to the place where it is returnable.¹⁹ The liability of a sheriff or other ministerial officer for a default in executing or returning a mandate issued by a surrogate, is governed by general provisions applicable to all courts of record,²⁰ and the special provision of the former statute²¹ on that subject has been repealed without any other substitute.

§ 1098. Commitment with benefit of jail liberties.— It was held, under the Revised Statutes, that a commitment to close custody was improper, and that the proper process was an execution against

was entitled to the remedy by attachment. In *Matter of Timpson* (15 Abb. Pr. [N. S.] 230 [1872]), the executor admitted that he had converted to his own use the trust funds since the decree was made, and the whole was lost, and he had no power to pay. The surrogate granted an attachment. In *Rugg v. Jenks* (4 Dem. 105), the executor was indebted to the testator at the time of his death, and at the time of his accounting was solvent and able to pay the same, but subsequently became insolvent and unable to pay the sum found due by the decree, which had never been docketed; — Held, he could not be punished for contempt in failing to pay the sum so found due, especially where the legatee who sought to enforce the payment was a co-executor who knew that the claim existed simply in the form of the original indebtedness at the time of rendering the account, and permitted the matter to so stand, taking no steps to enforce the decree or even to docket it as a judgment until after the insolvency. In *Matter of Schweibert* (25 Misc. 464; 55 N. Y. Supp. 649), the executor was directed to make payment of the distributive share of a minor legatee to his general guardian to be appointed, but no appointment

was made for five years, meanwhile the executor made advances to the person appointed, for the benefit of the minor, as he had done prior to the decree. Held, upon a motion to punish the executor for contempt on his refusal to pay over, on the ground he had no funds, that he was entitled to be credited with the sums paid, with interest from the date of the guardian's appointment, and should be ordered to pay the balance, with interest from that date. Where an attorney for an executor knew that a decree against the executor was unsatisfied in part, and procured it to be satisfied of record, the executor will not be punished for contempt unless he was actually privy to such unauthorized satisfaction. (*Matter of Feehan*, 36 Misc. 614; 73 N. Y. Supp. 1126.)

¹⁶ *Matter of Davidson*, 5 Dem. 224; *Gillies v. Kreuder*, 1 id. 349; *Matter of Kurtzman*, 2 St. Rep. 655; *Matter of Waring*, 1 App. Div. 29; 36 N. Y. Supp. 529, and cases *supra*.

¹⁸ *Matter of Snyder*, 103 N. Y. 178; 34 Hun. 302; *Matter of Battle*, 5 Dem. 447; *Matter of Steinert*, 29 Hun. 301.

¹⁹ Co. Civ. Proc., § 2515.

²⁰ Co. Civ. Proc., §§ 100-107.

²¹ 2 R. S. 223, § 9.

the person, in the form prescribed by the court of chancery, upon which the defendant was entitled to the jail liberties.²² And this rule is followed in proceedings under the Code of Civil Procedure.²³ The sheriff has no right to release the person in custody, except on his giving an undertaking as provided in section 2277 of the Code.²⁴

²² *Watson v. Nelson*, 69 N. Y. 536. Compare *People v. Cowles*, 3 Abb. Ct. App. Dec. 507. See § 1084, *ante*.

²³ *Baker v. Baker* 23 Hun. 356; *Meyers v. Becker*, 29 id. 567; *People v. Riley*, 25 id. 587; *Matter of Amerman*, 3 St. Rep. 356.

²⁴ In *Matter of Callan* (N. Y. Law J., Dec. 8, 1891), the sheriff accepted a deposit of money in lieu of bail,

which the latter turned over to the clerk of the Surrogate's Court. Held, that neither of these officers had authority to receive the money. The clerk was ordered to return the money to the sheriff, the surrogate saying that the rights of the parties in regard to the money must be settled in another tribunal.

CHAPTER XXII.

COSTS IN SURROGATES' COURTS.

TITLE FIRST.

RULES FORMERLY PREVAILING.

§ 1099. **Before the Code.**— Before the adoption of the eighteenth chapter of the present Code, the subject of costs in Surrogates' Courts was involved in great confusion. That act has established uniform, brief, and intelligible rules in respect to the matter. The power of Surrogates' Courts to award costs, like that of other courts, is purely statutory.¹ Neither the common-law courts, nor the chancellor, had any power, independently of the statute, to award costs to be paid by one party to another, or out of a fund in court.² The Revised Statutes were the first legislation on the subject of costs in Surrogates' Courts.³

§ 1100. **Costs in contested cases.**— The statute provided that in all cases of contest before a Surrogate's Court, the court might award costs to the party in the judgment of the court entitled thereto, to be paid to either party by the other, personally, or out of the estate which was the subject of the controversy.⁴ The Code of Procedure had no application to this subject,⁵ and costs in these courts (except in New York county) were regulated by the Revised Statutes until the adoption of the present Code of Civil Procedure. But the Revised Statutes, while authorizing an award of costs, did not fix the rate, and it was only in 1837⁶ that the

¹ Matter of Bailey, 47 Hun, 477; Wend. 363; Lee v. Lee, 39 Barb. 172; Fernbacher v. Fernbacher, 4 Dem. 227; Devin v. Patchin, 26 N. Y. 441, 449; Walton v. Howard, 1 id. 103; Du Bois v. Brown, id. 317; Halsey v. Van Amringe, 6 Paige, 12; Shultz v. Pulver, 3 id. 182; Burtis v. Dodge, 1 Barb. Ch. 77; Lee v. Lee, 39 Barb. 172; Devin v. Patchin, 26 N. Y. 441; Matter of Gates, 2 Redf. 144; Matter of Mace, 4 id. 325.

² Downing v. Marshall, 37 N. Y. 380. And see Seaman v. Whitehead, 78 id. 306.

³ Shultz v. Pulver, 3 Paige, 182; 11

Matter of Gates, 2 Redf. 144; Noyes v. Children's Aid Society, 10 Hun, 289. An order awarding costs was *coram non judice*, and void. (Reid v. Vanderheyden, 5 Cow. 719.)

⁴ 2 R. S. 223, § 10. And see 2 R. S. 63, § 39, as to award of costs in proceedings to revoke probate on allegations.

⁵ See Devin v. Patchin, 26 N. Y. 441.

⁶ L. 1837, c. 460, § 70.

Legislature authorized the taxation of costs at the rate then allowed for similar services in the Common Pleas.⁷ Costs could not be awarded in excess of the rate thus fixed, nor could allowances be made to a party or to counsel, to be paid personally or out of the estate, even upon the consent of the parties to the proceeding;⁸ and if the representative paid allowances thus decreed, the amount would not be allowed him as a credit on his accounting.⁹ Although the statute gave the surrogate power to award costs, to be paid "by the other party, personally," yet this power was not exercised against a party who had contested in good faith, and on reasonable grounds, although unsuccessfully.¹⁰ In matters of accounting, costs were awarded to the accounting party so far as he was free from fault; and as to inquiries growing out of alleged breaches of trust, costs were awarded against him, where the objections were sustained.¹¹

§ 1101. Costs in uncontested cases.— Under the Revised Statutes, costs could be awarded in "cases of contest" only. Under later statutes, power was given to the surrogate to award costs, in certain cases where there was no contest, as in a proceeding to compel the filing of an inventory, or an account, by a representative, etc., where the surrogate might, in his discretion, charge the representative or guardian personally with the costs.¹²

⁷ See 2 R. S. 636, § 27, for Common Pleas fees. This statute, except with reference to Surrogates' Courts, became obsolete in 1840. (L. 1840, c. 386, § 40.) See *Western v. Romaine*, 1 Bradf. 37; *Willcox v. Smith*, 26 Barb. 316; *Devin v. Patchin*, 26 N. Y. 441; *Matter of Gates*, 2 Redf. 144.

⁸ *Halsey v. Van Amringe*, 6 Paige, 12; *Burtis v. Dodge*, 1 Barb. Ch. 77; *Noyes v. Children's Aid Society*, 10 Hun, 289, and cases *supra*. In *Devin v. Patchin* (*supra*), a surrogate had directed certain amounts to be paid to counsel representing different parties, by way of allowances for their services, in the contest before him for letters of administration. On appeal, though these orders were not appealed from, the Court of Appeals took occasion to notice them, and to declare that they were unauthorized and illegal, and that Surrogates' Courts were not the almoners of deceased persons.

⁹ *Matter of Gates*, 2 Redf. 144. In *Willcox v. Smith* (26 Barb. 316), it was held, that costs could be awarded to a party only, and not to his counsel. But they might be awarded to

any party, whether successful or not, and to as many as, in the surrogate's judgment, were entitled thereto. (*Noyes v. Children's Aid Society*, 70 N. Y. 481, disapproving, on this point, 10 Hun, 289, and overruling *Lee v. Lee*, 39 Barb. 172.)

¹⁰ 2 R. S. 223, § 10. Thus, it was held, that one who found a will which he was interested to establish, and which he propounded for probate, should not be personally charged with costs of the contestants, though a revocation was shown and probate refused. (*Matter of Griswold*, 15 Abb. Pr. 299.) In *Matter of Gooseberry* (52 How. Pr. 310), it was held, that costs of the establishment, by an applicant for letters of administration, of relationship to the decedent, should be allowed, if at all, on the final accounting.

¹¹ See *Ray v. Van Hook*, 9 How. Pr. 427; *Griffith v. Beecher*, 10 Barb. 432; *Willcox v. Smith*, 26 id. 316; *Dunford v. Weaver*, 84 N. Y. 445.

¹² L. 1867, c. 722, § 8. The statute regulating commissions provided for allowance of such sum, for counsel fee

§ 1102. **Costs in New York county.**— In 1870, the surrogate of New York county acquired authority to grant allowances, in lieu of costs to counsel, in any proceeding before him, in the same manner as was then prescribed by the Code of Procedure in civil actions.¹³ The only effect of this authorization was to fix the maximum amount which could be allowed in any case, and to prescribe the basis for calculating that amount;¹⁴ otherwise the rules established under the Revised Statutes continued to govern — *e. g.*, that allowance might be made, in a proper case, to an unsuccessful party.

TITLE SECOND.

COSTS UNDER THE CODE

SUBDIVISION 1.

AWARD OF COSTS.

§ 1103. **General provisions of the Code, inapplicable.**— The general provisions of the present Code, in respect to the award and enforcement of payment of costs fixing the amount thereof and giving or compelling security therefor,¹⁵ have no application to

on the final accounting, as the surrogate might deem reasonable. (2 R. S. 93, § 58, as amended L. 1863, c. 362, § 8.) But this allowance was to be made to the accounting party himself; he was allowed to charge the estate for such counsel fee as he had been obliged to pay, limited, however, by the rate prescribed by the act. (*Seaman v. Whitehead*, 78 N. Y. 306; *Noyes v. Children's Aid Society*, 70 id. 481.) In *Matter of Walsh* (1 L. Bul. 63), it was held, that there was no precedent for an allowance in lieu of costs.— and that no such allowance could be made,— where a creditor applied, upon citation to the next of kin, for letters of administration upon the estate of an intestate, and the party cited at once appeared and took out letters.

¹³ L. 1870, c. 359, § 9.

¹⁴ *Gunning v. Lockman*, 3 Redf. 273; 4 Abb. N. C. 173. Where several attorneys represented the interests of one infant in a proceeding, it was held, that only one allowance should be granted to all, and that the amount should be properly apportioned among them. And although an infant party had a general guardian, yet where a special guardian was appointed on the

executor's accounting, the allowance to the special guardian, as well as to the attorneys for the general guardian, should be paid out of the estate, when the other allowances are charged to the same. (*Gunning v. Lockman*, *supra*.) Compare, generally, *Down v. McGourkey*, 15 Hun, 444; *Hurd v. Warren*, 16 id. 622. On an accounting, at the instance of a creditor, the statutory allowance of 5 per cent. was to be computed on the amount of the creditor's recovery, not on the amount of the estate. (*Browning v. Vanderhoven*, 4 Abb. N. C. 166; 55 How. Pr. 97.)

¹⁵ Co. Civ. Proc., c. 21, tit. 1-3. A Surrogate's Court has no authority, therefore, to require a party to a special proceeding therein to furnish security for the payment of his adversary's costs. (*Loesche v. Griffin*, 3 Dem. 358.) The statute in regard to giving security for costs (2 R. S. 620), which applied only to courts of record, was held not to apply to the Surrogate's Court in an application by a creditor, etc., to compel the executor to pay out of the fund in his hands (*Westervelt v. Gregg*, 1 Barb. Ch. 469); and such is still the rule. (Co. Civ. Proc., § 3347, subd. 13.) So, too,

Surrogates' Courts.¹⁶ Those tribunals are governed, in these particulars, by certain sections applicable only to them, and designed to remove the obscurity and doubt heretofore prevailing upon the subject, while conferring upon surrogates, both in respect to the award and amount of costs, a discretion obviously desirable, in view of the complexity of interests of litigants before them, and the multifarious character of questions, which, from time to time, are presented to them for adjudication. The provisions of the present Code supersede all those above recited, although many of the principles enunciated in the decisions cited have, doubtless, a bearing upon the existing statute.¹⁷

§ 1104. **Award of costs by intermediate order.**—The surrogate may award costs either (1) by an intermediate or interlocutory order, or (2) by a final order, otherwise termed a decree. Where the surrogate makes or enters in writing a direction not included in a decree, *i. e.*, "an order," the awarding or denial of costs thereby is the same in case of a similar order made by the Supreme Court in an action;¹⁸ in other words, costs may be denied, or awarded either absolutely or to abide the event, to any party, in the discretion of the court.¹⁹ Where awarded, such costs may be collected "in like manner" as if awarded in an action in the Supreme Court.²⁰ Whether a matter is to be determined by an order or by a decree, must of course depend upon the character of the proceeding in which it is required to be made. Thus, the denial of an application to open a decree is properly incorporated

with reference to that provision of the Code (§ 3278) by which an attorney for a plaintiff who may be required to file security, is liable for costs. (*Matter of Rasch*, 26 Misc. 459; 55 N. Y. Supp. 434.)

¹⁶ Co. Civ. Proc., § 3347, subd. 13.

¹⁷ The repeal in 1880 of the Act of 1870, giving powers to the surrogate of the county of New York, "to grant allowance in lieu of costs," given by the former act, did not affect a proceeding pending at the time the repealing act took effect. (*Matter of Weston*, 91 N. Y. 502; overruling *Matter of Sexton*, 1 Dem. 3.) See *Matter of Gray*, 27 Hun. 461. It is a general principle, however, that the recovery of costs is controlled as to items and rate of compensation, at least, by the statutes in force at the time the right to costs accrues, or at the time of taxation. (*Supervisors, etc. v. Briggs*, 3 Dem. 173; *Van Valkenburgh v. Van*

Alen, 1 How. Pr. 86; *Goodenow v. Livingston*, id. 232; *Taylor v. Gardner*, 4 id. 67; *Holmes v. St. John*, id. 66.) It is held, accordingly, that the regulations of the Code of Civil Procedure, as to costs in Surrogates' Courts, apply to proceedings, though commenced before September 1, 1880, where the decree was not settled until after that date. (*Matter of Mace*, 4 Redf. 325.)

¹⁸ Co. Civ. Proc., § 2556; *Matter of Miles*, 5 Redf. 110.

¹⁹ See Co. Civ. Proc., § 3236; *Lawton v. Green*, 64 N. Y. 326; *Concklin v. Taylor*, 68 id. 221. But upon an accounting, if no objections are filed, and the account is found correct, no allowance should be made to counsel representing legatees or next of kin. (*Osborne v. McAlpine*, 4 Redf. 1.) See *Matter of Welling*, 51 App. Div. 355; 64 N. Y. Supp. 1025.

²⁰ See Co. Civ. Proc., § 2556. See § 1090, *ante*.

in an order, and not in a decree; and the maximum allowance of costs thereupon is ten dollars and the necessary disbursements.²¹ But an application for leave to issue an execution is a special proceeding, and not a motion; and if the application is contested, the petitioner is entitled to seventy dollars costs, and if uncontested, to twenty-five dollars.²²

§ 1105. Order dismissing proceedings.—Where the surrogate dismisses a proceeding by a person interested in an estate or fund, to compel an executor, administrator, or other trustee to renew his official bond, upon a compliance with the demand, he is required to make the decree upon such terms as to costs, as justice requires.²³ But it seems there is no statutory authority to award costs on a dismissal of a proceeding, *e. g.*, for a settlement of accounts — for want of jurisdiction of the subject-matter.²⁴

§ 1106. Costs on decree or final order.—An award of costs in a decree is in the discretion of the surrogate, except in one of the following cases, in which they are of right, to wit:

“1. Where special directions respecting the award of costs, are contained in a judgment or order, made upon an appeal from the surrogate's determination, or upon a motion for a new trial of questions of fact tried by a jury; in either of which cases costs must be awarded according to those directions.

“2. When a question of fact has been tried by a jury; in which case, unless it is within the foregoing subdivision, the decree must award costs to the successful party.

“3. When the decree is made upon a contested application for probate or revocation of probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but the surrogate may order a copy of stenographer's minutes to be furnished to the contestant's counsel, and charge

²¹ Pease v. Egan, 3 Dem. 320.

²² Matter of Taylor, 8 Civ. Proc. Rep. 453.

²³ Co. Civ. Proc., § 2599. But on a proceeding to determine whether the bond of an administratrix afforded adequate security to the creditors, etc., of the estate, the surrogate cannot award costs or allowances out of the

decedent's estate directly to the counsel of parties litigant; and such a defect in the order is not cured by the fact that it, in form, granted costs to the parties and not to their attorneys. (Walton v. Howard, 1 Dem. 103, and cases cited.)

²⁴ Bunnell v. Ranney, 2 Dem. 327.

the expenses thereof to the estate, if he shall be satisfied that the contest is made in good faith." ²⁵

§ 1107. Special direction of appellate court.— The foregoing first subdivision is to be read in connection with section 2589, which provides that the appellate court, on an appeal from a surrogate's order or decree, "may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the Surrogate's Court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party as directed by the appellate court; or, if such a direction is not given, as directed by the surrogate." This does not mean that, if the appellate court fails to award appeal costs, the surrogate may do so; but it means that if the appellate court does award costs, and gives no direction whether the same shall be paid out of the estate or fund, or by the unsuccessful party, the surrogate may exercise his discretion in the particulars wherein the appellate court has failed to exercise its own.²⁶ The surrogate has no power to award costs in an appeal proceeding, where the appellate court has refused to award them,²⁷ or has made no direction as to costs.²⁸

²⁵ Co. Civ. Proc., § 2558. The surrogate has no power to award costs to a party not before him in the proceeding. (Matter of Gates, 2 Redf. 144.)

²⁶ Matter of Hatten, 6 Dem. 444; 17 St. Rep. 774. But the fact that the Appellate Division, upon an appeal from a decree, has charged the costs of that appeal upon the contestants personally presents no reason why the surrogate should change his original award of costs and charge them against the contestants personally. (Matter of Seagrist, 8 App. Div. 298; 40 N. Y. Supp. 940.) The question whether costs of an appeal should be charged upon executors personally or upon the estate, should be determined upon motion in the Supreme Court where the action was brought, and not upon their accounting before the surrogate. (Harrington v. Strong, 49 App. Div. 39; 63 N. Y. Supp. 257.)

²⁷ Schell v. Hewitt, 1 Dem. 249. As to costs on awarding a jury trial in a probate case, by the General Term, see Sutton v. Ray, 72 N. Y. 482. While it may be assumed that when an appellate court awards costs, the effect

is to include costs of such court only, yet if it assumes to deal with the whole subject, and *reverses* the judgment appealed from with costs, that includes all the costs of all the inferior courts. (Murtha v. Curley, 92 N. Y. 359; Matter of Hood, 30 Hun, 472.) An executor who takes an unsuccessful appeal to avoid a personal liability may be charged personally with the costs. (Pittman v. Johnson, 35 Hun, 38; 15 Abb. N. C. 472.) For the rules in regard to costs of appeal, under the old Code, before 1862, see Brockway v. Jewett, 16 Barb. 590; Sherman v. Youngs, 6 How. Pr. 318; Wilcox v. Smith, 26 Barb. 316; Whitbeck v. Patterson, 22 id. 83; Van Pelt v. Van Pelt, 16 How. Pr. 299. And those after 1862, see Morgan v. Morgan, 39 Barb. 20. And those under the Revised Statutes, see 2 R. S. 618, § 35, and Stagg v. Jackson, 1 N. Y. 206.

²⁸ Matter of Bull, 1 Connolly, 395; 22 St. Rep. 880. In that case, the proponent was not allowed the costs and disbursements necessary for the preparation of the appeal, such as printing the case and points, nor sten-

§ 1108. **Costs on a new trial.**— On the grant of probate, on a new trial granted by the appellate court, on appeal from a decree refusing probate, no costs of contest will be awarded for services on the second trial. For the purpose of awarding costs and allowances, the former decree will be taken as the basis, and such additional compensation awarded for services on the new trial as the proof may warrant, and, in addition, the *per diem* allowance for the trial.²⁹

§ 1109. **Jury trials.**— The second subdivision of section 2558 refers to a trial by jury of a question of fact ordered by the surrogate in a proceeding for the disposition of real property to pay debts,³⁰ and not to one ordered by the appellate court, on appeal from the probate decree.³¹ The costs of the former proceeding are awarded a preference, in payment, from the proceeds of sale.³² It will be noted that the appeal, in that proceeding, *may be from an order of the Surrogate's Court*, since the surrogate may grant the new trial.³³

§ 1110. **Proponent's costs on contested probate.**— The proponent of a paper for probate, if he is named therein as executor, and takes the proceeding in good faith, is entitled, as of right, to costs, whether the paper is or is not admitted to probate. This, it will be noticed, does not give a proponent, other than the executor, a right to costs in case of a refusal of probate.³⁴ Parties, though not proponents, who, having several interests, appear in support of the will by separate attorneys may be awarded costs.³⁵ An executor who in good faith, but unsuccessfully, opposes an application to revoke the probate of the will under which he received letters, and to have admitted to probate an alleged later will, is within the equity of the statute and is entitled to costs.³⁶ If the

ographer's fees, for minutes ordered for preparing the case on appeal. See *Matter of Baldwin*, 30 Misc. 169; 63 N. Y. Supp. 727. Where the Appellate Division reversed an order of the surrogate "with costs," simply, the surrogate has no power to tax disbursements also. Co. Civ. Proc., §§ 3251, 3256, apply to actions and not to orders of the surrogate. (*Matter of Steenken*, 58 App. Div. 85; 68 N. Y. Supp. 444.) So, too, after affirmation of a decree judicially settling the accounts of a testamentary trustee, the surrogate has no authority to make a decree allowing the trustee the expenses of the appeal and attorneys' fees thereon. (*Matter of Mc-*

Echron, 55 App. Div. 147; 67 N. Y. Supp. 18.)

²⁹ *Matter of Darragh*, N. Y. Law J., Jan. 14, 1890.

³⁰ Co. Civ. Proc., § 2549.

³¹ *Matter of Bull*, *supra*.

³² Co. Civ. Proc., § 2793, subd. 4. The costs, when awarded, are the same as the taxable costs in an action. (Co. Civ. Proc., § 2560.)

³³ Co. Civ. Proc., § 2548.

³⁴ *Collyer v. Collyer*, 4 Dem. 53; 17 Abb. N. C. 329. See *Matter of Folts*, 71 Hun. 492; 24 N. Y. Supp. 1052.

³⁵ *Matter of Lasak*, 1 Connoly. 486; 7 N. Y. Supp. 2; 23 Abb. N. C. 54.

³⁶ *Bertine v. Hubbell*, 1 Dem. 335.

executor named in a paper, either prior or subsequent to the one offered for probate, contests the one so offered, and seeks to defeat the probate, by establishing the will in which he is named, he is entitled to costs, if acting in good faith, though he fail. But such contesting executor who acts as his own counsel in the proceedings is not entitled to costs as of right.³⁷ The application for probate must have been "contested." Where the next of kin, after cross-examination of the witnesses offered by the proponent, withdrew their objections and the will was admitted, the case is not one of contest.³⁸

§ 1111. **Special guardian's compensation.**— An allowance to a special guardian, who is an unsuccessful contestant of a will offered for probate, must be fixed by the surrogate, and inserted in the decree; and cannot be allowed on *ex parte* application without notice, after the decree has been entered.³⁹ An allowance for the guardian's attendance before the appellate court, on appeal from a decree to which he is a party, cannot be made by the surrogate, in the absence of any direction to that effect by the appellate tribunal.⁴⁰

§ 1112. **Costs to contestant in probate proceeding.**— While the court may, in its discretion, award costs to an unsuccessful contestant, if it find that his contest was in good faith, he is not bound to do so.⁴¹ On the other hand, the contestant may, in the discretion

³⁷ Whelpley v. Loder, 1 Dem. 368, 382; Allen v. Public Adm'r, 1 Bradf. 221; Arthur v. Nelson, 1 Dem. 337, 348; Matter of Valentine, 9 Abb. N. C. 313.

³⁸ So held under 2 R. S. 223, § 10. (Peck v. Peck, 23 Hun. 312.)

³⁹ Matter of Budlong, 33 Hun. 235; 100 N. Y. 203. See Forster v. Kane, 1 Dem. 67; Matter of Robinson, 160 N. Y. 448; Matter of Rasch, 26 Misc. 459. Sections 2558 (subd. 3), 2559, 2561, 3256, Co. Civ. Proc., limit the amount of costs and disbursements which may be awarded to a guardian *ad litem*, even though he has in good faith contested the probate, to \$70, and \$10 for each additional day more than two days occupied in the trial or hearing, and the disbursements which may be taxed in an action. (Matter of Tracy, 18 Abb. N. C. 242; Matter of Rupaner, 7 App. Div. 11; 39 N. Y. Supp. 763.) Railroad fares, hotel bills, the fees of associate counsel, and the ex-

penses of dictation, etc., cannot be allowed, for the statute does not authorize them to be charged upon the estate. Such expenses, if payable at all, can be charged only against the property of the infant. (Ib.; Matter of Farmers' Loan & Trust Co., 49 App. Div. 1; 63 N. Y. Supp. 227.) Where the estate of the infant is not taxable under the transfer tax, no allowance can be made to his special guardian. (Matter of Post, 5 App. Div. 113; 38 N. Y. Supp. 977.)

⁴⁰ Schell v. Hewitt, 1 Dem. 249; Matter of Bull, *supra*. And see § 112, *ante*. On a settlement of an executor's accounts, an allowance to the guardian is proper, and must be fixed before entry of decree: it cannot be changed on appeal. (Matter of Marshall, 19 St. Rep. 156.)

⁴¹ Matter of Mondorf, 110 N. Y. 450; Matter of Willett, 6 Dem. 435; 17 St. Rep. 776.

of the court, be personally charged with proponent's costs.⁴² Whether costs awarded in a probate proceeding should be charged personally against the unsuccessful contestants or out of the estate of the decedent, rests in the sound discretion of the surrogate, and the rule is that a defeated contestant should be charged with costs where his resistance has been wanton or malicious or clearly unfounded, but not where a resistance is based upon what, from his standpoint, may have seemed proper and necessary in the interests of justice, and for the due protection of his rights.⁴³ If the contest is successful, it is usual to award costs to the contestant, though not as a matter of right.⁴⁴ Several parties interested in contesting the probate have a right to employ separate counsel to protect their several interests, and it is discretionary with the surrogate, as in other courts, to grant costs to the several contestants.⁴⁵

§ 1113. Contested application for, or revocation of, letters.— On a contest over a grant of letters of administration, the court has discretion to grant or to withhold costs. Where there is a fair justification for the contest, costs out of the estate may be granted to the unsuccessful contestant;⁴⁶ or where there is want of good faith he may be charged personally with the costs.⁴⁷ So, where

⁴² *Matter of Whelan*, 6 Dem. 425; *Matter of Seagrist*, 1 App. Div. 615; 37 N. Y. Supp. 496; *Matter of Lowman*, 1 Misc. 43; 22 N. Y. Supp. 1055.

⁴³ *Matter of Henry*, 5 Dem. 272. In *Matter of Tacke* (1 Connolly, 119), the contest of a will was instituted and carried on without any reasonable grounds by the contestant, instigated by one G., whose son appeared as attorney for the contestant in the proceeding but took no active part therein, the proceeding being really conducted by G., who was not a lawyer, and had great influence over his young and inexperienced son, the nominal attorney. The contestant was charged with the maximum amount of costs and taxable disbursements of the contest.

⁴⁴ *Matter of Munter*, 19 Misc. 201; 44 N. Y. Supp. 605. See *Matter of Bogart*, 46 App. Div. 240; 61 N. Y. Supp. 671. But where objections were filed without any intent to protect any interest of the contestant, but merely to cause annoyance to the proponent, and the will would have been refused probate without any contest, no costs will be allowed the contestant. (*Mat-*

ter of Kivlin's Will, 37 Misc. 187; 74 N. Y. Supp. 937.)

⁴⁵ *Collyer v. Collyer*, 4 Dem. 53. See *Hauselt v. Vilmar*, 76 N. Y. 630. The former statute, which authorized the surrogate to award costs "to the party in his judgment entitled thereto," did not prevent him from awarding costs to more than one party on a side. (*Noyes v. Children's Aid Society*, 70 N. Y. 481.) The object of the third subdivision of section 2558 is stated in the commissioner's note to be "to check the vastly increasing number of cases wherein wills are contested on slight grounds, the contestants relying, if the estate is large, upon procuring allowance for costs which will indemnify them against the expense of the litigation."

⁴⁶ *Matter of Page*, 107 N. Y. 266, 271.

⁴⁷ *Matter of Clark*, 15 N. Y. Supp. 370. The right of an estate to recover costs charged against a contestant of the right of administration is not lost by their payment out of the estate, by consent of all parties pending an appeal, and execution may issue there-

the reckless and careless conduct of a representative has made the institution of a proceeding for his removal imperative, he should be personally charged with the costs of that proceeding.⁴⁸ But an allowance of costs to both parties in such a proceeding is unwarranted.⁴⁹

§ 1114. **Costs of accounting proceeding.**—The granting of costs to an accounting party, where there is a contest, is discretionary both in respect to indemnity to him, and to charging the estate, or the accounting party personally.⁵⁰ Where a reference was rendered necessary by the failure of his attorney to explain to the special guardian, when so requested by him, items of the accounting, which were afterward found on the reference to be erroneous, and where the reference had been very much prolonged and delayed through the neglect of himself and his attorney, the entire cost of the proceeding will be charged upon the accounting party personally.⁵¹ On the other hand, where objections to an account are filed, not in good faith, the court will charge the costs of the accounting to the objectors personally, and the same will be collected by deducting the amount from their respective shares.⁵²

for, after affirmance. (Matter of Bartlett, 18 Week. Dig. 65.)

⁴⁸ Matter of Stanton, 1 Connoly, 108.

⁴⁹ Matter of Engelbrecht, 15 App. Div. 541; 44 N. Y. Supp. 551.

⁵⁰ Matter of Collamer, 5 St. Rep. 196.

⁵¹ Matter of Williams, 1 Connoly, 99. When executor personally charged with costs. See Ferris v. Disbrow, 22 Week. Dig. 330; Buckland v. Gallup, 40 Hun, 61; Ketchum v. Ketchum, 4 Cow. 87; Matter of Woodard, 13 St. Rep. 161; Matter of Matthewson, 8 App. Div. 8; 40 N. Y. Supp. 140; Matter of Gabriel, 44 App. Div. 623. Where there is a dispute as to whether a particular fund is assets, and decision is made in favor of distributees, the costs of the proceedings are chargeable against the administrator individually. (Matter of Mull, 16 St. Rep. 981; Matter of Manhardt, 17 App. Div. 1; 44 N. Y. Supp. 836.) An administrator is not personally chargeable with costs because he has been charged with interest on moneys held by him, where he has prepared his account in good faith. (Walker v. Dow, 6 Dem. 265.) On the settlement of an administrator's accounts, the administrators of decedent's wife, of whose estate decedent had been administrator, appearing for the purpose of de-

fending decedent's bond, are not entitled to costs out of decedent's estate (Matter of Reed, 12 St. Rep. 139); nor is the representative of a deceased surety entitled to costs upon the settlement of the accounts of the administrator of the principal. (Matter of Bailey, 47 Hun, 477.) The allowance of costs in favor of an administratrix, against the sureties on the bond of her co-administrator, whose misapplication of funds the sureties endeavored unsuccessfully to charge her with liability for,—*sustained*. (Matter of Adams, 51 App. Div. 619; 64 N. Y. Supp. 591; *affd.*, 166 N. Y. 623.) The costs of an accounting of an executor or trustee who has been removed or resigns should be borne by him and cannot be charged against the estate. (Matter of Bevier, 17 Misc. 486; 41 N. Y. Supp. 268.) Where an objection to accounts of executors of a deceased guardian was justified, the estate of the infant should not be charged with the costs of the proceeding. (Matter of Frank, 1 App. Div. 39; *sub nom.* Matter of Schneider, 36 N. Y. Supp. 972; *sub nom.* Matter of Metzger v. Schneider, 72 St. Rep. 75.)

⁵² Matter of Selling, 6 Dem. 428. The surrogate has no authority to

Where a disputed claim against the estate is submitted to the surrogate for determination, under section 1822, the allowance or disallowance of costs to the claimant is in the discretion of the surrogate; such discretion is to be exercised within the limits, as to amount, of section 2561, and he is to be controlled by the principles applicable to actions at law against estates.⁵³

§ 1115. Allowing counsel fees and expenses.— In addition to the surrogate's general power to award costs to a party, the Code provides that he "may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars for each day occupied in the trial, and necessarily occupied⁵⁴ in preparing his account for settlement, and otherwise preparing for the trial.⁵⁵ Costs and such *per diem* allowances for legal services as are necessary will be allowed,⁵⁶ but only to the accounting party, and can be properly made to such a party only in so far as the labor of preparation was demanded by the best interests of the estate concerned.⁵⁷ The authority given to the

grant additional allowances to legatees or remaindermen who, on the accounting, have not succeeded in surcharging the account or securing disallowance of items. (Matter of Wellington, 51 App. Div. 355; 64 N. Y. Supp. 1025.) Costs will be charged personally against the administrator of a life beneficiary of a trust fund, in possession thereof, who raised technical objections against the claims of the remaindermen. (Matter of Post, 30 Misc., 551; 64 N. Y. Supp. 369.)

⁵³ Matter of Ingraham, 35 Misc. 577; 72 N. Y. Supp. 62; Matter of Coonley, 38 Misc. 219.

⁵⁴ Occupied by whom. See Walton v. Howard, 1 Dem. 103.

⁵⁵ Co. Civ. Proc., § 2562, as amended 1881. See § 559, *ante*. See Brown's Accounting, 16 Abb. Pr. (N. S.) 457; Van Nest's Estate, 1 Tuck. 130; Valentine v. Valentine, 2 Barb. Ch. 430; Drake v. Price, 5 N. Y. 430; affg. 7 Barb. 388; Holley v. S. G., 4 Edw. 284. As to what is "a judicial settlement," see Matter of Miles, 5 Redf. 110. As to how far the court on appeal will reverse a decree which grants an allowance exceeding the limit in

section 3254, see Riggs v. Cragg, 26 Hun. 89.

⁵⁶ Matter of Halsey, 13 Abb. N. C. 253. A *per diem* allowance for time occupied in preparing for trial is only allowed in accounting proceedings. (Matter of Aaron, 5 Dem. 362.) This allowance is not intended to compensate him for his personal services, but simply to secure legal assistance. (Matter of Peyser, 5 Dem. 244.) Costs on an accounting can only be allowed where counsel is employed. Where the accounting party prepares his own account without counsel, although he is himself a lawyer, he is not entitled to costs. (Valentine's Estate, 9 Abb. N. C. 313.) An executor removing from the State without settling his accounts is not entitled to an allowance of his expenses upon returning to do so. (Matter of Nockin, 15 St. Rep. 731.)

⁵⁷ Matter of Weeks, 5 Dem. 194. In that case, two co-executors, who differed respecting matters appertaining to the execution of their trust, which might have been satisfactorily presented in one proceeding, filed separate accounts of their transactions,

surrogate to allow counsel fees and expenses upon rendering his decree, in no way limits his authority to allow as a credit in the account, a sum, in excess of the statutory limit, paid by the accounting party to his counsel for services in respect to his accounting, where it appears that services beyond the ordinary preparation of the account, or for trial, were rendered, and were necessary.⁵⁸

The allowance of costs, etc., should be to the party, and not to his counsel or attorney.⁵⁹ A *per diem* allowance for time occupied in preparing for trial is permissible only in accounting proceedings.⁶⁰ Such allowance is not intended to compensate the accounting party for his personal services in such preparation, but is to enable him to secure legal assistance and advice when needed for putting the account into proper form.⁶¹

§ 1116. Costs of decree, how and by whom payable.—“Except where special provision is otherwise made by law, costs, awarded by a decree, may be made payable by the party personally,⁶² or out of the estate, or fund, as justice requires; but costs, other than actual expenses, cannot be awarded to be paid out of an estate or fund which is less than one thousand dollars in amount or

each of which was contested and referred, with substantially the same results that would have been accomplished had the controversy arisen in respect of the account first filed;—Held, that neither executor nor any of the other parties could recover costs or counsel fees out of the estate in both proceedings. Where an executor has kept his accounts in such an irregular and disorderly manner that very many days are required in the preparation of his accounts for judicial settlement, in the hearing thereupon the surrogate will only allow him for his expenses in preparing such account upon the basis of the time which would have been required if his accounts had been kept in the proper manner. (Matter of Wilcox, 11 Civ. Proc. Rep. 115, 136.) To same effect, O'Reilly v. Meyer, 4 Dem. 161.

⁵⁸ Matter of Smith, 26 Abb. N. C. 56; 33 St. Rep. 929; 19 Civ. Proc. Rep. 302; 12 N. Y. Supp. 88. In Matter of Young (N. Y. Law J., Apr. 25, 1891), it appeared from the accounts, supported by vouchers, that the administrators had credited themselves with \$350, or \$175 in each case, for general services, including preparation

of the accounts. The surrogate allowed their disbursements on the accounting proceeding, but refused costs.

⁵⁹ Walton v. Howard, 1 Dem. 103; s. c. as Matter of Withers, 2 Civ. Proc. Rep. 162; McMahon v. Smith, 20 Misc. 305; 45 N. Y. Supp. 663; *revd.*, on other points, 24 App. Div. 25; Matter of Crane, 68 id. 355; 74 N. Y. Supp. 88; Matter of Welling, 51 App. Div. 355; 64 N. Y. Supp. 1025. The costs of an accounting by an executor, etc., have no place in the account *filed in that proceeding*, as they must first be fixed by the decree. Charges for counsel fees, paid on the accounting, should be separately stated and accompanied with an affidavit showing conformity to Co. Civ. Proc., § 2562. (Hayward v. Hewlett, 5 Redf. 330.)

⁶⁰ Matter of Aaron, 5 Dem. 362.

⁶¹ Matter of Peyser, 5 Dem. 244.

⁶² In Matter of Curry (47 St. Rep. 307; 19 N. Y. Supp. 728), the executor refused to pay costs out of the estate, as directed by a decree, admitting the will to probate;—Held, that the surrogate was justified in directing him to pay such costs out of the estate, together with costs of the motion, *personally*.

value."⁶³ The amount or value of an estate is not the balance left after payment of funeral expenses, debts, and expenses of administration, but the gross amount thereof, at the time of the owner's death, with any increase up to the time of accounting.⁶⁴ The surrogate has no power to direct a temporary administrator to pay costs, out of the estate, of a special proceeding for the probate of an alleged will.⁶⁵ The decree in such case should award costs and provide for their payment by the person to whom letters should thereafter be granted.⁶⁶

SUBDIVISION 2.

AMOUNT OF COSTS.

§ 1117. **Amount of costs of intermediate order.**—The amount of costs, where awarded by an intermediate order, are the same as upon a similar order made by the Supreme Court in an action;⁶⁷ *i. e., in general*, a sum fixed by the court, not exceeding ten dollars, besides necessary disbursements for printing and referee's fees, to each party to whom costs are awarded;⁶⁸ although it is provided that "upon a motion for a new trial, upon a case," in the Supreme Court, etc., in an action, the sums allowable are same as *upon an appeal* to the Appellate Division.⁶⁹

§ 1118. **Costs and disbursements awarded by decree.**—In all cases, except where a question of fact has been tried by a jury, and except costs of appeal, "the surrogate, upon rendering a decree, may, in his discretion, fix such a sum, to be allowed as costs, in addition to the disbursements, as he deems reasonable, not exceeding, where there has not been a contest,⁷⁰ twenty-five dollars, or where there has been a contest, seventy dollars; and, in

⁶³ Co. Civ. Proc., § 2557. See *Matter of Van Kleeck*, 2 Connolly, 14; 20 N. Y. Supp. 85.

⁶⁴ *Chalker v. Chalker*, 5 Redf. 480.

⁶⁵ *Matter of Aaron*, 5 Dem. 362; *McGovern v. McGovern*, 50 N. Y. Super. (J. & S.) 390. See *Duryea v. Mackey*, 151 N. Y. 204.

⁶⁶ The surrogate cannot order a temporary administrator to pay the costs allowed to the several parties by a decree awarding letters of administration. Such costs are not debts due to the creditors of decedent, nor expenses of the temporary administrator's trust, and while the offer and consent of all the parties, by their attorneys, to the payment thereof by him might protect

him (*Matter of Parish*, 29 Barb. 627), yet such consent would not justify such an order. (*Matter of Badger*, 3 L. Bul. 71, and cases cited.)

⁶⁷ Co. Civ. Proc., § 2556.

⁶⁸ See Co. Civ. Proc., § 3251, subd. 3, paragraph ninth.

⁶⁹ See Co. Civ. Proc., § 3251, subd. 3, paragraph eighth, and subd. 4. See also Co. Civ. Proc., § 2481, subd. 6, and §§ 2548, 2588. But see *id.*, § 2561.

⁷⁰ See *Matter of Ryland*, 25 Misc. 283; 55 N. Y. Supp. 433, as to what is a "contest." See *Matter of Horgarty*, 62 App. Div. 79; 70 N. Y. Supp. 839.

addition thereto, where a trial or hearing upon the merits before the surrogate necessarily occupies more than two days, ten dollars for each additional day; and where a motion for a new trial is made before the surrogate, if it is granted, seventy dollars; if it is denied, forty dollars."⁷¹ Costs, when awarded by a decree, include all disbursements of the party to whom they are awarded, which might be taxed in the Supreme Court.⁷² The sum allowed for costs must be fixed by the surrogate, and inserted in the decree.⁷³

⁷¹ Co. Civ. Proc., § 2561. See *Matter of Miles*, 5 Redf. 110. Section 2561 is equally applicable to a hearing before a referee appointed by the surrogate as to a hearing before the surrogate in person; but the section does not contemplate or empower any allowance for days on which an adjournment occurs without any actual hearing. (*Matter of Clark*, 21 Week. Dig. 563.) See *Matter of Collamer*, 5 St. Rep. 196. No greater sums than those specified in the statute can be allowed. (*Matter of Hitchier*, 25 Misc. 369; 55 N. Y. Supp. 642.)

⁷² *Matter of Bender*, 86 Hun. 570; 33 N. Y. Supp. 907; *Matter of Hitchler*, 25 Misc. 369; 55 N. Y. Supp. 642. For the taxable disbursements in the Supreme Court, see Co. Civ. Proc., § 3256. In *Matter of Hamer* (N. Y. Law J., June 10, 1891), the surrogate allowed the proponent \$1.50 for each party served with citation within the county of New York, it appearing from his affidavit that the maximum sum allowed by law to the sheriff would be reasonable. He also allowed for each party served outside of the county of New York and within the State of New York, the sum of \$1. and mileage from the courthouse of the county wherein the citation was served, as provided by section 3307 of the Code. As to taxing stenographer's fees by consent, see *Matter of Willett*, 6 Dem. 435; 17 St. Rep. 776, 780; *Matter of Maritch*, 29 Misc. 270; *Matter of Engelbrecht*, 15 App. Div. 541; 44 N. Y. Supp. 551. As to referee's fees, see *Matter of Hurd*, 6 Misc. 171; 26 N. Y. Supp. 893; *Matter of Santos*, 31 Misc. 76 (termination of reference under §§ 1019, 2546).

⁷³ Co. Civ. Proc., § 2559. The amount involved is to be considered in allowances, and counsel accepting retainers in litigations of small estates will be limited in their fees. (*Matter*

of *Jones*, 28 Misc. 599; 59 N. Y. Supp. 1020.) Where there has been a contest before the surrogate it is in his discretion to fix such a sum, not exceeding \$70, as he deems reasonable to be allowed as costs in addition to disbursements, and he may further allow the sum of \$10 for each day in excess of two spent on the trial, and the surrogate's order is conclusive on the question. (*Matter of Niles*, 34 St. Rep. 720; 12 N. Y. Supp. 157.) In New York county, the following rules are in force: "Whenever a party to a decree shall deem himself entitled to costs, the same will be considered and determined by the surrogate on two days' notice of adjustment, to be served upon the opposing party, with the items of costs and disbursements to which the party may deem himself entitled at the time of the settlement of the decree, which disbursements shall be duly verified, both as to their amount and necessity; and at the same time and on like notice, the surrogate will pass upon any additional allowance to be made to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account; which notice of adjustment and allowance shall be accompanied by an affidavit setting forth the number of days necessarily occupied in the trial or hearing, the number of days necessarily occupied in preparing an account for the settlement and in the preparation for trial, the time occupied on each day in the rendition of services, and their nature and extent in detail. In case such trial shall have been had before a referee, the time necessarily occupied in such trial before him may be shown by a certificate of such referee. The affidavit of disbursements, time engaged in trial and in preparing the account, and for trial, may be controverted by affidavit." (Rule XXII. Mar. 16, 1888.)

§ 1119. **Costs of appeal.**— The Code contains the following clause: "The costs of an appeal, where they are awarded in a Surrogate's Court, are the same as if they were awarded in the Supreme Court."⁷⁴ Although this provision is not altogether clear, yet, since the rule seems plainly to be that costs of an appeal are always awarded, if at all, by the appellate court, we construe the clause quoted as in effect declaring that where costs of an appeal from a decree or order, made in a special proceeding instituted in a Surrogate's Court, are awarded, the amount thereof is the same as if the special proceeding were one instituted in the Supreme Court. This construction is made clear by an amendment (1881) of section 3240, by which it is provided that costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.⁷⁵

"Wherever any person shall appear in support of the will propounded under section 2617 of the Code, such person shall not thereby become entitled to recover any costs on the probate of said will, unless it shall appear to the satisfaction of the surrogate that the interest of said parties was not sufficiently represented and prosecuted by the executor named in the will, and his counsel." (Rule VI, Mar. 16, 1888.)

⁷⁴ Co. Civ. Proc., § 2560.

⁷⁵ See *Matter of Simpson*, 26 Hun, 459; *Cole v. Terpenning*, 27 id. 111; *Schell v. Hewitt*, 1 Dem. 249. Infant respondents on an appeal, appearing by an attorney other than that of the adult respondents, are entitled, on an affirmance, to a separate bill of costs. (*Savage v. Gould*, 60 How. Pr. 255.)

CHAPTER XXIII.

PROBATE AND REVOCATION OF PROBATE OF HEIRSHIP.

TITLE FIRST.

PROBATE OF HEIRSHIP.

§ 1120. **In general.**— The difficulty which may attend the judicial determination of questions of heirship, including the ascertaining of who are entitled to succeed to an intestate's real estate, gave occasion to a statute¹ which provided means, by a proceeding before the surrogate, for obtaining presumptive evidence of the facts, as to the persons who constitute the heirs-at-law of a deceased person. The act has been revised in the Code, and amended in various particulars, chiefly by prohibiting a continuance of the proceedings, in case a contest arises, and by providing for a revocation or modification of the decree of probate. We are not aware that this mild remedy has been availed of, or received judicial construction.

§ 1121. **Of what estates heirship provable.**— The special proceeding may be instituted² with respect to the estate of a person, seized in fee of real property within the State, who dies intestate, or without having devised his real property to specific persons.³ “The word, ‘intestate,’ signifies a person who died without leaving a valid will; but where it is used with respect to particular property, it signifies a person who died without effectually disposing of that property by will, whether he left a will or not.”⁴

§ 1122. **Who may proceed, and before what court.**— The heirs of the decedent or any of them, or any person deriving title from or through such heirs or any of them, may apply to the Surrogate's

¹ L. 1873, c. 552; amended L. 1874, the heirs of testator. *Sed qu.*, if it should be to any other class, by its generic appellation.

² Co. Civ. Proc., § 2654.

³ As where a devise is, in terms, to ⁴ Co. Civ. Proc., § 2514, subd. 1.

Court who has acquired jurisdiction of the estate;⁵ or, if no Surrogate's Court has acquired such jurisdiction, then to the Surrogate's Court of the county where the real property, or any part thereof, is situated.⁶ The application must be made by "a written petition, duly verified; describing the real property; setting forth the facts upon which the jurisdiction of the court depends; and the interest or share of the petitioner, and of each other heir of the deceased, in the real property; and praying for a decree establishing the right of inheritance thereto, and that all the heirs⁷ of the decedent may be cited to attend the probate of that right."⁸ The citation must set forth the name of the decedent and of the petitioner; the interest or share which the petitioner claims; and a brief description of the real property.⁹ Any heir of the decedent, who has not been cited, may, nevertheless, appear at the hearing; and thereby make himself a party to the special proceeding. But this provision does not affect a right or interest of such a person, unless he becomes a party.¹⁰

§ 1123. Hearing; dismissal; evidence.—"Upon the return of the citation, the surrogate must hear the allegations and proofs of the parties. If it appears that there is a contest, respecting the heirship of a party, or respecting the share to which a party is entitled, as an heir of the decedent, the surrogate must dismiss the proceedings. If there is no such contest, he must inquire into the facts and circumstances of the case. The petitioner must establish, by satisfactory evidence,¹¹ the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question; the number of heirs entitled to inherit the property in question; the name, age, residence, and relationship to the decedent, of each; and the interest or share of each in the property."¹²

"The surrogate, where these facts are established, must make a decree, describing the property, and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree."¹³

⁵ Probably by a grant of letters, or by the institution of an application therefor. See Co. Civ. Proc., §§ 2475-2477.

⁶ Co. Civ. Proc., § 2654, as amended 1892.

⁷ See Co. Civ. Proc., § 2518; § 75 *et seq.*, *ante*.

⁸ Co. Civ. Proc., § 2654.

⁹ Co. Civ. Proc., §§ 2654, 2655.

¹⁰ Co. Civ. Proc., § 2655.

¹¹ Compare Co. Civ. Proc., § 2661, and §§ 185, 342, *ante*.

¹² Co. Civ. Proc., § 2656.

¹³ Co. Civ. Proc., § 2656.

§ 1124. **Effect of decree; recording of copy.**—An exemplified copy of the decree of probate, “and of the proofs taken *thereupon*,¹⁴ may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when the exemplifications are so recorded, the decree, or the record thereof, is presumptive evidence of the facts so declared to be established thereby.”¹⁵

TITLE SECOND.

REVOCATION OF PROBATE OF HEIRSHIP.

§ 1125. **Who may apply and when.**—In addition to the general provision, that a surrogate may open, vacate, modify, or set aside, or enter, as of a former time, a decree or order of his court; or grant a new trial or a new hearing for fraud, newly-discovered evidence, clerical error, or other sufficient cause, which powers are exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers,¹⁶ the Code contains special regulations as to setting aside, in whole or in part, a decree made in this proceeding. Any person other than a party to the special proceeding for probate, or the heir, devisee, or assignee of such a party, may make an application for the revocation or modification of the decree.¹⁷ The application for revocation, etc., may be made at any time within ten years after a decree establishing the right of inheritance is made, “to the court;” *i. e.*, the court which rendered the decree.¹⁸ The application must be made by a written petition, duly verified, showing that the petitioner “has a right, title, or interest in the real property, or a part thereof, which is injuriously affected by the decree; stating that the decree is erroneous in some material particular, specified therein, and praying that the decree may be set aside or modified in that particular, and that all the persons, whose heirship was established by the decree, may be cited to show cause why the prayer of the petition should not be granted.”¹⁹

§ 1126. **Requisites of petition, where heir has died or aliened.**—“If an heir has since died, or has conveyed the share or interest so established, by a deed duly recorded in the county, the petition

¹⁴ That is, upon the hearing.

¹⁵ Co. Civ. Proc., § 2657.

¹⁶ Co. Civ. Proc., § 2481, subd. 6.

¹⁷ Co. Civ. Proc., § 2658.

¹⁸ Co. Civ. Proc., § 2658.

¹⁹ Co. Civ. Proc., § 2658.

must state that fact; and must pray that the persons, who have succeeded to his interest, may be also cited.”²⁰

§ 1127. **Decree of revocation, etc.**— Where such a petition is presented, and it appears, upon the hearing, that, if the petitioner, or his ancestor, testator, or grantor, had been a party to the special proceeding for probate, the decree, or a part thereof, could not have been legally made, the surrogate must vacate or modify the decree accordingly. “An exemplified copy of the decree or order, so vacating or modifying the original decree, may be recorded in the office of any clerk or register, where a copy of the original decree was recorded.”²¹

²⁰ Co. Civ. Proc., § 2658.

²¹ Co. Civ. Proc., § 2659. There is no provision as to the effect of this decree, as evidence.

CHAPTER XXIV.

APPEALS.

TITLE FIRST.

APPEALS TO THE SUPREME COURT.

§ 1128. **Changes in practice effected by the Code.**—The commissioners who framed the Code left Surrogates' Courts in the category of courts not of record, and revised the laws, embodied in that act, on this theory; but the Legislature, in 1877, made these tribunals courts of records, leaving, however, most of the other pertinent provisions of the Code unchanged. Thus the General Rules of Practice are declared by the Code to be binding upon all courts of record, except the Court for the Trial of Impeachments and the Court of Appeals. Accordingly, the rules which took effect March 1, 1884, except so far as such a result would be inconsistent with statutes, govern these courts; and surrogates are expressly mentioned. The general chapter of the Code, concerning appeals, was originally declared¹ not to apply to appeals from a Surrogate's Court; and though that provision has been repealed,² it is believed that the principle still remains, inasmuch as a complete scheme for appeals, in the first instance, is contained in the eighteenth chapter of the Code;³ in which, however, certain sections of the first-mentioned chapter are made applicable by reference.⁴

§ 1129. **Appealable decree and orders.**—An appeal to the Supreme Court lies from: (1) Every decree⁵ of a Surrogate's Court, *i. e.*, every "*final* determination of the rights of the parties, to a special proceeding" in that court;⁶ and (2) every *order* affecting

¹ L. 1876, c. 449, § 5, subd. 9.

² L. 1880, c. 245, § 1, subd. 52. See Co. Civ. Proc., § 3347, subd. 9.

³ Tit. 2, art. 4.

⁴ Co. Civ. Proc., § 2575. As to practice on appeals from surrogates' decrees entered on or after September 1, 1880, in proceedings commenced before that day, see Co. Civ. Proc., § 3347.

subd. 11. See also *Matter of Gates*, 26 Hun, 179; *Mills v. Hoffman*, 92 N. Y. 181; *Matter of Sayre*, 20 St. Rep. 682.

⁵ Otherwise termed a "*final order*." (Co. Civ. Proc., § 2550.)

⁶ Co. Civ. Proc., §§ 2550, 2570. The docketing of a surrogate's decree does not make it a judgment of the Su-

a substantial right, made, before or after the decree in a special proceeding, by the surrogate, or by the Surrogate's Court;⁷ unless the decree or order was rendered or made upon the appellant's default.⁸ There can be no appeal from the mere decision of the surrogate upon which no formal order has been entered.⁹ An appeal taken from a decree brings up for review each intermediate order which is specified in the notice of appeal, which necessarily affected the decree, and which has not already been reviewed by the appellate court, upon a separate appeal taken from that order.¹⁰

§ 1130. Orders affecting a substantial right.—The Revised Statutes gave a right of appeal to the Supreme Court "from the orders, decrees, and sentences of surrogates in *all* cases;"¹¹ yet this language was, by judicial construction, subjected to certain limitations, which, it is believed, are, in the main, applicable to the provisions of the present Code, the design of which was, obviously, not to create any radical change in the rules governing the appealability of these determinations. The clause, "which affects a substantial right," introduced by the present Code, is conformable to the construction placed upon the former statute, under which it was held, notwithstanding the comprehensive language of the section cited, that it did not embrace orders not affecting a substantial right, or merely formal orders, or those depending on mere questions of discretion.¹² The same principle

preme Court, and it is still a subject of appeal, as a surrogate's decree. (*Davies v. Skidmore*, 5 Hill, 501.) Though a decree be unauthorized, and, therefore, erroneous, yet, if it purport to be final, it is a final decree for the purposes of appeal. (*Smith v. Van Kuren*, 2 Barb. Ch. 473.) A decree settling accounts which determines the principles upon which the account is adjusted is final, although it gives the representative leave to further account as to certain expenses incurred by him. (*Matter of Van Houten*, 18 App. Div. 301; 46 N. Y. Supp. 190.)

⁷ Co. Civ. Proc., § 2570.

⁸ Co. Civ. Proc., § 2568. There can be no appeal from an *ex parte* order on the ground of its irregularity. (*Skidmore v. Davies*, 10 Paige, 316.) The aggrieved party should move, on notice, to vacate an *ex parte* order, and appeal from the order of refusal. (*Matter of Johnson*, 27 Hun, 538.)

⁹ *Matter of Callahan*, 66 Hun, 118;

139 N. Y. 51. See *Potter v. Ogden*, 136 id. 384, 401.

¹⁰ Co. Civ. Proc., § 2571. The Court of Appeals cannot review a judgment of the General Term (Appellate Division) reversing upon the facts a decree of the surrogate admitting a will to probate, and directing a new trial, before a jury, of questions of fact, nor does an appeal from a subsequent judgment, after such new trial, bring up such order for review, under Co. Civ. Proc., §§ 1316, 1317, as it is not, within the meaning of these sections, either an interlocutory judgment or an intermediate order necessarily affecting the final judgment. (*Matter of Budlong*, 126 N. Y. 423; 38 St. Rep. 436.)

¹¹ 2 R. S. 609, § 104.

¹² Under the Revised Statutes, such orders as the following were held not appealable, as not affecting a substantial right, or as being purely discretionary: a refusal to entertain an

governs under the present Code. On the other hand, an order directing an administrator to render an account of the proceeds of sales of property claimed by him, individually, affects a substantial right, and is appealable;¹³ and so is a refusal to dismiss a proceeding for the examination of a person alleged to have property of the decedent's estate, where there was a defect of parties.¹⁴ An appeal now lies from the surrogate's finding of a sufficiency of assets to pay a judgment.¹⁵

Appeals to the Supreme Court, from orders resting in the surrogate's discretion, do not stand on the same footing as similar appeals from Special Term orders of the Supreme Court; except that in certain cases, where a matter is within the discretion of the surrogate, his action will be reviewed only to ascertain whether there has been an abuse of discretion or a violation of justice.¹⁶ Thus, whether a general guardian shall be appointed for an infant,

application for the appointment of a collector [special administrator] though a mandamus might lie to compel the surrogate to hear and determine the allegation on the merits (*McGregor v. Buel*, 24 N. Y. 169); an order merely directing that a petition for the removal of a guardian should be inquired into (*Skidmore v. Shaw*, 3 Ch. Sent. 54); a denial of an application for an order directing an executor to institute proceedings for the recovery of assets in a foreign jurisdiction, was held, under the circumstances of the case, discretionary, and not reviewable by the Court of Appeals, on an appeal from the judgment of the General Term affirming a decree of the surrogate settling the executor's account. (*Sherman v. Page*, 85 N. Y. 123.) The discretion conferred upon the surrogate, by 2 R. S. 67, § 62, to require payment, to an appellant succeeding in impeaching the validity or execution of a will, by the adverse party, of the costs and expenses of the proceedings (reserving the question whether the payment should be made personally, or out of the estate), was held not reviewable in any other court. (*Marvin v. Marvin*, No. 1, 11 Abb. Pr. [N. S.] 97.) But, as to costs in a final order, see *Lain v. Lain*, 10 Paige, 191; *Willcox v. Smith*, 26 Barb. 316. An objection that the surrogate had no power, under the statute, to make an arbitrary allowance to counsel (*Devin v. Patchin*, 26 N. Y. 441; *Seaman v. Whitehead*,

78 id. 306), or to an unsuccessful party (*Noyes v. Children's Aid Society*, 10 Hun. 289; *affd.*, 70 N. Y. 481), may be taken by appeal. The Court of Appeals will not review a General Term decision, that the surrogate's award of costs was discretionary. (*Ib.*) The General Term cannot review the discretionary order of the surrogate charging the executor personally with costs. (*Matter of Selleck*, 111 N. Y. 284.) Compare *Matter of Vandervoort*, 33 St. Rep. 944; 19 Civ. Proc. Rep. 355.

¹³ *Fiester v. Shepard*, 26 Hun. 183; *affd.*, 92 N. Y. 251; *Matter of Gilbert*, 39 Hun. 61; *affd.*, 104 N. Y. 200. As to whether an order of a surrogate requiring an administrator to render an intermediate account is appealable, see *Matter of Hurlburt*, 43 Hun. 311.

¹⁴ *Matter of Slingerland*, 36 Hun. 575.

¹⁵ Co. Civ. Proc., § 2552.

¹⁶ *Matter of Adler*, 60 Hun. 481; 39 St. Rep. 462; *Matter of Hyde*, 47 St. Rep. 208; 19 N. Y. Supp. 742. While the opening of a decree, for fraud or newly-discovered evidence, is discretionary, the exercise of that discretion is reviewable. (*Matter of Tilden*, 56 App. Div. 277; 67 N. Y. Supp. 879.) But not an order denying a motion to vacate an order punishing an executor, removed for contempt in failing to obey the final order removing him. (*Matter of Pye*, 23 App. Div. 206; 48 N. Y. Supp. 865.)

and whether he shall be selected out of the relatives of the infant, being matter of discretion, committed to the surrogate, is not reviewable.¹⁷ An order denying a motion for the simultaneous trial of different issues joined in a special proceeding, does not "affect a substantial right," and is not appealable; and an attempted appeal therefrom does not operate to stay the trial of such issue.¹⁸ A decree denying a motion to dismiss proceedings to revoke the probate of a will, which imposes no costs, is not appealable;¹⁹ nor is an order refusing leave to a person, having no interest in the estate, to intervene in a proceeding to compel the executor to pay a legacy;²⁰ nor an order appointing a referee to take evidence and report the same to the court;²¹ nor an order referring back an accounting to the referee, with directions to proceed according

¹⁷ Matter of Vandewater, 115 N. Y. 669; 26 St. Rep. 207; Matter of Welch, 74 N. Y. 299.

¹⁸ Henry v. Henry, 4 Dem. 253; s. c. in part as Matter of Henry, 3 How. Pr. (N. S.) 386; 9 Civ. Proc. Rep. 100. An order denying a motion for the issuance of a commission is appealable, but as the appeal is from an order denying an application, it has no practical operation as a stay and will not prevent a trial of the issues to which the desired testimony related. (Ib.) An order allowing contestant, on an accounting, to amplify his answer, specifying debts for which the executor is to be held liable, is not reviewable. (Matter of Burnett, 15 St. Rep. 116.)

¹⁹ Matter of Soule, 46 Hun. 661. An order denying a motion to dismiss a petition is not a final adjudication and is not appealable. (Matter of Phalen, 51 Hun. 208; 21 St. Rep. 34.) But an order amending the petition and directing the issuance of a supplemental citation is appealable, if the effect of the order was to deprive the person brought in of a Statute of Limitations which had run in his favor. (Ib.) An order dismissing, conditionally, proceedings for the probate of a will, affects a substantial right and is appealable. (Matter of Buckley, 2 St. Rep. 673.) But an order dismissing a *motion to set aside a citation* requiring administrators to show cause why the letters of administration issued to them should not be revoked, made before the citation was served, does not affect a substantial right, and is, therefore, not appealable. (Matter of

Westurn, 5 App. Div. 595; 39 N. Y. Supp. 429.) So, too, an order refusing to strike out of the record the name of a person. (Matter of Nottingham, 88 Hun. 443; 34 N. Y. Supp. 404.) Likewise, an order refusing to resettle a former order. (Matter of Sondheim, 69 App. Div. 5; 74 N. Y. Supp. 510.) In the Nottingham case (*supra*) it was said that where a surrogate improperly refuses to proceed and decree distribution, the remedy is by mandamus, and not by appeal.

²⁰ Matter of Halsey, 93 N. Y. 48. But an order granting the application of one claiming to be a legatee, for an accounting by the executor, who contested his interest, affects a substantial right, and is appealable. (Fiester v. Shepard, 26 Hun. 183.)

²¹ Matter of Pearsall, 21 St. Rep. 305. Compare *Moffatt v. Moffatt*, 3 How. Pr. (N. S.) 156. An order directing examination of witness, notwithstanding allegation that witness is mentally unsound, is not appealable (Matter of Hutchings, 40 St. Rep. 916; 16 N. Y. Supp. 36); nor is an order directing an attorney, having custody of estate's funds, to deposit same, pending adjustment of his claim against the estate. (Matter of De Oraindi, 31 St. Rep. 744; 9 N. Y. Supp. 873.) An order directing executors to account, and to deposit bonds with a trust company named, or show cause why such deposit should not be made, is, as to the latter clause, merely an order to show cause and not appealable. (Matter of Kreischer, 30 App. Div. 313; 51 N. Y. Supp. 802.)

to the original order of reference, and making no final disposition of the matter.²²

§ 1131. **Who may appeal.**— Any party aggrieved may appeal, in the first instance, to the Supreme Court,²³ from a decree or an order, except where the decree or order of which he complains was rendered or made upon his default,²⁴ or where he has complied with some condition imposed upon him thereby.²⁵ The requirement that appellant must be an *aggrieved* party, supercedes a ruling, under the former statute, that any of the parties to a proceeding for the probate of a will and codicils, who, though

²² Matter of Jost, 46 St. Rep. 129; 19 N. Y. Supp. 48. "When the referee has reported under this direction and his report has been confirmed or set aside and a final order made thereon, there will be a proper subject of review; the matter at present is simply under investigation." (Ib.) An order granting a commission to take testimony, will not be interfered with on appeal, except where it appears to have been illegal or arbitrary. (Matter of Plumb, 64 Hun. 317; 46 St. Rep. 362; 135 N. Y. 661.) An appeal lies from an order adjudging an applicant for letters of administration incompetent, by reason of impropriety (McMahon v. Harrison, 6 N. Y. 443); from a decision in proceedings for the sale of real estate for debts, adjudging certain claims to be valid and subsisting demands against the deceased and his estate (Owens v. Bloomer, 14 Hun. 296); and from an order in such proceedings, vacating the sale on the ground that the price obtained was insufficient, and ordering a resale (Delaplaine v. Lawrence, 10 Paige, 602); though it has been doubted whether the appellate court, in such a case, would review the weight of evidence as to the insufficiency of price. (Delaplaine v. Lawrence, 3 N. Y. 301.)

²³ Co. Civ. Proc., § 2570. An attorney, asserting a lien for services, cannot appeal, as he is not a party in interest. (Matter of Evans, 33 Misc. 671; 68 N. Y. Supp. 937.)

²⁴ Co. Civ. Proc., § 2568. In Matter of Hodgman (69 Hun. 484; affd., 140 N. Y. 421), it was held, that on a legatee's appeal from a decree, on a judicial settlement, which disallowed his claim for interest, he was not entitled to a review of such provisions of the

decree as affected only other parties to the proceeding, he being in no way aggrieved thereby. It was held, even under the Revised Statutes, that a person who had no interest in the estate, or whose interest had ceased on the birth of a posthumous child who is entitled to the estate, could not prosecute an appeal (Reid v. Vanderheyden, 5 Cow. 719); nor could a husband, by virtue of his wife being the next of kin, appeal, in his own name alone, from a decree affirming the probate of a will. (Foster v. Foster, 7 Paige, 48.) Where an executor, committed to jail by a surrogate for disobedience of a final decree directing him to make certain payments to different parties named, was discharged from imprisonment on *habeas corpus*, and the General Term, on a writ of *certiorari*, affirmed the discharge:— Held, that one of the parties named in the surrogate's order, as entitled to a certain payment, but who was not the relator in the writ of *certiorari*, could not appeal to the Court of Appeals from the General Term order. (Watson v. Nelson, 69 N. Y. 536.) Formerly, appeals in probate cases, including proceedings to revoke probate on allegations, and proceedings for construction of wills, could be maintained only by a devisee or legatee named in the will, or by an heir-at-law of, or next of kin to, the testator. (2 R. S. 66, § 55; L. 1870, c. 359, § 11.) See Alston v. Jones, 10 Paige, 98; Mason v. Jones, 2 Bradf. 325. But compare Williams v. Fitch, 15 Barb. 654.

²⁵ Thus, where executors give a bond pursuant to a decree revoking their letters unless they do so, they cannot appeal. (Matter of O'Brien, 145 N. Y. 379; 64 St. Rep. 829.)

the will were established, would take nothing by the codicils, and whose interests were, therefore, unaffected, whether the decision of the surrogate in reference to the codicils were affirmed or rejected, might, nevertheless, appeal from the decision admitting the codicils to probate,²⁶ or even from a decree admitting a will to probate, notwithstanding he may have been the petitioner for probate.²⁷ Under the present statute, only persons who have an *interest in the controversy*, which has been injuriously affected by the decision below, may appeal therefrom.²⁸ A special guardian does not become *functus officio* by the rendition of the decree, and may, therefore, prosecute an appeal.²⁹ But where a representative, upon an accounting, has brought in all persons interested, he has no further duty in their behalf and may not appeal from the decree, save so much thereof as affects his own rights.³⁰

§ 1132. Appeals by a person not a party.—It was always the rule that, in probate cases at least, the right of appeal did not depend upon the appellant having been a party to the proceeding in the Surrogate's Court. The fact of his being named in the will entitled him to appeal from a decree refusing probate.³¹ This principle has been incorporated in the Code, applicable to all classes of appealable decrees and orders, which provides that any "creditor of, or person interested in, the estate or fund affected by the decree or order, who was not a party to the special proceeding, but was entitled by law to be heard therein, upon his application; or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired; may intervene and appeal."³²

²⁶ Delafield v. Parish, 42 Barb. 274; 25 N. Y. 9; 1 Redf. 1. An executor may appeal from a judgment of the surrogate refusing probate to a codicil. (Matter of Stapleton, 71 App. Div. 1; 75 N. Y. Supp. 657.)

²⁷ Vandemark v. Vandemark, 26 Barb. 416.

²⁸ Bryant v. Thompson, 128 N. Y. 426. One to whom an executor has assigned his commissions, before they were ascertained and liquidated, has no interest which will entitle him to move to vacate a decree refusing commissions to such executor, or to appeal from an order denying such motion. (Matter of Worthington, 141 N. Y. 9; 35 N. E. 929.)

²⁹ Matter of Stewart, 23 App. Div. 17; 48 N. Y. Supp. 999.

³⁰ Matter of Hodgman, 140 N. Y. 421; Matter of Coe, 55 App. Div. 270; 66 N. Y. Supp. 784; Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

³¹ Lewis v. Jones, 50 Barb. 645.

³² Co. Civ. Proc., § 2569. "The facts, which entitle such person to appeal, must be shown by an affidavit, which must be filed, and a copy thereof served with the notice of appeal." (Ib.) See Delaplaine v. Lawrence, 10 Paige, 602; Reid v. Vanderheyden, 5 Cow. 719; Sherman's Appeal, 16 Abb. Pr. 397, note; Lewis v. Jones, 50 Barb. 645; Pruyn v. Brinkerhoff, 7 Abb. Pr. (N. S.) 400; Marvin v. Marvin, 11 id. 97; Gilman v. Gilman, 1 Redf. 354; 35 Barb. 591. Under the old practice, it was improper for separate appeals

§ 1133. **Necessary and proper parties to appeal.**—“Each party to the special proceeding in the Surrogate’s Court, and each person not a party, who has, or claims to have, in the subject-matter of the decree or order, a right or interest, which is directly affected thereby, and which appears upon the face of the papers presented in the Surrogate’s Court, or has become manifest in the course of the proceedings taken therein, must be made a party to the appeal.³³ A person not a party, but who is a necessary party, may be brought in by an order of the appellate court, made after the appeal is taken; or the appeal may be dismissed on account of his absence; and the appellate court may prescribe the mode of bringing in such a person, by publication, by personal service, or otherwise.³⁴

§ 1134. **Infants as parties.**—Formerly, where an infant or other incompetent was a party to an appeal, it was necessary to procure the appointment of a guardian *ad litem* by the appellate court, notwithstanding the surrogate had appointed a special guardian for the infant in the proceeding below; but under the present system, such new appointment is not necessary, and the special

to be taken by several parties in interest whose rights are identical. But one appeal, in which all the interested parties are named, was allowed. (Brockway v. Jewett, 16 Barb. 590.) If, however, one of the respondents wishes to raise a question between himself and a co-respondent, he should appeal separately. (Ross v. Ross, 6 Hun. 80.) An interested person may apply to be made a party respondent to the appeal, although his time to appeal has expired. (Cox v. Schermerhorn, 12 Hun. 411.)

³³ Co. Civ. Proc., § 2573.

³⁴ Co. Civ. Proc., § 2573. “But this section does not require a person interested, but not a party, to be brought in, if he was legally represented, or was duly cited in the court below.” (Ib.) The surrogate cannot make an order for the intervention of new parties, pending an appeal. (Matter of Dunn, 1 Dem. 294.) On an appeal from an order denying an application to revoke probate, the administrator is a necessary party; although he was not notified to attend and oppose the application before the surrogate. (Matter of Thompson, 11 Paige, 453.) An affirmance or reversal of a decree can only be made upon a duly certi-

fied record, and *probably* upon a compliance with section 2573, as to the proper parties on the appeal. Hence, an appeal arranged between counsel, and not containing the certified record, will be dismissed. (Matter of Hall, 27 St. Rep. 133.) Under the old practice, the counsel who, under an order of the surrogate, was to receive money from a decedent’s estate to be applied to a specific purpose, was held to be a proper party to an appeal from such order. (Gilman v. Gilman, 3 Hun. 22.) For the former practice in regard to dismissing appeal for a defect of parties, see Gardner v. Gardner, 5 Paige, 170; Foster v. Tyler, 7 id. 48; Gilchrist v. Rea, 9 id. 65; Jauncey v. Rutherford, id. 272; Gilman v. Gilman, 1 Redf. 354; Willecox v. Smith, 26 Barb. 316; Brown v. Evans, 34 id. 594; Suffern v. Lawrence, 4 How. Pr. 129; Patterson v. Hamilton, 26 Hun. 665. Where the surrogate had made allowances to the counsel of parties contesting the probate of a will, it was held, that they might be made parties to an appeal from the order, as their interest in the allowance was personal, and could not be discharged by payment to their clients. (Peck v. Peck, 23 Hun. 312.)

guardian appointed by the surrogate may be made a party to the appeal, instead of the infant. If no special guardian was appointed below, application should be made for the appointment of a guardian by the appellate court.³⁵

§ 1135. Designation of the parties and the proceeding.—The party or person appealing is designated the appellant, and the adverse party the respondent.³⁶ After the appeal is taken, the name of the appellate court must be substituted for that of the court below, in the title of the special proceeding, and the name of the county may be omitted; otherwise, the title is not to be changed, in consequence of the appeal.³⁷

§ 1136. Abatement and revivor of appeal.—Where the adverse party has died since the making of the determination appealed from, or where such determination was made after his death (if permitted by law), an appeal may be taken, as if he were living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent.³⁸ Where either party to an appeal dies before the appeal is heard, if an order, substituting another person in his place, is not made, within three months after his death, the appellate court may, in its discretion, make an order requiring all persons interested in the decedent's estate, to show cause before it, why the determination appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires.³⁹ The order must specify a day, when cause is to be shown, which must be not less than six months after making the order, and must designate the mode of giving notice to the person interested; and upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the determination appealed

³⁵ As to appeal, by an infant, from an order appointing his guardian, see *Underhill v. Dennis*, 9 Paige, 203; *Kellinger v. Roe*, 7 id. 362. The relatives of the infant, who opposed the appointment, are not necessary parties. (*Chaffee v. Baptist Miss. Con.*, 10 Paige, 85.)

³⁶ Co. Civ. Proc., §§ 1295, 2575.

³⁷ Co. Civ. Proc., § 1295.

³⁸ Co. Civ. Proc., §§ 1297, 2575. In such a case, an undertaking required to perfect the appeal, or to stay the

execution of the determination appealed from, must recite the fact of the adverse party's death; and the undertaking inures, after substitution, to the benefit of the person substituted. (*Ib.*)

³⁹ Co. Civ. Proc., §§ 1298, 2575. The former section also contains a retrospective clause, relating to deaths occurring before its passage; as to which the section should itself be consulted.

from, or dismiss the appeal, or make such further order in the premises as justice requires.⁴⁰

§ 1137. **Limitation of time to appeal.**— The Code abrogates the former varied rules⁴¹ respecting the time for taking an appeal from the different adjudications in a Surrogate's Court by providing that an appeal by a party must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the Surrogate's Court, of a copy of the decree or order from which the appeal is taken, and a written notice of the entry thereof. An appeal by a person who was not a party must be taken within three months after the entry of the decree or order, unless the appellant's title was acquired by means of an assignment or conveyance from a party; in which case, the appeal must be taken within the time limited for appeals by the assignor or grantor.⁴² An omission to take an appeal in time is fatal; no court or judge can grant relief.⁴³ The proceedings, in such a case, will be dismissed upon motion, which must be made to the appellate court,⁴⁴ and the party cannot obtain relief indirectly, by a motion.⁴⁵

§ 1138. **Enlarging time, curing defects, etc.**— Formerly, the court had not power to cure any defect in the proceeding, such as allowing a bond for costs to be filed *nunc pro tunc*;⁴⁶ but it is now provided that where the appellant has, seasonably, and in good faith, served his notice of appeal, either upon the clerk or

⁴⁰ Co. Civ. Proc., §§ 1298, 2575. An application for an order of substitution must be made to the appellate court; and where personal service of notice of application for an order has been made, within the State, upon the proper representative of the decedent, an order of substitution may be made upon the application of the surviving party. (Co. Civ. Proc., §§ 1299, 2575.)

⁴¹ The time was computed from the entry, and not the service of the order (Bay v. Van Rensselaer, 1 Paige, 422; Robertson v. McGeoch, 11 id. 640); and the court had not power to enlarge the time. (Bronson v. Ward, 3 Paige, 189; Stone v. Morgan, 10 id. 615.)

⁴² Co. Civ. Proc., § 2572; Matter of Kavanagh, 29 St. Rep. 215; 10 N. Y. Supp. 899; Matter of Dingman, 66 App. Div. 228; 72 N. Y. Supp. 694 (appeal by State comptroller in transfer tax proceeding). Under the Re-

vised Statutes, the time was: 1. Six months after entry, to appeal from an order appointing, removing, or refusing to remove a guardian. (2 R. S. 153, § 18.) 2. Three months after entry, to appeal from a decree granting or refusing probate (2 R. S. 66, § 55); from a decree revoking or confirming probate on allegations filed (2 R. S. 62, § 35); from a decree finally settling the accounts of executors, etc. (2 R. S. 610, § 105; id. 95, § 67; id. 152, § 113; L. 1866, c. 115; Bronson v. Ward, 3 Paige, 189; Guild v. Peek, 11 id. 475.) 3. Thirty days after entry of the order or decree in all other cases.

⁴³ Co. Civ. Proc., § 784; Stone v. Morgan, 10 Paige, 615.

⁴⁴ Hynes v. McCreery, 2 Dem. 158.

⁴⁵ Marsh v. Avery, 81 N. Y. 29; La-velle v. Skelly, 24 Hun, 642.

⁴⁶ Spotts v. Dumesnil, 12 Abb. Pr. (N. S.) 117, note; Marvin v. Marvin, 11 id. 97.

upon the adverse party, or his attorney, but has omitted, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, or to stay the execution of the determination appealed from, the appellate court may, upon proof, by affidavit, of the facts, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.⁴⁷ Not only "the appellate court," but the Surrogate's Court, has jurisdiction to allow an appellant, who has seasonably served notice of appeal, to file and serve an undertaking on appeal, when he has, through mistake or inadvertence, omitted to do so within the proper time.⁴⁸

§ 1139. Notice of appeal and its service.— The appeal is effected by a notice of appeal served within the State upon each party to the special proceeding who is made a respondent, and also upon the surrogate or clerk of the Surrogate's Court. When the respondent appeared in the proceeding below by attorney, the notice may be served either upon the attorney or upon the party personally.⁴⁹ If he appeared below in person, it must be served upon him personally. If he did not appear below, though cited, it must also be served upon him personally, if, with due diligence, he can be found within the county; otherwise it may be served by depositing it, indorsed with a direction to the party, with the surrogate, or the clerk of the Surrogate's Court. Where a person to be served cannot, with due diligence, be found, to make personal service upon him, the surrogate, or a justice of the Supreme Court, may, by order, prescribe such mode of service as he thinks proper; and service in that mode has the same effect as personal service.⁵⁰

§ 1140. Security on appeal.— The appeal is perfected by the service of the notice of appeal, and (except as hereinafter men-

⁴⁷ Co. Civ. Proc., §§ 1303, 2575. See *Ellsworth v. Fulton*, 24 How. Pr. 20; *Morris v. Morange*, 26 id. 247. See General Rule 32, as to power of surrogate to enlarge time, etc.

⁴⁸ *Matter of Darragh*, 1 Connolly, 170; 19 St. Rep. 207; *Matter of Witmark*, 15 id. 745; *Matter of Cluff*, 11 Civ. Proc. Rep. 338; 7 St. Rep. 753.

⁴⁹ Where a motion to compel acceptance of a notice of appeal, claimed to have been served too late, is granted, re-service by mail is sufficient. (*Matter of Williams*, 6 Misc. 512; 27 N. Y. Supp. 433.)

⁵⁰ Co. Civ. Proc., § 2574. Where the

notice of appeal and the undertaking on appeal were filed December 8th, but neither was served upon the proponent or the executor named in the will until December 12th, and in the meantime letters testamentary were issued to both executors.—Held, that the mere filing with the court of the notice, and the undertaking necessary to effectuate the appeal, did not stay the proceedings and prevent the issuance of the letters. Application for the appointment of a temporary administrator was, therefore, denied. (*Matter of Coles*, N. Y. Law J., Feb. 23, 1893.)

tioned) the filing of a proper undertaking in the surrogate's office (approved by the surrogate, or a judge of the appellate court), with at least two sureties, to the effect that the appellant will pay costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars.⁵¹

§ 1141. **Security to effect a stay.**—Certain decrees are designated in the statute, appeals from which do not stay the execution thereof, unless the appellant gives extraordinary security. Thus, to effect the stay of the execution of a decree directing an executor, administrator, testamentary trustee, guardian, or other person, to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property, the appellant must give an undertaking, with at least two sureties, in not less than twice the sum directed to be paid, deposited or distributed, "to the effect that, if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires, will deposit or distribute the money, or deliver the property, so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed."⁵² An executor or administrator must give the same kind of undertaking in order to stay the operation of an order granting leave to issue an execution against him, pursuant to section 1825 of the Code.⁵³ And in order to effect, by appeal, a stay of the exe-

⁵¹ Co. Civ. Proc., § 2577. An undertaking, which the appellant is required to give, or any other act which he is required to do, for the security of the respondent, may be waived by the written consent of the latter. (Co. Civ. Proc., §§ 1305, 2575.) See *id.*, §§ 810-816, for general regulations, as to the form, etc., of undertakings. After the filing and service of a sufficient notice of appeal, and of an undertaking to render the appeal effectual, the matter is removed from the jurisdiction of the Surrogate's Court, and proceedings predicated upon the insufficiency of an undertaking filed by the appellant must be initiated by the respondent in the appellate court. *Du Bois v. Brown*, 1 Dem. 317.) As to justification of sureties, in New York county, see Rule XVI. No undertaking is required by the public administrator of New York

county, either to perfect an appeal by him, or to stay execution thereon. (L. 1898, c. 230, § 24, subd. 15.)

⁵² Co. Civ. Proc., §§ 2578, 2580. For the former requirement, see 2 R. S. 116, § 21; *Mount v. Mitchell*, 31 N. Y. 356; *Davies v. Skidmore*, 5 Hill, 501; *Matter of Espie*, 3 Redf. 270.

⁵³ Co. Civ. Proc., §§ 2578, 2580. There is a difference of opinion whether, on appeals under section 2578, more than one undertaking is necessary for any purpose, that is, whether the undertaking designated in the section is sufficient both to perfect the appeal and also to effect a stay. Judge Rumsey, in his *Practice* (vol. 2, p. 754), expresses the opinion that "no security need be given to perfect the appeal in the cases mentioned by section 2578, because such appeals are specially excepted from the operation of section 2577." *Rollins, S., in Fernbacher v.*

cution of a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the Surrogate's Court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law, the appellant must give an undertaking with at least two sureties, in a sum therein specified, to the effect that if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance, or dismissal, surrender himself, in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.⁵⁴

§ 1142. Proceedings in other cases, when stayed.— Except in the cases above mentioned, a perfected appeal has the effect to stay all proceedings to enforce the decree or order appealed from, which a perfected appeal from a judgment in an action has, as prescribed in section 1310 of the Code.⁵⁵ But it is expressly pro-

Fernbacher (4 Dem. 227, 247), made the remark (*obiter*) that in cases provided for in sections 2578, 2579, the appeal is *perfected* by giving the special security, and thereupon proceedings are stayed by the operation of section 2584. In New York county, the surrogate has held, that *to perfect* an appeal in *any* case, including appeals from orders and decrees mentioned in section 2578, an undertaking for costs and damages must be given as required by section 2577. (Matter of Cluff, 7 St. Rep. 753; 11 Civ. Proc. Rep. 338; Matter of Witmark, 15 St. Rep. 745.)

⁵⁴ Co. Civ. Proc., § 2579. Upon a subsequent appeal to the Court of Appeals, an undertaking, under section 1326, is all that is necessary. (Matter of Pye, 21 App. Div. 266.) The Appellate Division may itself grant the stay. (Ib.) As to actions on undertaking, see §§ 1309, 2579, 2581. The rules of procedure in ordinary appeals, with reference to requiring a new undertaking, where the sureties become insolvent, etc., and permitting a deposit in lieu of an undertaking, govern appeals from surrogates' decrees. See Co. Civ. Proc., §§ 1306, 1308, 2575.

⁵⁵ Co. Civ. Proc., § 2584. See Sudlow v. Pinckney, 1 Dem. 158; Stern v.

Newberger, 15 Week. Dig. 133; Matter of Arkenburgh, 11 App. Div. 44. *It seems*, that, where an executor appeals individually from the decree, declaring void a legacy attempted to be given to him in the will of his testator, and directing him to distribute the amount among the next of kin, an undertaking filed by him in the sum of \$250, is sufficient, and an additional undertaking under sections 2578, 2580, is not required to stay execution. (Du Bois v. Brown, 1 Dem. 317.) Where one appeals from a decree, adjudging him entitled to a certain sum, on the ground that he is entitled to more, and excepts from the notice of appeal so much of the decree as is in his favor, the execution of the decree is not stayed, as respects the excepted portion. (Matter of Bullard, 4 Civ. Proc. Rep. 284.) In Matter of Kavanagh (29 St. Rep. 215), pending an appeal by one of the legatees from a decree declaring several legacies to be void, a decree for distribution was made, from which the appealing legatee also appealed, and gave an undertaking for \$250. Held, on a motion by one of the next of kin to enforce payment of his share, that the stay secured by the filing of this undertaking was intended only to prevent action by the executors, so far as may

vided that an appeal from a decree of the surrogate, admitting a will to probate, or granting letters testamentary, or of administration, or from an order or judgment of the Appellate Division of the Supreme Court affirming such decree, does not stay the issuing of letters, "where, in the opinion of the surrogate, manifested by an order, the preservation of the estate requires that the letters should issue. Letters so issued confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or satisfy a legacy, or to distribute the unbequeathed property of the decedent, until after the final determination of the appeal."⁵⁶ It seems to be plain enough, from this language, that an appeal from a decree granting letters will stay the issue of letters, *unless*, in the surrogate's opinion, the preservation of the estate requires the issue of letters.⁵⁷ In a proper case, therefore, he may make an order, reciting the necessity there is for an immediate grant of letters, and vacate the stay effected by the appeal. There is no similar provision in respect to an appeal from a decree revoking probate, or revoking letters testamentary, of administration, or of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or a freeholder appointed to execute a decree for the sale of real property, or appointing a temporary administrator, or an appraiser of personal property; such an appeal does not stay the execution of the decree or order appealed from.⁵⁸

be necessary for the protection of the interests of the appellant. The executors should set aside and retain a sum sufficient to provide for a possible reversal on appeal, and then proceed to carry out the directions of the decree, so far as the same will not be affected by the success of the appellant.

⁵⁶ Co. Civ. Proc., § 2582, as amended 1900. And in case letters shall have been issued before such appeal, the executor or administrator, on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities, and exceptions above provided. (Ib.) See Thomson v. Tracy, 60 N. Y. 174; Matter of Gihon, 48 App. Div. 598; Newhouse v. Gale, 1 Redf. 217. The authority of an administrator with the will of a decedent annexed is *ipso facto* sus-

pending by an appeal from the decree granting his letters, and so remains unless the surrogate by order confers upon him the limited powers in that section specified. (Matter of Place, 5 Dem. 228.)

⁵⁷ Application for the issue of letters to executors under a will contested but admitted to probate, pending an appeal from the decree,—*denied*, when the temporary administrator had given ample security, the securities of the estate were invested in permanent form, and there was no present requirement of a sale of any of them. (Matter of Gihon, 27 Misc. 626; 59 N. Y. Supp. 494.)

⁵⁸ Co. Civ. Proc., § 2583; Stout v. Betts, 74 Hun. 266; 26 N. Y. Supp. 809. An order directing an executor to file an official bond within twenty

§ 1143. **Making and settling a case and exceptions.**— We have already pointed out that, if a party wishes to appeal from a surrogate's decree, on the trial of an issue of fact, he must procure from the court such findings or refusals to find, as will present, through appropriate exceptions, the questions he desires to have reviewed.⁵⁹ In the absence of exceptions, the appellate court is powerless to reverse.⁶⁰ The appeal may be taken upon questions of law, or upon the facts, or upon both;⁶¹ as under the former practice.⁶² If the appeal is from a decree rendered upon a trial of an *issue of fact*, it must be heard on a case made and settled by the surrogate, as upon an appeal in an action.⁶³ This provision is merely declaratory of the power of the appellate court to review both the facts and the law on appeal from surrogate's decrees. It does not, even by inference, require an appellant desiring a review upon the facts to so specifically state in his notice of appeal.⁶⁴ The rule that in an *action* tried by a jury, a motion for a new trial is necessary to enable the appellate division to

days after service of a copy of the order, provided, in case of his failure so to do, as follows: "It is hereby ordered that the letters testamentary be revoked and annulled." The executor perfected an appeal from the order within the time specified; after the expiration of which, an application was made for an absolute decree of revocation. Held, that the application must be denied, on the ground that, either the order in question was itself a decree revoking letters, in which case a further decree was unnecessary,—or it was not such a decree, in which event it was not within section 2583, and the appeal operated as a stay. (*Halsey v. Halsey*, 3 Dem. 196.)

⁵⁹ In the absence of findings, separately stated, there is nothing to review. (*Matter of Widmayer*, 52 App. Div. 301; 65 N. Y. Supp. 83; *Matter of Damon*, 47 App. Div. 315; 61 N. Y. Supp. 997.) But where the referee states separately his findings, the surrogate who confirms the report need not do so. (*Matter of Bettman*, 65 App. Div. 229.)

⁶⁰ See § 114, *ante*, as to having findings found by surrogate or referee. As to the necessity of findings and exceptions, see, in addition to the cases there cited, *Matter of Sprague*, 125 N. Y. 732; *s. c.* more fully, 35 St. Rep. 450; *Matter of Peck*, 39 St. Rep.

234; 21 Civ. Proc. Rep. 85. Exceptions to a referee's report are a sufficient basis for an appeal, though none are filed to the surrogate's decision thereon. (*Matter of McAleenan*, 53 App. Div. 193; 65 N. Y. Supp. 907; *affd.*, 165 N. Y. 645; *Matter of Yetter*, 44 App. Div. 404; 61 N. Y. Supp. 175; *affd.*, 162 N. Y. 615.) An order based on affidavits, may be reviewed without exceptions. (*Matter of Scott*, 49 App. Div. 130; 62 N. Y. Supp. 1059.)

⁶¹ Co. Civ. Proc., § 2576.

⁶² *Howland v. Taylor*, 53 N. Y. 627.

⁶³ Co. Civ. Proc., § 2576. As to the necessity of a case made, see *Matter of Walrath*, 69 Hun, 403, and cases cited.

⁶⁴ *Matter of Stewart*, 135 N. Y. 413.

A notice that the appeal is "from the decree and each and every part thereof" is sufficient to authorize a review upon the facts. (*Ib.*) In *Burger v. Burger* (111 N. Y. 523; 20 St. Rep. 105), it was held, that if a notice of appeal from a decree admitting a will to probate, recites that it is upon the facts, as well as the law, it is sufficient to give the appellate court jurisdiction to review the facts; an exception to the surrogate's findings of fact is neither necessary nor proper. But where the appeal is also upon the law, only such questions of law can be considered as have been properly raised by objection.

review the facts, is based on reasons wholly inapplicable to the case of a trial before a surrogate: consequently no exceptions are necessary for the proper presentation of the question whether there should be a new trial before a jury.⁶⁵ Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law, and an exception may be taken to such a finding or ruling, or to a refusal to find or rule.⁶⁶ The General Rules of Practice 32 and 33 requires a case to be made and served within thirty days after service of a copy of the decree or order appealed from, but permit the surrogate to allow further time. Where the right of an appellant to serve a notice of appeal has expired by limitation, his time to make and serve a case on appeal will not be extended;⁶⁷ and the surrogate has no power to extend the time to serve a case on appeal, after the period within which such service must be made, under the General Rules of Practice, has expired.⁶⁸ On the other hand, if the time for perfecting the appeal by filing security has not expired, the surrogate may enlarge the time for making and serving a case.⁶⁹ The case is to

⁶⁵ *Burger v. Burger*, *supra*; *Matter of Stewart*, 135 N. Y. 413; *Matter of Patterson*, 40 St. Rep. 919; 16 N. Y. Supp. 146.

⁶⁶ Co. Civ. Proc., § 2545. In *Burger v. Burger* (*supra*), it was held that section 2545 has no relation to findings on controverted facts, or refusals to find facts not conclusively established. The court said: "The rule under the Code is, that an appeal on the facts from the decree of a surrogate admitting, or refusing to admit, a will to probate brings up for review in the Supreme Court the question of the sufficiency, weight, or preponderance of evidence, and the general merits of the decision; and that it is not necessary that any exception should have been taken to the findings of fact, or that there should have been any request for findings in order to give the General Term jurisdiction to review the facts, and reverse or affirm the decision of the surrogate thereon." Until settlement of a case, the surrogate cannot be required by the parties to a probate proceeding to pass upon proposed findings of fact and conclusions of law. (*Matter of Hoyt*, 5 Dem. 284.) When the case and exceptions are settled and filed, the clerk is required to certify them to the appellate court, together with the other papers and proceedings prescribed by sections 1344, 1353, 2585.

He should include all papers recited in the decree appealed from. (*Matter of Mullen*, N. Y. Law J., Feb. 7, 1890.) The clerk will not be required by mandamus to certify and return to the county clerk as part of the papers, on appeal from an order of the surrogate, a paper which the surrogate has stated was never brought to his attention until the case was presented for settlement, although such paper was upon file. (*Matter of Studwell*, 8 Civ. Proc. Rep. 414.)

⁶⁷ *Matter of Cluff*, 11 Civ. Proc. Rep. 338.

⁶⁸ *De Lamater v. Havens*, 5 Dem. 53.

⁶⁹ *Matter of Williams*, 6 Misc. 512; 27 N. Y. Supp. 433; *Tilby v. Tilby*, 3 Dem. 258; where it was held, that the provisions of section 2572, limiting the time for taking an appeal from a Surrogate's Court to thirty days from the time of service of a copy of the decree or order complained of, and of section 2577 declaring that, to render an appeal effectual for any purpose, the appellant must give an undertaking to the effect specified; and General Rules of Practice 32 and 33, requiring a case to be made and served within a specified period after service of a copy of the decree or order, but permitting the surrogate to allow further time, etc., are to be construed independently of each other.

be "settled by the surrogate as prescribed by law" (§ 2576); that is, where the trial is by a referee, *e. g.*, on a judicial settlement of accounts, the case is to be settled by the referee.⁷⁰

The correct practice on appeal from a decree or order, in which it is unnecessary to prepare and settle a case, is, for the parties to submit to the clerk of the court such a return as they deem themselves entitled to, whereupon the clerk will determine what papers he should certify to the appellate court.⁷¹

§ 1144. Principles of determination of surrogate appeals.—It has always been understood that appeals from surrogates' decrees were to be determined, not on the principles governing the determination of a common-law writ of error, but on those governing appeals under the old chancery practice.⁷² The distinguishing feature of an appeal in equity, as contrasted with a writ of error at law, was that the appeal was substantially a rehearing, on which the appellate court examined the whole case as fully as if it were brought before it in the first instance, and determined all the questions involved, whether of law or fact, without being in any way concluded by the decision of the court below. It followed that the appellate court would not reverse a decree merely because improper evidence was admitted by the surrogate,⁷³ or proper evidence was rejected by him,⁷⁴ if it appeared, on the one hand, that there was competent evidence sufficient to sustain it, or, on the other, that, after considering the rejected evidence, the decree was still sustainable on the facts shown. In other words, the appellate court might treat the appeal as if it were an original hearing, and must make such a decree as in its judgment ought to have been made in the first instance.⁷⁵ It is expressly

⁷⁰ See § 118, *ante*. If it is desired to amend or modify the testimony, it should be done before the report is confirmed. (Matter of Dietzel, 36 App. Div. 300; 55 N. Y. Supp. 323.)

⁷¹ Matter of Kavanagh, N. Y. Law J., Mar. 10, 1890. Upon what papers an appeal from an order, setting aside a report as to claim against decedent's estate, is to be heard, see Foote v. Valentine, 48 Hun. 475.

⁷² See Clapp v. Fullerton, 34 N. Y. 190.

⁷³ Schenck v. Dart, 22 N. Y. 420; Clapp v. Fullerton, 34 id. 190; Robinson v. Raynor, 28 id. 494; Matter of Paige, 62 Barb. 476; Brick v. Brick, 66 N. Y. 144.

⁷⁴ Horn v. Pullman, 72 N. Y. 269.

⁷⁵ Burger v. Burger, 111 N. Y. 523; 20 St. Rep. 195. Only those questions in which the appellant has an interest will be considered. (Matter of Allen, 81 Hun. 91; 30 N. Y. Supp. 683; *affd.*, 151 N. Y. 243.) The court will not determine, for the first time, a question of fact which was not examined and determined below, but was assumed for the purpose of the decision of other points; but if such question is material to the other questions raised on the appeal, the court may examine it, for the purpose of seeing what probability there is of the appellant's sustaining the point on a retrial. (Christy v. Clarke, 45 Barb. 529.) Compare Lee v. Lee, 39 id. 172; Dobke v. McClaran, 41 id. 491;

provided that a decree or order shall not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.⁷⁶ To justify a reversal under this provision, it must appear that, if competent evidence, which was rejected, had been received, the appellant's case would not have failed, or that, without improper evidence, which was received, the respondent's case was deficient.⁷⁷ Where the evidence is not returned, the facts found by the court or referee must be assumed to be justified by the proof.⁷⁸ An appeal from a decree or an order brings up for review, by each court to which the appeal is carried, each decision to which an exception was duly taken by the appellant.⁷⁹

§ 1145. Powers of Appellate Court.—Under the former practice, however, there was a distinction, as to the powers of the appellate court, between appeals in probate cases and other appeals. On appeals in probate cases, the General Term had only the powers of the Circuit judge when such appeals were taken to him,⁸⁰ that is, to affirm or reverse the surrogate's decree. It could not make such other decree as it thought the surrogate should have made. This distinction no longer exists;—the rule established by the Code being that which governs equity appeals generally. It is, therefore, provided, that "where an appeal is taken upon the facts, the appellate court⁸¹ has the same power to decide the ques-

Smith v. Remington, 42 id. 75; Moore v. Moore, 21 How. Pr. 211.

⁷⁶ Co. Civ. Proc., § 2545; Matter of Torkington, 79 Hun, 128; 61 St. Rep. 426; Matter of Degen, 89 Hun, 143; 34 N. Y. Supp. 1137; Matter of Seagrist, 1 App. Div. 615; 37 N. Y. Supp. 496; Matter of Miner, 146 N. Y. 121; 66 St. Rep. 265. An error in receiving in evidence declarations of the decedent in behalf of his estate, upon the trial of a claim against the estate, must have been necessarily prejudicial to the claimant, and will justify a reversal of the decree. (Matter of Bronson, 67 Hun, 237; 22 N. Y. Supp. 96.) See also Matter of Bedlow, 67 Hun, 408; 22 N. Y. Supp. 290; Matter of Mellen, 56 Hun, 553; 31 St. Rep. 770; 9 N. Y. Supp. 929; Matter of Williams, 46 St. Rep. 791; 19 N. Y. Supp. 778; Matter of Chamberlain, 46 St. Rep. 841; 19 N. Y. Supp. 1010; Matter of Potter, 161 N. Y. 84.

⁷⁷ Snyder v. Sherman, 88 N. Y. 656; affg. 23 Hun, 139. See Matter of

Smith, 96 N. Y. 661; Harper v. Harper, 1 Sup. Ct. (T. & C.) 351. Where the evidence, on a trial of an issue of fact by the surrogate, is so evenly balanced that a determination either way would not be reversed on appeal, it may not be said that the losing party is not prejudiced by admission of incompetent testimony, and the admission thereof is error requiring a reversal. (Matter of Eysaman, 113 N. Y. 62.)

⁷⁸ Wheelwright v. Rhoades, 28 Hun, 57.

⁷⁹ Co. Civ. Proc., § 2545, fifth sentence. This provision was not contained in the revision commissioners' original draft of this section. How it is to be reconciled with Co. Civ. Proc., § 1337, as construed in Matter of Ross, 87 N. Y. 514, *query*?

⁸⁰ 2 R. S. 608, § 95.

⁸¹ This means the Supreme Court only. (Matter of Ross, 87 N. Y. 514.) And see Davis v. Clark, id. 623. The rule laid down in Hewlett v. Elmer (103 N. Y. 156), that the Supreme

tions of fact which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee." ⁸² So, upon an appeal from a surrogate's decree opening, vacating, modifying, or setting aside a decree or order of his court, or granting a new trial for fraud, etc., the appellate court must review the determination as if an original application was made to it. ⁸³ It is also provided that "the appellate court may reverse, affirm, or modify the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing." ⁸⁴

Court has the power and it is its duty "to decide the questions of fact which were before the surrogate," was followed upon appeal, on the facts and on questions of law, from a decree upon an executor's accounting in *Matter of McGraw*, 45 Hun. 354. See also *Matter of Drake*, 45 App. Div. 206; 60 N. Y. Supp. 1020; *Matter of Brunor*, 21 App. Div. 259; *Matter of Laudy*, 148 N. Y. 403; *Matter of Pike*, 83 Hun. 327; 31 N. Y. Supp. 689; *Matter of Hamilton*, 76 Hun. 200; 27 N. Y. Supp. 813; *Matter of Warner*, 53 App. Div. 565; 65 N. Y. Supp. 1022; *Matter of Welling*, 51 App. Div. 355; 64 N. Y. Supp. 1025; *Matter of Rogers*, 10 App. Div. 593; 42 N. Y. Supp. 133.

⁸² Co. Civ. Proc., § 2586. The power conferred upon an appellate court to receive, in its discretion, further testimony or documentary evidence, and to appoint a referee, should be cautiously used. (*Matter of Hannah*, 45 Hun. 561.) Before the Revised Statutes, the Court of Chancery proceeded on appeals from the decrees of surrogates, according to the course of the civil law, and might hear new testimony and call to its aid the verdict of a jury upon disputed questions of fact (*Vanderheyden v. Reid*, 1 Hopk. Ch. 408; *Van Wyck v. Alley*, id. 552; *Scribner v. Williams*, 1 Paige, 550), and the same rule seems to have been in force under the Revised Statutes, and until the reorganization of the courts under the Constitution of 1846, and the adoption of the Code of Procedure. (*Williamson v. Williamson*, 6 Paige, 298; *Case v. Towle*, 8 id. 479.) It was then held, that the determination of the appeal must be made upon

the proofs contained in the surrogate's return; and the appellate court could not receive further evidence. (*Devin v. Patchin*, 26 N. Y. 441; *Abbey v. Christy*, 49 Barb. 276; *White v. Story*, 2 Hill, 543.) It might reverse either on the law or the facts. (*Marvin v. Marvin*, 3 Abb. Ct. App. Dec. 192; *Johnson v. Hicks*, 1 Lans. 150.)

⁸³ Co. Civ. Proc., § 2481, subd. 6. The power of the court is limited to the grounds stated. (*Matter of Hawley*, 100 N. Y. 206.) The inherent power of a court over its records to modify, amend, and vacate them, independent of special statutory authority, cannot be exercised by an appellate court. (*Ib.*) See *Howell v. Howell*, 30 Hun. 625; *Booth v. Kitchen*, 7 id. 255, 260. A decree on a judicial settlement, which followed a decision of the General Term in an action to construe the will, which held the widow entitled to have a mortgage on lands devised to her paid by the executors, which last decision was afterward reversed by the Court of Appeals, should be modified accordingly. (*Matter of Cahen*, 26 St. Rep. 860; s. c. without opinion, 117 N. Y. 626.)

⁸⁴ Co. Civ. Proc., § 2587. Where an executor appeals from a decree rendered upon the settlement of his account, which is objected to, each of the parties to the accounting, the respondents, though not appealing therefrom, are still at liberty, under this section, to specify any item in the account which they deem erroneous against them. (*Freeman v. Coit*, 27 Hun. 447.) See *Matter of Lawson*, 42 App. Div. 377; 59 N. Y. Supp. 152; *Matter of Mayer*, 84 Hun. 539; 32 N. Y. Supp. 850. See §§ 1293-1323 for the general

Where probate of a will is contested on the grounds of want of execution, and of undue influence, evidence being adduced to sustain the latter ground, and the surrogate rejects the instrument on the former without passing on the latter, the court, on appeal, cannot reverse the decree and direct the surrogate to admit the will: it should remit the proceedings to the surrogate, to be heard on the question of undue influence.⁸⁵ But in a case where the only issue presented by the record is as to the due execution of the will, on the testimony of the subscribing witnesses, between whom there was no contradiction, the question is simply one of legal inferences, and the appellate court may, on reversing a decree refusing probate, order the probate, without sending the case back to the surrogate.⁸⁶

In other than probate cases, the appellate court may now, as heretofore, upon a reversal or modification of the decree appealed from, remit the proceedings to the surrogate, with instructions to him to enter a decree, upon the principles settled by the decision on the appeal, or to take such further proceedings as may be necessary.⁸⁷ It may be stated, as a general rule, that the appellate court will not usually disturb the surrogate's decision as to the facts, where the evidence is evenly balanced and directly contradictory, and the question is merely one of credibility.⁸⁸ No par-

provisions relating to appeals and award of restitution.

⁸⁵ Dack v. Dack, 84 N. Y. 663.

⁸⁶ Matter of Wilcox, 131 N. Y. 610; 43 St. Rep. 191. It appearing, however, that there was an issue concerning an alleged alteration,—Held, that the General Term should have remitted the proceedings to the surrogate for the trial of that issue. (Ib.)

⁸⁷ Matter of Kellogg, 104 N. Y. 648; Gardner v. Gardner, 7 Paige, 112; Halsey v. Van Amringe, 6 id. 12; Matter of Forman, 1 Tuck. 205. If a portion of a decree be appealed from and reversed, the remainder stands, except so far as it is necessarily affected by the reversal. In such case, upon final accounting, the whole accounting is not opened, but the accounts, as settled by the surrogate, will be altered only *pro tanto*, to the extent necessary to carry out the decree of the surrogate, as modified by the decree above. (Morgan v. Andariese, 1 Bradf. 133.) Where, however, the appellate court proceeds, as it has power, beyond an affirmance or reversal, and adjudicates the cause, remitting it with direc-

tions to proceed in an accounting, upon the basis of facts established by that adjudication, the surrogate should deem the adjudication final and conclusive as to those facts, even against one who was not made a party to the appeal. (Clayton v. Wardell, 2 Bradf. 1.) Upon affirmance of an order granting leave to issue execution upon a judgment after the death of the judgment debtor, the successful party is entitled to enter and docket with the clerk of the surrogate's county a judgment of affirmance, establishing the surrogate's decree and awarding costs as for similar services in an action. Wadley v. Davis, 38 Hun. 186.) Where an order removing an executor upon one ground, is erroneous, but other sufficient grounds may exist, the order may be reversed without prejudice to the right to renew the application. (Matter of Pye, 18 App. Div. 309; 45 N. Y. Supp. 836.)

⁸⁸ Robinson v. Smith, 13 Abb. Pr. 359; Crolus v. Stark, 64 Barb. 112; Matter of Hunt, 110 N. Y. 278; Matter of Clark, 82 Hun,

ticular rule can be laid down as to how great a preponderance of evidence on the part of the appellant is necessary to secure a reversal on a question of fact, but it is said that the court will more readily reverse the decree of a surrogate on conflicting evidence, than it will set aside the verdict of a jury.⁸⁹ The court should consider only legal evidence in determining whether a decree should be reversed or affirmed.⁹⁰

§ 1146. **Awarding a jury trial.**— There are two classes of cases, in which a trial by jury may be had, of a question of fact arising in the course of a surrogate's proceedings, dependent upon two separate provisions of the Code. One class comprises jury trials, *in the first instance*, as a substitute for a hearing and decision by the surrogate alone; and the other includes jury trials occurring during the progress of an appeal from certain of his decrees, and after the appellate court has decided upon a reversal. The first provision of the Code, referred to, is that the surrogate may, in his discretion, make an order for such a trial of any controverted question of fact, arising in a special proceeding for the application of a decedent's real property to the payment of his debts.⁹¹ Such a trial can be reviewed, in the first instance, *only* upon a motion for a new trial; which may be granted by the surrogate, or the court in which the trial took place, or, if it took place at a trial term of the Supreme Court, by the Supreme Court, in a case where a new trial of specific questions of fact, tried by a jury, pursuant to an order for such a trial, made in an action, would be granted.⁹² An appeal which will lie to the Supreme Court, may be taken from an order, made upon the motion for a new trial, as if the order had been made in an action, and with like effect.⁹³

The other provision of the Code is to the effect that "where the reversal or modification of a decree by the appellate court is founded upon a question of fact, the appellate court must, if the appeal was taken from a decree made upon a petition to admit a will to probate, or, to revoke the probate of a will, make an order, directing a trial, by a jury, of the material questions of

341: 31 N. Y. Supp. 476; Coale v. Coale, 63 App. Div. 32; 71 N. Y. Supp. 214.

⁸⁹ Lake v. Ranney, 33 Barb. 49; Rollwagen v. Rollwagen, 3 Hun, 121; See Robinson v. Raynor, 28 N. Y. 494; Kyle v. Kyle, 67 id. 400, 409; Gilman v. Gilman, 3 Hun, 22. Where the will was not returned to the appellate court, every presumption was held to

be against the appellant. (Wallace v. Storry, 4 Hun, 791.)

⁹⁰ Matter of Kelemen, 57 Hun, 165; 32 St. Rep. 937.

⁹¹ Co. Civ. Proc., § 2547. And see *ante*, § 863.

⁹² Co. Civ. Proc., § 2548, as amended 1895. See *id.* § 999; Matter of Gannon, 2 Misc. 329; 21 N. Y. Supp. 960.

⁹³ Co. Civ. Proc., § 2549.

fact, arising upon the issues between the parties.”⁹⁴ The ordering of a jury trial, in case of a reversal, is a peremptory requirement, unless the case is one in which the court can properly take the facts from the jury and determine the question as one of law.⁹⁵ Where, however, there is no conflict in the facts and the matter is one of conclusions from the facts, a jury trial will not be awarded.⁹⁶ If there was no evidence below in behalf of the contestants, which, standing alone, was sufficient to defeat the probate, such failure of evidence is to be regarded as raising a question of law only, and on reversal of a decree revoking probate, the court will not send the case to a jury, but will confirm the original decree admitting the will.⁹⁷ So, the provision that “after the trial, a new trial may be granted as prescribed in section 2548” (*supra*), refers to cases in which a new trial may be granted, and not to the court before which an application therefor may be made. It gives no authority to the surrogate to grant a new trial.⁹⁸

⁹⁴ Co. Civ. Proc., § 2588. It may be doubted whether, since the enactment of section 2653a, an appeal in a probate case, except upon questions of law, is the advisable course to pursue. Such appeals are not to be encouraged. (Matter of Beek, 6 App. Div. 211; 39 N. Y. Supp. 810; *affd.*, 154 N. Y. 750; Matter of Austin, 35 App. Div. 278; 55 N. Y. Supp. 52.)

⁹⁵ Matter of Laudy, 148 N. Y. 403; 42 N. E. 1061; modifying 78 Hun, 479.

⁹⁶ Matter of Hunt, 110 N. Y. 278; explaining Matter of Martin, 98 id. 193; Sutton v. Ray, 72 id. 482. See Matter of Smith, 96 id. 661; Matter of Wilcox, 131 id. 610; Thompson v. Stevens, 62 id. 634. For recent cases, in which the appellate court awarded a jury trial, see Matter of Perego, 65 Hun, 478; 20 N. Y. Supp. 394; Van Orman v. Van Orman, 34 St. Rep. 824; 11 N. Y. Supp. 931; Matter of Mahoney, 38 St. Rep. 344; 14 N. Y. Supp. 335; Matter of Drake, 45 App. Div. 206; 60 N. Y. Supp. 1020; Matter of Tompkins, 69 App. Div. 474; 74 N. Y. Supp. 1002; Matter of Van Houten, 11 App. Div. 208; 42 N. Y. Supp. 919; Matter of Brunor, 21 App. Div. 259; Matter of Wells, 45 id. 626; 60 N. Y. Supp. 1100; Matter of Dixon, 42 App. Div. 481; 59 N. Y. Supp. 421; Matter of Gallup, 43 App. Div. 437; 60 N. Y. Supp. 137.

⁹⁷ Matter of Rapplee, 66 Hun, 558; *affd.*, 141 N. Y. 553; Matter of Martin, 98 id. 193. On a reversal, on the facts, of a decree granting or refusing probate, the court could not formerly direct the surrogate to enter a decree of probate, but was required to couple the order of reversal with a direction for a jury trial. See 2 R. S. 66, § 57; id. 609, § 98; Sutton v. Ray, 72 N. Y. 482; Tyler v. Gardiner, 35 N. Y. 559, 596; Howland v. Taylor, 53 id. 627. In the last-mentioned case, where the probate was contested on the question of the genuineness of the will, the Court of Appeals directed a jury trial. See also Kingsley v. Blanchard, 66 Barb. 317. See Matter of Laudy, 148 N. Y. 403.

⁹⁸ Matter of Patterson, 63 Hun, 529; 44 St. Rep. 842. Where the issues of a contested probate have been tried in the Supreme Court and a verdict rendered, the Special Term has no power to direct entry of judgment thereon, but the papers must be transmitted to the Surrogate's Court. (Matter of Laudy, 35 App. Div. 542; 55 N. Y. Supp. 98; Matter of Campbell, 48 Hun, 417.) Compare Matter of Budlong, 54 id. 131; 26 St. Rep. 863. See generally as to new trials, after a verdict, Marvin v. Marvin, 3 Abh. Ct. App. Dec. 192; McKinley v. Lamb,

TITLE SECOND.

APPEALS TO THE COURT OF APPEALS.

§ 1147. **When an appeal lies.**—An appeal, in surrogate causes, from the Supreme Court is to the Court of Appeals. The provision of section 2585 of the Code, requiring that on “appeal from a decree or an order of a Surrogate’s Court, * * * the judgment or an order made thereupon must be entered,” does not require the entry of a *judgment* before an appeal can be taken to the Court of Appeals from the decision of the Appellate Division; but an appeal from its order is proper.⁹⁹ The order appealed from must be a final one. Thus an order reversing a probate decree and directing a jury trial is not a final order which is appealable;¹ though a reversal for error of law remitting the proceedings back to the surrogate, or the granting of a new trial or a new hearing before the surrogate, is appealable to the Court of Appeals.² So an order reversing an order refusing an accounting, and remitting the proceedings to the surrogate for an accounting as petitioned for, is not a final order, and is not reviewable.³ But a decision of the Appellate Division, on appeal from a surrogate’s decree settling the accounts of an executor, is appealable, notwithstanding the remission of the cause to the Surrogate’s Court that he might conform the decree to their judgment.⁴ So, the appellate court’s reversal of a surrogate’s order denying a motion to vacate certain decrees made upon an accounting, and vacating such decrees, is the necessary termination of the proceeding and is reviewable in the Court of Appeals, in a case where the Appellate Division had no power to make the order by reason of the bar of the Statute of Limitations.⁵ But an affirmance of such an order is not reviewable⁶ as it is not one “finally determining” the proceeding.⁷

64 Barb. 199; Matter of Laudy, 14 App. Div. 160. The surrogate cannot make any order or decree other than that directed by the appellate court. (Matter of De Haas, 24 Misc. 258; 53 N. Y. Supp.) 565.)

⁹⁹ Libbey v. Mason, 112 N. Y. 525.

¹ Talbot v. Talbot, 23 N. Y. 17; Marvin v. Marvin, 3 Abb. Ct. App. Dec. 192; Sutton v. Ray, 72 id. 482, and cases *infra*.

² Talbot v. Talbot, *supra*.

³ Matter of Latz, 110 N. Y. 661; Roe v. Boyle, 81 id. 305; Whittlesey

v. Hoguet, 66 id. 358. Compare *Messerve v. Sutton*, 3 id. 546.

⁴ Stimson v. Vroman, 99 N. Y. 74; Matter of Prentice, 160 id. 568.

⁵ Matter of Tilden, 98 N. Y. 434; *s. c.* with opinion below, 1 How. Pr. (N. S.) 409. A surrogate’s order vacating satisfaction of a decree is final. (Matter of Regan, 167 N. Y. 338.)

⁶ Matter of Small, 158 N. Y. 128; 29 Civ. Proc. Rep. 57.

⁷ *Ib.*; Van Arsdale v. King, 155 N. Y. 325; City of Johnstown v. Wade, 157 id. 50.

§ 1148. **What questions reviewable.**— The jurisdiction of the Court of Appeals is limited to a review of questions of law only; hence where the Appellate Division has unanimously decided that there is evidence supporting, or tending to sustain, a finding of fact, there can be no review.⁸ So, too, a reversal of the surrogate's decree, where it is on the facts, and directing a jury trial, is not reviewable in the Court of Appeals.⁹ A reversal by the appellate court for error in the admission of evidence, is a reversal for error of law, and not for error of fact; hence, in such a case, a jury trial, in a probate matter, cannot be ordered, even if such trial can be ordered in any case by the Court of Appeals, as to which there is doubt.¹⁰ As the court's jurisdiction is limited to the review of questions of law, it will not entertain an appeal from an order denying a motion for a new trial, and to set aside the verdict of a jury in a probate case sent by the surrogate to a jury, for the purpose of determining whether the verdict was against the weight of evidence.¹¹ A question of fact depending upon conflicting testimony will not be entertained by the court,¹² but a finding of fact, unsupported by any evidence, is an error of law and may be reviewed.¹³ The provision of the Code (§ 2586) that, where an appeal is taken upon the facts, the *appellate court* has the same power to decide the questions of fact which the surrogate had, applies only to the Supreme Court.¹⁴ The evidence may be looked into only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the surrogate; if such evidence is found, the court is concluded by the finding.¹⁵ *Mere matters of discretion* are not reviewable.

⁸ Co. Civ. Proc., § 191, as amended 1895. See id., § 1337; *Matter of Rogers*, 153 N. Y. 316; *Matter of Hall*, 164 id. 196. For the rule prior to the amendment of section 191, see *Matter of Ross*, 87 N. Y. 514; *Marx v. McGlynn*, 88 id. 357; *Matter of Darrow*, 95 id. 668; *Matter of Higgins*, 94 id. 554; *Davis v. Clark*, 87 id. 623; *Kingsland v. Murray*, 133 id. 170; 44 St. Rep. 515; *Ackerman v. Ackerman*, 26 id. 666; *Matter of Flynn*, 49 id. 388; *Matter of Bolton*, 141 N. Y. 554.
⁹ *Burger v. Burger*, 111 N. Y. 523; *Matter of Thorne*, 162 id. 238; 56 N. E. 625.

¹⁰ *Matter of Smith*, 96 N. Y. 661. See *Howland v. Taylor*, 53 id. 627.

¹¹ *Matter of Bull*, 111 N. Y. 624.

¹² *Hewlett v. Elmer*, 103 N. Y. 156. In that case, it was held, that L. 1883, c. 229, amending Co. Civ. Proc., § 3347,

subd. 11, by providing that appeals to the Court of Appeals from an order or judgment affirming, reversing, or modifying an order, etc., of a Surrogate's Court, should be heard and decided in conformity with the laws and practice regulating such appeals and the hearing and decision thereof in force on April 30, 1877,—did not have the effect of giving the Court of Appeals jurisdiction to review a question of fact, depending upon conflicting evidence, upon appeal from a judgment of the Supreme Court affirming a decree of a surrogate.

¹³ *Matter of Rogers*, 153 N. Y. 316.

¹⁴ *Davis v. Clark*, 87 N. Y. 623. See § 1145, *ante*.

¹⁵ *Matter of Rogers*, 153 N. Y. 316; *Matter of Valentine*, 100 id. 607; *Matter of Cottrell*, 95 id. 329. Where the court entertains a reasonable doubt

Thus, the court will not review a decision of the Appellate Division affirming a decision of a surrogate punishing an executor for contempt in refusing to pay over a sum found due, upon the settlement of his accounts, where the only defense interposed consisted of allegations of insolvency and inability to pay, which rested upon conflicting evidence and were addressed to the discretion of the court below.¹⁶ So, too, an order of the surrogate requiring a life tenant to give security,¹⁷ or vacating a stay on probate;¹⁸ but an order denying a motion to vacate an order fixing appraiser's fees, affects a substantial right and is appealable.¹⁹

§ 1149. Proceedings after determination of appeal.—Where the proceedings are remitted to the surrogate by the Appellate Division, a certified copy of its order should be filed in the surrogate's office.²⁰ Where they are remitted by the Court of Appeals, judgment should be first entered on the remittitur in the Supreme Court, and a certified copy of the latter judgment filed in the surrogate's office.²¹ Under the Revised Statutes, when a decree in a probate case was affirmed or reversed on a question of law, the affirmance or reversal was required to be certified to the surrogate whose decision was appealed from, and the copies of papers were to be returned to him,²² and the surrogate was thereupon to direct the administration of the estate according to the will, if the court affirmed his decree admitting it to probate, or if otherwise, he was to annul and revoke the probate. If his decree refusing probate was affirmed, no further proceedings could be taken before him; but if it was reversed, he proceeded to take proof of the

as to the correctness of the surrogate's decree, where incompetent evidence has been received, a case is presented where the party excepting is necessarily prejudiced, and the error requires a reversal of the judgment. (*Matter of Smith*, 95 N. Y. 516.) See *Brick v. Brick*, 66 id. 144; *Schenck v. Dart*, 22 id. 420. On an appeal from an order reversing the decree of a surrogate, it will be assumed that the reversal was for errors of law where the order does not certify that it was based upon errors of fact. (*Matter of Haxtun*, 102 N. Y. 157; *Matter of Keefe*, 164 id. 352.)

¹⁶ *Matter of Snyder*, 103 N. Y. 178; *Cochrane v. Ingersoll*, 73 id. 613. The question of the allowance of costs of proceedings for the sale of a decedent's lands for debts is not brought up for review upon an appeal from the sur-

rogate's decree directing a sale. (*Matter of Lamberson*, 63 Barb. 297; *Matter of Laird*, 42 Hun. 136.) A question as to referee's fees is not properly brought before the Court of Appeals on an appeal from a determination of the General Term affirming a decree of the surrogate, rendered in proceedings in which a reference was had. (*Kearney v. McKeon*, 85 N. Y. 136.) See *Fredenburgh v. Biddlecom*, 85 id. 196; *Matter of Denion*, 137 id. 428; *Matter of O'Brien*, 145 id. 379.

¹⁷ *Hitchcock v. Peaslee*, 145 N. Y. 547; 65 St. Rep. 504.

¹⁸ *Matter of Baldwin*, 158 N. Y. 713.

¹⁹ *Matter of Harriot*, 145 N. Y. 540; 65 St. Rep. 528.

²⁰ Co. Civ. Proc., § 2585.

²¹ Co. Civ. Proc., § 194; *Wright v. Wright*, 3 Redf. 325.

²² 2 R. S. 609, §§ 97, 98.

will. In case the decree was reversed on a question of fact, and a jury trial had, as before mentioned, the final determination thereon was to be certified to the surrogate, and if the determination was in favor of the validity of the will, or of the sufficiency of the proof thereof, the surrogate was required to record the will, or admit it to probate, as the case might be.²³ If the determination was against the validity of the will, or against the competency of the proof thereof, the surrogate was required to annul and revoke the record of probate thereof, if any had been made. Although these provisions are included in the General Repealing Act of 1880, the practice prescribed is not out of harmony with the present system of procedure, and should be followed. Where, on affirmance of the decree, the proceedings are remitted to the surrogate, he has no power to open the decree, and grant a rehearing for alleged error of law.²⁴

²³ 2 R. S. 67, §§ 59, 60.

N. Y. Supp. 565; § 1146, note 98,

²⁴ Reed v. Reed, 52 N. Y. 651. See *ante*.
Matter of De Haas, 24 Misc. 258; 53

FORMS.

No. 1.

[*Ante*, § 11.]

Certificate of Disqualification of Surrogate.

[*Title of the proceeding.*]

I, O. T. C., hereby certify, that I am the surrogate of _____ county, N. Y., and that I am related by affinity [*or, consanguinity*] to one of the executors named in the will of the above-named deceased, and who is also one of the petitioners named in the within petition [*here specify facts of relationship*]; and, for the reason aforesaid, I have no jurisdiction in this matter.

WHEREFORE, pursuant to section 2485 of the Code of Civil Procedure, I hereby designate Hon. E. W., the surrogate of the adjoining county of _____, to act in my place in the said matter.

[*Date.*]

[*Signature.*]

No. 2.

[*Ante*, § 14.]

Establishing Authority of Another Officer to Act as Surrogate.

I. *Petition.*

To the [Supreme] Court of the State of New York:

The petition of R. Y. B., of the [town] of _____, in the county of _____ and State of New York, shows:

I. That C. H., late of the town of _____, in the county of _____, and State of New York, died on the _____ day of _____, leaving his last will and testament, by which your petitioner was appointed the executor thereof.

II. That your petitioner has presented a petition to the surrogate's court of the county of _____, asking that said will be proved and letters testamentary granted thereon. Your petitioner is informed and advised, that O. T. C., the surrogate of said county, cannot act as surrogate in the matter, for the reason, as appears by the certificate of said surrogate hereto annexed, that [*here state cause briefly.*]

WHEREFORE, your petitioner prays, that an order may be made by this court establishing these facts, and establishing the authority of the [*naming officer mentioned in Code, § 2484*], to act in the place of said surrogate, and declaring that he is empowered *to discharge the duties of the office of surrogate of said county [in relation to the matter of—*naming the proceeding, for instance, thus*:—the proving of the last will of C. H., of _____, deceased, and the granting of letters testamentary thereon, and in all things relating thereto, and in all things relating to the accounting and settlement

of said estate — *and if required, add,* — upon his giving security by a bond — *describing it and directing the filing.*

[Date.]

[Signature.]

[Verification.]

II. Order Establishing Authority of another Officer or Court to act as Surrogate.

[Title.]

On reading and filing the annexed¹ petition duly verified the day of , and the certificate of O. T. C., surrogate of the county of , dated the day of ; by which it appears to the satisfaction of this court that a proceeding has been instituted in said surrogate's court of the county of , for the probate of the will of C. H., deceased; that said O. T. C., surrogate, cannot act as surrogate in said matter for the reason that [*state cause briefly*], and on motion of H. L. D., attorney for the petitioner, it is ordered that [*naming officer mentioned in § 2484 of Code, or in New York county, say, the supreme court in and for the county of New York*], be and he [*or it*] is authorized and empowered to act in place of said surrogate and to discharge the duties of the office of the surrogate of said county of , in the matter of proving the last will and testament of C. H., deceased, and the granting of letters testamentary thereon, and all matters relating to the accounting and settlement of said estate — [*and if required, add,* — upon his giving a bond — *describing it and directing the filing*].

[Signature.]

III. Order Transferring a Probate Proceeding to Supreme Court.

[Ante, § 11.]

[Title.]

By virtue of the authority vested in this court and in the surrogate of this county, by § 2547 of the Code of Civil Procedure, it is hereby ORDERED that the above-entitled proceeding now pending in this court, being a special proceeding for the probate of a will, be and the same is hereby transferred to the supreme court in and for the county of New York.

[Signature],

Surrogate.

IV. Notice of Removal of Proceeding.

[Title.]

You are hereby notified that by virtue of the authority vested in the surrogate's court of this county, by § 2547 of Code of Civil Procedure, the surrogate, by an order filed on the day of , has transferred the above-entitled proceeding now pending in this court to the supreme court in and for the county of New York.

Yours, etc.,

[Signature],

Calendar Clerk.

V. Order Remitting Proceedings to Surrogate's Court.

[Title.]

This proceeding having been transferred to me [*or, to this court*] from the surrogate's court of the county of , by order of the supreme court dated the day of , for the reason that [*state reason briefly*], and it appearing to me that the reason for the exercise of the powers and jurisdiction of said surrogate's court has ceased to operate, now, pursuant to § 2491 of the Code of Civil Procedure, it is ordered that this proceeding be and the same is hereby transmitted back to the surrogate's court of the county of , for final disposition by him.

[Signature.]

¹ In New York county, the filing of the certificate is not necessary.

No. 3.

[Ante, § 72.]

Petition for Citation; General Form.

[Title.]

To the Surrogate's Court of the county of New York:

The petition of E. G., residing at _____ street, respectfully shows:

That your petitioner is, [stating in what relation the petitioner stood to the decedent, as thus:] a legatee named in the last will and testament of A. M., deceased, and as such is interested in the above-entitled proceeding.

That letters testamentary [or, of administration] on the estate of said deceased were granted by the surrogate of the county of New York to P. G. on the _____ day of _____,

That more than _____ has elapsed since his appointment, and the said P. G. has not [for instance, filed any account of his proceedings as such executor].

Your petitioner therefore prays that a citation may be issued requiring the said P. G. to appear in this court, and show cause why [stating relief sought, as thus:] he should not file and judicially settle his account as executor of A. M., deceased.

[Signature].

Petitioner.

[Verification.]

No. 4.

[Ante, § 73.]

Order for Citation.

At a Surrogate's Court [etc.].

[Title.]

On reading and filing the petition of E. G. [stating nature of the petition, as thus:] praying for a judicial settlement of the accounts of A. M., or executor, etc., of said deceased, it is ordered, that a citation issue to all persons interested in the estate of the said deceased, as creditors, legatees, next of kin, or otherwise [or, if the proceeding be for probate, say:], to the widow, devisees, legatees, heirs and next of kin of said deceased, mentioned in said petition, returnable the _____ day of _____, at _____ o'clock in the forenoon, and also that said citation contain a notice to said parties who are infants, to then and there show cause why a special guardian should not be appointed by the surrogate to appear for them and protect their interests in the above entitled proceeding.

_____, Surrogate.

No. 5.

[Ante, § 74.]

Citation.**I. General Form.**

THE PEOPLE OF THE STATE OF NEW YORK,

To John Doe and James Jackson [or, on accounting, to all persons interested in the estate of A. B., late of _____, deceased, as creditors, legatees, next of kin, or otherwise], send greeting:

You and each of you are hereby cited and required personally to be and appear before our surrogate of the county of New York, at the surrogate's court of said county, held at the county courthouse in the city of New York, on the _____ day of _____ [not more than four months after date], at half-past ten o'clock in the forenoon of that day, then and there [here state briefly the object for which the person is cited, e. g., to show cause why the letters of administration granted to you on the _____ day of _____]

, as administrators of the estate of A. B., deceased, should not be revoked — *or*, to attend the judicial settlement of the account of , as executor of the last will, etc., of A. B., deceased].

[Where infants are cited add: and such of you as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none to appear and apply for one to be appointed or in the event of your neglect or failure to do so a guardian will be appointed by the surrogate to represent and act for you in the proceeding.]

IN TESTIMONY WHEREOF we have caused the seal of our said surrogate's court to be hereunto affixed. Witness, Hon. , surrogate of said county, at the city of New York, the day of , in [Seal.] the year of our Lord, one thousand nine hundred and , Surrogate.
[or, Clerk to the Surrogate's Court].

II. Citation to Attend Probate.¹

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B., C. D., and E. F., the widow, heirs, and next of kin of G. H., deceased, send greeting:

Whereas, H. W., of the city of New York, has lately applied to our surrogate's court of the county of New York, to have a certain instrument, in writing, relating to both real and personal estate, duly proved as the last will and testament of G. H., late of the city of New York, deceased.

Therefore, you, and each of you, are hereby cited to appear before our said surrogate, at the county courthouse, in the city of New York, on the day of , at half-past ten o'clock in the forenoon of that day, then and there to attend the probate of the said last will and testament.

IN TESTIMONY WHEREOF [etc., as above].

No. 6.

[Ante, § 77.]

Additional Service of Citation on Infant or Incompetent.

I. Affidavit.

[Title and Venue.]

A. B., being duly sworn, says:

I. That he is [here state his relation to the infant, or to the cause, and what, if anything, has been done as to service upon him].

II. That the above-named party, Y. Z., is an infant of the age of [upwards of] fourteen years, residing with his mother, in the of [or, is an habitual drunkard, mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs — *or*, is an infant under the age of fourteen years — *or*, is judicially declared to be incompetent to manage his affairs, by reason of idiocy — and that affiant believes that the interest of , the person to whom a copy of the citation in the above-entitled special proceeding was delivered, in behalf of said Y. Z., is adverse to that of the said Y. Z. — *or state other unfitness, giving reasons*].

III. That no previous application for an order directing service of said citation on some third person in behalf of said infant [or, incompetent] has been made herein, to the best of affiant's knowledge, information, and belief.

[Jurat.]

[Signature.]

II. Order on Forgoing.

[Title.]

An application having been made by A. B., of , to the surrogate of county [here state object, e. g., to have a certain paper writing proved as the will of M. N., late of — *or*, the account of his proceedings as ex-

¹ See § 157, ante, as to persons to be cited.

executor of the will of M. N., late of _____, deceased, judicially settled], and it appearing by the petition [*or, affidavit*] of said A. B., upon which said application is based,* that Y. Z., one of the persons to be cited, is an infant of the age of fourteen years [*or, and the said surrogate having, in his opinion, reasonable grounds to believe that Y. Z., one of the persons to be cited, is an habitual drunkard—**or, mentally incapable adequately to protect his rights although not judicially declared to be such*]:

Now, on motion of L. M., attorney for said A. B. [*omit this, if on surrogate's motion*],

IT IS ORDERED,† that a copy of the citation issued on said application, be also delivered personally, in behalf of said Y. Z., to, and left with, N. O., residing in the city and county of New York [at least eight days before the return day of said citation], and that the service of said citation shall not be deemed complete until such delivery.

[*Where the infant is under fourteen, or the incompetent person has a committee, continue from the asterisk above, That Y. Z., one of the persons to be cited, is an infant under the age of fourteen years,—**or, has been judicially declared to be incompetent to manage his affairs by reason of lunacy—**or, idioey—**or, habitual drunkenness,—and it appearing, by the affidavit of A. B., that a copy of the citation, issued on said application, has been duly served on S. Z., the—mother—of said infant, with whom he resides,—**or, the committee of said lunatic—**or, idiot—**or, habitual drunkard,—and the said surrogate, having reasonable ground to believe that the interest of said S. Z. is adverse to that of said Y. Z.—**or, to believe that said S. Z. is not a fit person to protect the rights of said Y. Z.—for the reason that—indicating it briefly*].

IT IS ORDERED.—[*continue as above from † to the end; then there may be added:*]—And IT IS FURTHER ORDERED, that the said N. O. be and he hereby is appointed special guardian, to conduct the proceeding in behalf of said Y. Z., to the exclusion of the said committee, S. Z., and with the same powers, and subject to the same liabilities, as a committee of the property.

No. 7.

[*Ante, § 81.*]

Order for Service of Citation out of State, or by Publication.

[*Title.*]

A duly verified petition¹ having been presented to and filed in the surrogate's court in the county of New York, by A. B., the person designated as sole executor, in the will of M. N., late of the city of New York, deceased, praying for the probate of said will, and for the issuing of a citation to attend such probate, and for such further or other order in relation to the proof of said will or the service of said citation, as should be just and proper, and a citation having been issued thereon directed to the [husband], legatees, heirs and next of kin of the said decedent,* [*here state ground of order for publication, for instance, thus in case of absentee:*] and it being proved by said petition, to the satisfaction of the surrogate, that Y. Z., the father of said M. N., deceased, is an adult, and a resident of this State, but is temporarily absent in Europe [where his post-office address is care of O. P. & Co., Paris, France]; and that personal service of the citation herein cannot with due diligence be made upon him within this State.

[*Where the residence of a party cannot be ascertained*] And it appearing by said petition [*or, affidavit*], that the residence of W. Z. [formerly W. K.], wife of A. Z., who is one of the heirs and next of kin of said decedent M. N., and one of the parties to whom the said citation is directed, cannot, after diligent inquiry, be ascertained by the petitioner:²

¹ Separate petition for an order of publication is usually not necessary; but if the facts required by Code, §§ 2522 or 2523, do not appear in the petition for probate, they should be set forth in a further affidavit.

² It seems to be immaterial whether the party sought to be served without the State, upon this ground, is a resident of this State or not. See Co. Civ. Proc., § 2523, subd. 1.

[Where there are unknown heirs or next of kin] And it being proved, to the satisfaction of the surrogate, that there are other heirs and next of kin of said deceased, whose names and places of residence are unknown, and cannot with due diligence be ascertained:

Now, on motion of N. R., attorney for said petitioner A. B., it is hereby ORDERED,

That service of the above-mentioned citation, upon the said [naming parties], be made by publication thereof in two newspapers, to wit: in the¹ both published in the city of New York, once a week for six successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the person so cited, in person, without the State [and — where the person to be called is an infant under fourteen years — a copy thereof to the person with whom the said (the infant) is sojourning,² and in the case of a corporation — a copy thereof to naming some officer specified in §§ 431, 432 of the Code].

And it is further ordered and directed, that on or before the day of the first publication, the petitioner deposit in the post-office, at the city of New York, a copy of the citation and of this order, contained in a securely-closed post-paid wrapper, directed to the said Y. Z. at [or, if several are to be served, to the following persons, respectively, at the places designated below:— giving addresses in full].

[Where residence is unknown] And it is further ordered that service of the citation in the above-entitled matter upon [naming parties], whose places of residence are unknown, and cannot with due diligence be ascertained, be made by publication thereof in two newspapers, to wit: [naming them, as above], once a week for six successive weeks, which is the time the surrogate deems reasonable, or, at the option of the petitioner, by service of the citation and a copy of this order upon the persons so cited without the State.

[Where mailing is impracticable, add] And the said surrogate, being satisfied by said petition [or, affidavit], that the above-mentioned petitioner A. B. cannot, with reasonable diligence, ascertain a place or places where the said W. Z. would probably receive matter transmitted through the post-office, hereby dispenses with the deposit of any papers therein.

[Where gratuitous additional publication, in case estate is not over \$2,000, is desired, add] And it affirmatively appearing from said petition, that the property of the decedent M. N. does not exceed two thousand dollars in value, it is hereby further

ORDERED, that the publication of said citation, hereby required to be made in the , be made gratuitously, and the publishers of said are hereby ordered and directed to make such publication without charge.

, Surrogate.

No. 8.

Same; Shorter Form.

[Title.]

A citation having been duly issued in the above-entitled matter, and it appearing to my satisfaction by the verified petition of E. G., that [naming parties to be cited] are heirs-at-law and next of kin of said A. B., deceased, or are interested as legatees, etc., under his said will, and to be cited upon the probate of said last will and testament of said deceased, and are nonresidents of this State, residing as follows, to wit:

I do hereby order and direct that the service of citation herein upon said [naming parties] be made by publication thereof in two newspapers, to wit: , being two newspapers printed and published in the county of , once in each of six successive weeks, which is the time I deem reasonable; or, at the option of the said petitioner, by delivering a copy of the said citation, without the State, to the said [naming them] in person. And I do

¹The newspapers in which the above service is to be published are in the discretion of the surrogate, but should be those only as are published in the county where the persons sought to be served reside, unless there is only one paper in the county, when publication may be made in such paper in another county as the surrogate designates.

²The surrogate may designate a person to be served in behalf of infants and incompetents in certain cases. See Co. Civ. Proc., § 2527, and form 6, ante.

further order and direct, that on or before the day of the first publication, the petitioner herein deposit in the post-office, in the city of _____, [four] sets of copies of the said citation and of this order, each set contained in a securely-closed, post-paid wrapper, and directed as follows: [*giving addresses in full*].

[*Date.*]

_____, Surrogate.

No. 9.

[*Ante*, § 85.]

Proof of Service of Citation.¹

[*Title and Venue.*]

P. B., being duly sworn, says that he is _____ years of age, and that on the _____ day of _____, 18____, at No. 14 Wall street, in the city of New York, he served the annexed citation on W. B., one of the persons named in said citation, by delivering to and leaving with him, personally, a true copy thereof [*or, where the party served is a lunatic*, by delivering to the said W. B., a lunatic, personally, a copy of the annexed citation, and by also delivering a copy thereof to and leaving the same with E. F., personally, who has been duly appointed the committee of the person and estate of said W. B., heretofore judicially declared to be of unsound mind — *or where the party served is an infant*, by delivering a copy of the same to the said infant personally, and by also delivering a copy thereof to E. F., the father of the said infant, personally, and leaving the same with them].

[*Where admission of service is indorsed on the citation, attach an affidavit, as follows:*] J. M., of the town of Goshen, in the county of Orange, being duly sworn, says, that he is well acquainted with C. S., of the said town of Goshen, and with his manner and style of handwriting, having frequently seen him write; that he was present and saw the said C. S. sign the said waiver; and the signature purporting to be the signature of the said C. S., subscribed to the admission of service of the annexed citation, is the true and genuine signature of the said C. S.

[*Where citation was published.*]²

That on the _____ day of _____, 18____, the first day of the publication of the citation herein, he deposited in the [general] post-office in the city [*or, town*] of [New York,] a copy of the citation issued herein, and of the order directing the publication thereof, entered the 20th day of June, 18____, copies of which are hereto annexed, contained in a securely-closed and duly post-paid wrapper, directed to each of the persons hereinafter named, at the places and addresses below stated, to wit: [*setting forth names of persons contained in the order of publication.*]³

[*Jurat.*]

[*Signature.*]

No. 10.

[*Ante*, p. 85.]

Appearance by Attorney or General Guardian.

[*Title.*]

Take notice that I am retained by and appear for A. B., one of the next of kin and heirs-at-law of the said C. D., deceased [*or, for E. F., general guardian of A. B., an infant named in the citation herein*], and demand that all notices and papers herein be served on me at my address given below.

[*Date.*]

[*Signature and Address.*]

To [name of], Surrogate, and E. F., Attorney for C. D., proponent of the will.

¹In New York county, the original citation must be returned to the clerk of the court before one o'clock, p. m., on the day preceding the return day, with sworn proof of service, or admission of service, duly acknowledged.

²Where service by publication has been ordered, personal service of nonresident within this State is void. (*Matter of Porter*, 1 Delehanty, 489.)

³To the affidavit of mailing, should be annexed the proofs of publication.

II. *Waiver of Service of Citation.*

[Title.]

We, the undersigned, widow, heirs, and next of kin and legatees, etc., of M. N., deceased, do hereby appear in person and waive the issue and service of a citation in the matter of proving the last will and testament of the said M. N., deceased, and we do hereby consent that the same be admitted to probate forthwith.

[Signatures.]

[Authentication as of a deed.]

III. *Admission of Service of Citation.*

[Title.]

I, E. G., named in the annexed citation, being of full age, do hereby admit due and timely service of a copy of the said citation upon me in person on this day of , at , in the State of : and I do hereby appear in person in the matter of proving the last will and testament of said deceased, and consent that the same may proceed to a decree without notice to me of any further proceedings therein.

[Authentication as of a deed.]

No. 11.

[Ante, § 109.]

Appointment of Special Guardian.¹I. *Petition.*

[Title.]

To the Surrogate of the county of :

The petition of A. B. [etc.,] shows:

I. That your petitioner is an infant over fourteen years of age, and resides with his [father] in the city of , county of , and State of [state age and residence of each other infant joining in the petition], and that your petitioner has not [or, neither of your petitioners has] any general guardian in the State of New York [or, if there is a guardian, state the facts].

II. That your petitioner is a legatee named in the will of M. N., deceased [or, is one of the next of kin to M. N., deceased].

That the will of said M. N. has been duly admitted to probate by a decree of the surrogate's court of New York county, but a petition has been presented to obtain a revocation of the said probate of said will, and a copy of the citation issued thereon has been duly served upon your petitioner.

III. That, to protect and preserve the rights and interests of your petitioners under the said will, it is necessary that some proper person should be duly appointed the special guardian of your petitioners in the said proceedings.

WHEREFORE, your petitioners pray that N. R., counselor-at-law, of the [city of New York], may be appointed such special guardian, to protect the rights and interests of your petitioners.

[Date.]

[Signatures.]

[Verification.]

[Indorse or attach consent as follows:]

I, N. R. of , counselor-at-law, hereby consent to become the special guardian of A. B., an infant [heir, etc.] of M. N., deceased, for the sole purpose of appearing for him and protecting his interests in the matter of [the probate, or, revocation of probate of] the will of M. N., deceased [and I hereby state that I have no interest in the proceedings adverse to the said infant].

[Date.]

[Signature.]

[Authentication as of a deed.]

¹ If the infant is under the age of fourteen years the petition should be made by his parent or a person with whom he resides, or in a proper case, by any of the parties to the proceeding.

II. *Affidavit of Special Guardian.*{*Title.*}

N. R., being duly sworn, says that he resides at _____, in the city of New York. That he is perfectly able and competent to protect the rights and interests of _____, infant, in this proceeding; that he has no interests adverse to that of said infant, and is not connected in business with the attorneys or counsel for the proponent. That he is of sufficient ability to answer to said infant for any damage which may be sustained by reason of his negligence or misconduct in this proceeding and is worth over [five hundred dollars] over and above all his debts and liabilities and besides property exempt by law from levy and sale under an execution. That his property consists of [stating it].

[*Jurat.*][*Signature.*]III. *Affidavit of Person with whom Infant Resides.*¹{*Title.*}

C. F. B., being duly sworn, says that he is the father [or state what relation the affiant occupies with respect to the infant] of A. B., infant; that said infant resides with deponent at _____, in the city of New York; that deponent has knowledge of the application of said infant for the appointment of N. R. as his special guardian and approves of the same; that deponent has no interests adverse to that of said infant, and has not influenced him in his selection of said special guardian.

[*Jurat.*][*Signature.*]IV. *Order Appointing Special Guardian.*{*Title.*}

It appearing to my satisfaction by the verified petition herein [or, the affidavit of J. K.], that A. B., one of the heirs and next of kin of the said deceased, is an infant having no general guardian [or, having a general guardian, but that the interests of said guardian are adverse to those of said infant]; now on reading and filing the consent of N. R., counselor-at-law of _____, to become special guardian for the said infant, for the sole purpose of taking care of his interests in this matter: ORDERED, that the said N. R. be, and he hereby is, appointed the special guardian for the said A. B., to appear and protect his interests in this matter.

[Or, where the appointment is made on the surrogate's motion, omit the recital, and say, after title:] IT IS ORDERED, that N. R. be, and he is hereby, appointed the special guardian of A. B., an infant, for the sole purpose of appearing for and taking care of his [or, her — or, their] interest in the matter of proving the will of said deceased.²

[*Signature of*],

Surrogate.

No. 12.

[*Ante*, § 52.]

Subpœna from Surrogate's Court.

THE PEOPLE OF THE STATE OF NEW YORK,

To [names of witnesses], greeting:

WE COMMAND YOU, that, all and singular business and excuses being laid aside, you and each of you appear and attend before the surrogate of the county of [New York], at a surrogate's court to be held in and for the county of [New York], at the county courthouse in [the city of New York], on the _____ day of _____, at _____ o'clock in the _____ noon, to testify and give evidence in a certain special proceeding now pending in said court, entitled, In the Matter of [insert title].

¹ This affidavit is made necessary to the appointment of a special guardian on the infant's application in the county of New York by the rules of the surrogate's court in that county. Rule 10, and see *ante*, § 109, n.

² Where the guardian is appointed on the surrogate's motion, the consent of the guardian is indorsed on the order.

[If production of a book or paper is desired, add: And you are hereby required to bring with you, and then and there produce — *here describe book or paper.*]

And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all damages sustained thereby by the party aggrieved, and forfeit fifty dollars in addition thereto.

WITNESS, Hon. _____, surrogate of our said county, at the [city of New York], the _____ day of _____, one thousand nine hundred and _____.

[Signature of],

Clerk to the Surrogate's Court.

No. 13.

[Ante, § 125.]

Obtaining Examination of Infirm Witness.

I. Affidavit.

[Title and Venue.]

A. T., being duly sworn, says, that he is the attorney for the proponent [or otherwise] herein [or describe any other proceeding]: that C. D. is one of the subscribing witnesses [or, is a material and necessary witness in support — or, in opposition to — the petition herein]; that said C. D. is past seventy years of age, and is confined to his house, No. _____, street, in the city of _____, by age and infirmity [or, sickness], and is unable to attend before the surrogate, to be examined in this matter.

[Jurat.]

[Signature.]

II. Order for Examination.

[Title.]

It appearing to the satisfaction of the surrogate, and the surrogate having good reason to believe, that the testimony of C. D., of No. _____, street, in the city of _____, is material and necessary to prove the due execution of said will, and that said C. D. is aged and infirm, and that the witness cannot attend before the surrogate within a reasonable time:

Now, on motion of A. T., the attorney for A. B., the proponent of said will, It is ORDERED, that the said C. D. be examined before * me [or, N. R., Esq., counselor-at-law, who is hereby appointed referee for that purpose] at the residence of said C. D., No. _____, street, in the city of New York, on the _____ day of _____, or on an adjourned day to be fixed by me.

[Where witness resides in another county, continue from * above,] the Hon. _____, surrogate of the county of _____, on the _____ day of _____, or on an adjourned day to be fixed by him; and that a certified copy of this order be delivered to said surrogate, on or before the _____ day of _____.

It is FURTHER ORDERED, that a copy of this order, duly certified under the seal of this court, together with the original will of said _____, be delivered to _____, the proponent of said will, to be by him transmitted to the surrogate of _____ county, for use upon such examination.

[In any case add:] That five days' written notice be given personally to the attorney of [adverse and other interested parties] of such examination.

That all proceedings herein stand adjourned till the _____ day of _____, at _____ o'clock, _____ M.

III. Notice of Examination of Infirm Witness.

[Title.]

Please take notice, that the surrogate of _____ county will take, in this matter, the examination of C. D. [one of the subscribing witnesses to the will of M. N., late of _____, deceased], at the residence of said C. D., No. _____, street, in the city of _____, county of _____, on the _____ day of _____, at _____ o'clock in the _____ noon.

[Signature.]

To [names of those to whom notice is required].

Attorney [etc.].

IV. *Record of Examination.*[*Title.*]

Examination of C. D., a witness sworn and examined in the above-entitled special proceeding, before Hon. _____, surrogate of the county of _____, pursuant to an order of the surrogate of the county of _____, made on the _____ day of _____,

[*Venue.*]

The said C. D., being duly sworn and examined by _____, says [*state substance, or set forth question and answer.*]

[*Signature.*]V. *Certificate of Surrogate to Examination.*

I, _____, surrogate of the county of _____, hereby certify, that pursuant to the annexed order by Hon. _____, surrogate of the county of _____, directing that C. D., an aged and infirm witness, be examined before me on the _____ day of _____, I attended on said day, at No. _____ street, in the [city] of _____, the residence of said C. D. [*here state any adjournment or other proceeding*], and there took the foregoing examination of said witness, and that I reduced the examination to writing, as above, and the same was subscribed by said witness in my presence [*or state other authentication*].

IN TESTIMONY WHEREOF, I have hereunto set my hand, and have affixed the seal of my court, the _____ day of _____, in attestation thereof.

[SEAL.]

_____, Surrogate.

No. 14.

[*Ante*, § 124.]**Interrogatories under Commission to Take Testimony of Foreign Witness, on Probate.¹**[*Title of Proceeding.*]

INTERROGATORIES to be administered respectively to W. W. and O. P., of Paris, France, who are witnesses to be examined under the annexed commission, in support of the will in the above-entitled proceeding:

First interrogatory.—What is your name, age, and occupation, and where do you reside?

Second interrogatory.—Were you acquainted with M. N., late of the city of New York, deceased?

State for how long a time prior to her decease you had known the above-named M. N., now deceased?

Third interrogatory.—Look at the instrument in writing, bearing date the _____ day of _____, purporting to be, and offered for probate as, the last will and testament of the said M. N., deceased, and say whether or not you were present as a witness at the time of the execution of the same? Did you see the said M. N. subscribe her name to the said instrument, or did she make such subscription in your presence, or did she acknowledge or declare to you that the signature "M. N.," at the foot of said instrument, was her signature?

Fourth interrogatory.—Did the said M. N., at any time, declare the said instrument so subscribed by her to be her last will and testament? if so, state when she so declared it to be her last will and testament, and, to the best of your recollection, what words were used by her in making such declaration; also state at what place said instrument was executed?

Fifth interrogatory.—State if you were requested by said M. N., at the time of the above-mentioned subscription or declaration, to sign said instrument as subscribing witness, and if you did thereupon sign as such witness, and if either of the signatures of the witnesses to said instrument is your signature; and, if so, specify which one?

¹The commission is in the form and tested as commissions in an action. The affidavit may be adapted from Form 13, *ante*, *mutatis mutandis*.

Sixth interrogatory.—Who was present when the said instrument was declared by M. N. to be her last will and testament, and to whom was such last declaration made, in whose presence was it signed by her, and in whose presence were you requested to sign, and in whose presence did you sign, as witness?

Seventh interrogatory.—Did you see the other subscribing witness to the said instrument sign his name; and, if so, state his name, and if he signed the same in the presence of said M. N. and yourself; and if he signed the same, as witness, at the request of the said M. N., and if she declared to him that said instrument was her last will and testament?

Eighth interrogatory.—Was the said M. N. over [twenty-one] years of age at the time of executing such instrument; was the said M. N. of sound mind, memory, and understanding at the time of executing such instrument; was she, at such time, under any restraint whatsoever; and was she, in any respect, incompetent to [devise] real estate?

Ninth interrogatory.—Do you know of any other matter or thing relative to the execution of the said instrument by the said M. N., or to the condition of the mind of the said M. N., at the time of such execution? answer fully and particularly.

[Signature and address of attorney.]

Waiver of Cross-Interrogatories.

I, S. G., the special guardian of the infant H. I., interested in the probate of the last will and testament of M. N., deceased, do hereby approve of the foregoing interrogatories, and waive my right to send out cross-interrogatories.

[Signature of Special Guardian.]

The foregoing interrogatories are allowed.

[Date.]

[Signature of],
Surrogate.

No. 15.

[Ante, § 117.]

Order of Reference of Questions of Fact, etc.¹

At a Surrogate's Court, etc.

[Title.]

The petition of A. B., a surety in the official bond of C. D., general guardian of E. F., an infant, praying for the removal of said guardian, on the ground that he is incompetent to fulfill his trust, having been presented to the court, and a citation issued to said guardian having been duly returned, and said guardian having filed an answer denying the material allegations of such petition,

IT IS ORDERED, 1. That the said matter be referred to _____, who is hereby appointed referee, to take and report to the surrogate the evidence upon the facts as to the alleged incompetency.

2. That the hearing be had before said referee, at such time and place, in the city of _____, as he shall appoint; and that he report thereon with all convenient speed.

3. That, on the coming in of said report, notice is to be given to the parties that have appeared, of motion to be made before the surrogate on the question of confirming such report, or for such other or further order as may be proper.

[Or, instead of subs. 2 and 3, insert: 2. That the first hearing of this matter, before said referee, take place at his office, in the city of _____, on the _____ day of _____ next, at _____ o'clock in the _____ noon, and the said referee bring in his report herein before the surrogate, on the _____ day of _____ next, at _____ o'clock in the _____ noon; which last-mentioned day is

¹ For Forms relating to Exceptions, Surrogates' Decisions, Requests to Find, etc., see Abb. New Forms, Nos. 503-513, 532, 533.

hereby appointed for the hearing of the parties hereto at the surrogate's office in said city, on the confirmation of the report of said referee, without further notice.]

[Signature of],
Surrogate.

[Same, on consent.]

[Title.]

Upon the consent of the attorneys for the respective parties to this proceeding,

IT IS ORDERED, by the said surrogate, that the evidence herein, on both sides of the case, be taken before , as referee, hereby appointed for that purpose, but upon the condition that all questions of law relating to the admission or exclusion of testimony shall be reserved for decision by the surrogate as they shall arise; that either party shall have the right to require the examination or cross-examination of any witness to be had in the presence of the surrogate; and that either party shall be at liberty, at any time, to apply to the surrogate, on notice, for a modification or rescission of this order.

[Signature of],
Surrogate.

No. 16.

[Ante, § 152.]

Petition for Proof of Will.

[Title.]

To the Surrogate's Court of the county of New York.

The Petition of T. G. S. respectfully shows:

I. That A. R., late of the city of New York, departed this life on the day of , leaving a last will and testament, dated the day of , [and a codicil thereto, dated the day of], which is signed at the end thereof by the said testator, and by [naming witnesses] as subscribing witnesses.

II. That the said decedent was, at or immediately previous to his death, a resident of the city and county of New York, and departed this life in said county. [Or, where the decedent was a nonresident of the State, That the decedent was not a resident of this State, but died in the city of Boston, leaving personal property within the State — or, which has since his death come into the State, and remains unadministered.] [Where decedent, a nonresident, died without the State, That the decedent was not a resident of this State, and died without the State, but left personal property in the county of New York — or, left personal property which has, since his death, come into the county of New York, and remains unadministered.] [Where nonresident had real property in the county, That the decedent was not, at the time of his death, a resident of this State, but died seized of real property to which the said will relates — or, which is subject to disposition, pursuant to the statute, for the payment of the debts, etc., of the decedent — situated in the county of New York; and that no petition for the probate of said will, or for a grant of letters of administration of the personal property of the decedent, has been filed in any surrogate's court of this State, to the best of your petitioner's knowledge, information, and belief.]

III. That said will relates to both real and personal property [or, to real property only — or, to personal property only]; and that the value of the personal property does not exceed dollars [or, where gratuitous additional publication of citation is desired, two thousand dollars].*

IV. [If the will relates exclusively to real estate, here set forth the names and places of residence of the heirs of the testator; or if, upon diligent inquiry, they cannot be ascertained, state that fact. If the will relates exclusively to personal estate, state the same facts in regard to the widow and next of kin of the testator. If the will relates to both real and personal estate, state the same facts in regard to the heirs, widow, and next of kin of the testator as for example:] That, as your petitioner is informed and

believes, the following persons are the [widow — or, husband — and] only heirs-at-law and next of kin of the said decedent, to wit:

L. C. R., widow, residing at No. _____.

L. R., a son, aged seventeen years, } residing with their mother, at the

E. R., a daughter, aged fifteen years, } place aforesaid.

[Where there is no widow or husband, or child:] E. R., the mother of said testator, residing at the city of New York, J. R., a brother, and M. R., a sister of said testator, residing at _____, and E. L. R. residing at _____, a daughter of B. R., a brother of the testator, who died before him.

[Where name of a person interested is unknown:] That your petitioner is informed and believes, that G. H., a sister of the testator, removed from this State, in or about the year 1860, to the State of Texas, where she married and afterward died, before the testator, leaving one or more children. But, after diligent inquiry, your petitioner is unable to ascertain their names, or the name of their father, or his or their residence, or whether they, or either of them, be dead or living.

[Or where residence cannot be ascertained:] That K. R., a brother of said testator, who is not a resident of this State, was known to reside in the city of Chicago, Ill., in or about the month of May, 1879. Your petitioner is informed and believes, that a letter addressed to said K. R. at Chicago, Ill., was deposited in the post-office at New York city, and was shortly thereafter returned through the post-office, with the information that said K. R. could not be found; and your petitioner, after diligent inquiry, has been unable to ascertain his present residence.

[Or where publication is sought:] That personal service of a citation cannot with due diligence be made upon the above-named nonresidents within the State of New York, and your petitioner prays for an order directing the service thereof without the State, or by publication, pursuant to sections 2522 and 2523 of the Code of Civil Procedure.

[Where a party has been without the United States for more than six months, add:] G. R., a son of said B. R., a resident of this State, who has been continuously without the United States for more than six months immediately prior to the date of this petition, and has not made a designation of any person upon whom to serve a summons on his behalf, as provided by section 438 of the Code of Civil Procedure, his present post-office address being care of Monroe & Co., Rue Scribe, Paris, France.

V. [Where the facts are not already stated, add:] All of the foregoing named are of full age and sound mind [except as follows: That said C. B. is an infant, of the age of _____, residing with _____, his mother, at the address aforesaid, and has no general guardian — or, if otherwise, name guardian, with address, and state how appointed, if known; — and that E. B. is a lunatic, for whom _____, of _____, is the committee — stating how appointed, if known].

VI. [It is usual to add:] That said decedent left him surviving no widow, nor any child or children, adopted child or children; the issue of any deceased child or children, or the issue of any deceased adopted child or children; or any father or mother, or any deceased child's husband or wife, or brother or sister of the half or the whole blood, or the issue of any deceased brother or sister, or any deceased brother's wife or any deceased sister's husband, except as above stated.

VII. [It is well to add in all cases:] That no petition for the probate of said will, or for letters of administration on said estate, has been heretofore filed in any surrogate's court of this State.

VIII. That your petitioner is the sole executor [and trustee] named in said will [or, one of the executors named, etc. — or, a legatee named, etc. — or, a creditor of the said testator in the sum of \$1,000, upon a certain promissory note made and delivered by the testator to the petitioner, on the _____ day of _____, for value].

IX. [Where interpretation of will executed in this State is sought:] That your petitioner is advised by counsel, and verily believes, that the true interpretation and legal effect of the [fourth clause of] said will are doubtful, in that [it is uncertain upon what contingency the trust thereby created was

intended to terminate — *or*, it is questioned whether the said clause does not unlawfully suspend the absolute ownership of the property so bequeathed in trust, *etc.*] That the following persons, besides those above named [*the next of kin, etc.*], are interested in the determination of the meaning, validity, and legal effect of said will, to wit: [*state names and residences of legatees, not already mentioned as next of kin, widow, etc.; or state*]. That the above-named [widow — *or*, husband — and] next of kin are the only persons who are interested in the determination of the meaning, validity, and legal effect of said [clause of said] will.

WHEREFORE, your petitioner prays, that the said last will and testament may be proved, and letters testamentary granted thereon, according to law, to the executor [*or*, executors] who may qualify thereunder, and that the above-named widow [*or*, husband], heirs and next of kin [*or either*] of said deceased may be cited to attend the probate thereof: and that, upon the presentation of this petition, the surrogate of the county of New York may make such further or other order, in relation to the proof of said will or the service of said citation, as may be just and proper [and that the validity, construction, and legal effect of the aforesaid disposition of personal property may be determined and adjudged].

[Date.]

[Signature.]

[Venuc.]

A. B., being duly sworn, says that he is the petitioner [*or other party*] above named, that he has read the foregoing petition [*or*, answer, *etc.*], subscribed by him, and that the same is true, to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that, as to those matters, he believes it to be true.

[Jurat.]

[Signature.]

No. 17.

Same; Shorter Form.

[Title.]

To the Surrogate's Court of the county of Kings:

The petition of P. G., of the city of Brooklyn, respectfully shows to this court that he is an executor named in the last will and testament of L. R., late of the city of Brooklyn, in the county of Kings, deceased.

That the said deceased was, at the time of his death, a resident of the county of Kings, and departed this life in said county on the day of

That said last will and testament relates to both real and personal estate, and bears date the day of , and was signed by the testator, and A. M. and L. R. as subscribing witnesses.

That said deceased left him surviving a [*or*, no] widow, E. R., who resides at the town of W., county of S., and as his only heirs-at-law and next of kin the following named persons, to wit: [*naming them*].

And your petitioner prays that the said instrument above described be proved and admitted to probate as a valid will of real and personal estate, and that the above-named widow, all the heirs-at-law and next of kin, of said testator, be cited to attend the probate thereof; that the surrogate, on the return day of said citation, appoint a competent and responsible person to appear as special guardian for the above-named infants, and that letters testamentary be granted thereon according to law.

[Date.]

[Signature.]

[Verification.]

Affidavit as to Heirs and Legatees.¹

[Title and Venuc.]

C. D., being duly sworn, says:

I. That he is executor named in the will of the above-named decedent.

II. That the above-named decedent died on the day of , at , in the city [*or*, town] of .

¹ This affidavit is made necessary by, and in conformity with, section 238 of chapter 908 of the Laws of 1896.

III. That the estimated value of the real property in this State, of which said decedent died seized, is dollars.

IV. That the estimated value of the personal property of which said decedent died possessed, is dollars.

V. That the names of the heirs-at-law of said decedent, their places of residence, and relationship to the decedent, are as follows:

Name.	Residence.	Relationship.

VI. That the following is a full and correct list of the names and residences of all the persons and bodies who are in any way entitled to any legacy, devise, interest, or estate under or by virtue of the will of said deceased, or from said decedent, together with the nature, value, and amount of such legacy, devise, interest, or estate.

Name of legatee or devisee.	Residence.	Amount or value of legacy.	Value of devise.

[Jurat.]

[Signature.]

No. 18.

[Ante, § 152.]

Petition for Probate where Citation is not Necessary.

[As in No. 16, to the asterisk, and then continue:]

IV. That the said decedent left him surviving no widow [or, husband] and no heir-at-law or next of kin, except your petitioner, who is the only child of said decedent, and of full age, and the sole executor named in said will, and is the only person interested thereunder.

V. That no petition for the probate of said will has been filed in any surrogate's court of this State.

WHEREFORE, your petitioner prays, that the said last will and testament may be proved, and letters testamentary granted thereon according to law.

[Signature.]

[Verification.]

No. 19.

[Ante, § 242.]

Petition for Proof of Nuncupative Will.

[After alleging jurisdictional facts as in No. 16, continue:] That on the day of , the said decedent was a mariner in actual service, and was captain of the brig Osprey, engaged in making the voyage from New York to Liverpool, said vessel then being in mid-ocean. That on the said day the decedent was seized with a sudden and violent sickness, to wit, with the disease of cholera, and being then in immediate danger of death, and having no opportunity to make a written will, he called to him your petitioner, who was the mate of the said vessel, and, in the presence of J. K. and L. M., sailors belonging to said vessel, addressed him substantially in the following words: "Upon my death I desire that you act as my executor, and take possession of all my personal estate, and divide it, one-half to my wife and the rest to my

daughter." That thereafter the said decedent continued to fail in strength, and died two days thereafter, on the day of , before the vessel arrived in port.

[The remainder of the petition should be as in Nos. 16 and 18 except that, as a nuncupative will can extend only to personalty, it is never necessary to cite the heirs-at-law.]

No. 20.

[Ante, § 234.]

Petition for Proof of Lost or Destroyed Will.

[The same as No. 16, except that, after paragraph VIII, as there given, insert:]

IX. That the said will was made by the said testator, on or about the day of , and [a copy of said will is hereunto annexed, marked Exhibit A — or, the witnesses to said will were J. K. and L. M., of Brooklyn, N. Y., the provisions of the said will were substantially as follows, viz., etc.].

X. That the aforesaid will of the said testator was in existence at and for some time subsequent to his death, and since his death has been lost or destroyed by accident or design — or, That the said will was, in the lifetime of the said testator, fraudulently destroyed in the following manner:— [stating facts making a prima facie case of fraudulent destruction in the lifetime of the testator.]

Your petitioner, therefore, prays that a citation may issue [etc., as in No. 16, and continue], and [that the instrument of which a copy is hereunto annexed, marked Exhibit A, may be established as the last will and testament of the said A. B., deceased — or, that the provisions of the last will and testament of the said A. B., deceased, may be established and declared to be as set forth in the foregoing petition].

[Verification.]

[Signature.]

No. 21.

[Ante, § 250.]

Petition for Leave to File for Record Exemplified Copy of Will.

To the Surrogate of the city and county of New York:

The petition of E. G., residing in the city of New York, State of New York, respectfully sheweth, that your petitioner is the executor [or, legatee] named in the last will and testament of L. R., deceased.

That said deceased was, at the time of his death, a resident of the city of Boston, State of Massachusetts, and departed this life in the said city of Boston, on the day of , leaving real property, or an interest in real property, situated within this county, to wit: [naming it specifically], which is devised, or made subject to a power of disposition by the said will of said deceased.

That said will was duly executed in conformity with the laws of this State.

That on the day of , the said will of said deceased was admitted to probate within the State where the decedent so resided as afore-said.

That said will is filed or recorded in the [naming office where will is filed], the same being the proper office as prescribed by the laws of said State of Massachusetts, and that the said will, with the proofs and the records thereof, remains in said court.

That your petitioner herewith presents a copy of such will or the record thereof and of the proofs or the record thereof, duly authenticated¹ by the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of the same or of the record thereof, and the signature of a judge of such court, or the signature of such officer, and of the clerk of such court or officer, if any: and further authenticated by a

¹ For the proper authentication of a will of another State, see L. 1888, c. 495; Co. Civ. Proc., § 2703.

certificate under the great or principal seal of such State and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate was duly authorized by the laws of such State to admit such will to probate; that the will and records, the accompanying copies of which are so authenticated, are kept pursuant to those laws, by such court or by the officers who authenticated such copies; that the seal of such court or officer affixed to such copies is genuine, and that the officer making such certificate under such seal of such State verily believes that each of the signatures attesting such copies is genuine.

[If no proofs are on file with the will, say:]

Your petitioner herewith presents with said copy of such will, or of the record thereof, authenticated as above set forth, a certificate that no proofs or statement of the substance of proofs of such will, are, or is on file, or recorded in such office, and that said certificate concerning proof accompanying the copy of the will or of the record so authenticated is under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under the great or principal seal of such State, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine and that such officer making such certificate under such seal of such State verily believes that the signature to such certificate concerning proofs is genuine.

That no previous application herein has been heretofore made to this court.

Your petitioner therefore prays that a decree may be signed by the surrogate of this court directing that said copies be filed and recorded in his office.

[Date.]

[Signature.]

No. 22.

[Ante, § 161.]

Answer to Petition for Probate.¹

[Title.]

The undersigned [or, J. K.], one of the next of kin of the said decedent, hereby contests the validity of the disposition of the real and personal estate of the said decedent, of which he died seized and possessed, contained in a certain paper writing bearing date the day of , and purporting to be his last will and testament, presented to and now before this court, for probate, as a will of real and personal estate [and also calls in question the construction and legal effect of said disposition]. And for answer to the petition of T. C. S. for the probate of said will, he avers [upon information and belief] as follows, to wit: [*state grounds of objections, e. g.*]

I. That the said paper is not the last will of the said decedent, and that the alleged execution thereof was not his free, unconstrained, or voluntary act.

II. That neither at the time said paper purports to have been executed, nor at any time when it was executed (if ever executed), was he of sound mind, memory, and understanding.

III. That the said paper was not subscribed, published, and attested, as and for his last will, in conformity with the statute in such case made and provided.

IV. That the said paper is invalid and void as a testamentary disposition of the decedent's property on the following, among other, grounds, to wit:

1. That A. J., the person to whom the said alleged will purports to devise an interest in real property in this State, is a nonresident alien, not authorized by law to hold real estate.

2. That there was not then, and there is not now, living any person of the name of A. J., or entitled to that name, or to the property so alleged to be devised and bequeathed.

¹ For other forms of objections, see Taylor Will Case, 10 Abb. Pr. (N. S.) 300.

addresses, are, as deponent is informed and verily believes, as follows: [*names and addresses.*]

Fifth. That all of the above are of full age and sound mind except [*naming them*], who are infants under the age of fourteen years, and [*naming them*], who are infants over the age of fourteen years.

WHEREFORE, an order is prayed for, fixing the time and place of hearing of the issues raised herein and prescribing the manner of giving notice to the above-named persons interested in the said hearing, and that the petitioner may have such other and further relief as to this court may seem just.

[*Verification.*]

II. Order Thereon.

[*Title.*]

On reading and filing the petition of E. G., the executor named in the last will and testament of L. R., late of the county of _____, deceased, by which it appears that objections to the probate of said will have been filed herein,

Now, on motion of X. Y., attorney for the petitioner, the proponent herein, it is

ORDERED, that a notice of hearing of the objections to the probate of said will be given by said E. G., petitioner, to the person or persons in being, who would take any interest in any property under the provisions of said will, and to the executors named therein, who have not appeared herein, being residents of the State of New York, by service personally on each of said persons of a copy of the notice of hearing of said objections to the probate of said will for the _____ day of _____; such service to be made at least eight days before the said _____ day of _____; and

IT IS FURTHER ORDERED, that service of said notice upon such of said persons as are not residents of this State shall be made in the manner following: by depositing at least sixteen (16) days before the said _____ day of _____, in the post-office in the town of _____, county of _____, a copy of said notice, contained in a securely-closed, post-paid wrapper, directed to each of the persons named in said petition respectively, at the places therein designated as their addresses.

_____, Surrogate.

III. Notice of Hearing.

[*Title.*]

Please take notice, that the issues, raised by the answer filed herein, will be brought on for a hearing before the surrogate of the county of _____, at the county courthouse in the town of _____, on the _____ day of _____, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, pursuant to an order of Hon. _____, the surrogate of the county of _____, dated the _____ day of _____.

[*Dated.*]

[*Signature of attorney.*]

No. 24.

[*Ante*, § 154a.]

Petition and Order for Leave to Intervene on Probate.

[*Title.*]

To Hon. _____, Surrogate of the county of New York [*or*, to the Surrogate's Court of the county of New York]:

The petition of A. B. respectfully shows:

I. That on the _____ day of _____, a petition, to prove the last will and testament of C. D., was duly filed in the office of the surrogate of the county of New York, and proceedings for the proof of such will are now pending before such surrogate.

II. That your petitioner is [a legatee named in said will — *or*, a creditor of such deceased, *stating the nature and amount of the debt and how it arose*], and is interested in the probate of said will.

Your petitioner, therefore, prays [that the said will may be proved, and] that he may be allowed to intervene in said proceedings, in order to protect his interests therein.

[Date.]

[Signature.]

[Verification.]

[The order granting leave may be as follows:] On reading and filing the verified petition of A. B., from which it appears that the said petitioner therein named is interested in the proof of the will of C. D., deceased, proceedings for which are now pending in this court, and that the said petitioner desires to intervene in such proceedings to protect his interest therein; now, after hearing the counsel of the petitioner and of the proponent respectively.

ORDERED, that the said A. B. have leave to appear in the said proceedings, with the same rights and privileges as if he had been named in the citation herein.

No. 25.

[Ante, § 165.]

Notice Requiring Examination of Witnesses.

[Title.]

Please take notice, that the undersigned, who contests the probate of the alleged will of said decedent, requires the examination of all the subscribing witnesses to said alleged will [or, of all the witnesses to said will, subscribing witnesses, or otherwise — and of any other witness whose testimony the surrogate of this county is satisfied may be material].

[Date.]

[Signature and address.]

No. 26.

[Ante, § 160.]

Order that Testimony on Probate be Taken by Clerk.

[Title.]

By virtue of the authority vested in this court and in the surrogate of this city and county, by chapter 701 of the act of the Legislature of the State of New York, passed June 25, 1887, entitled "An Act to amend section 2546 of the Code of Civil Procedure," it is hereby

ORDERED, that the testimony in the above-entitled proceeding now pending in this court, being a special proceeding for the probate of a will, be taken by B. T., assistant to the surrogate, he to report the same to this court for its consideration.

[Signature].
Surrogate.

No. 27.

[Ante, § 165.]

Depositions to Prove Will.

I. Examination of Subscribing Witness.

[Title.]

Examination of witnesses, sworn and examined in the above-entitled matter.

[Venue.]

E. S., of New York city, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the proponent to prove said will, says: I was well acquainted with J. T., the said testator, and had known him for more than six years before his death. The subscription of the decedent's name to the instrument now shown to me and offered for probate as his last will and testament, and bearing date the day of . . . was made by the decedent at 150 Bond street, in the city of New York, in the presence of myself and P. T., the other subscribing witness. At the time of such subscription, the said decedent declared the said instrument so subscribed by him to be his last

will and testament: and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in his presence [and in the presence of said P. T.]. I also saw said P. T., the other attesting witness, sign his name as a witness at the end of said will and know that he did so at the request of said decedent, and in his presence. The said decedent, at the time of so executing said instrument, was upwards of the age of [twenty-one] years, and of sound mind, memory, and understanding, and not under any restraint or in any respect incompetent to make a will.

[*Jurat.*][*Signature.*]

II. Examination as to Custody of Will.

[*Title and Venue.*]

A. B. and C. D., being duly and severally sworn and examined before _____, surrogate of the county of _____, say:

I. The said A. B., for himself, says that he is an attorney-at-law, having an office at _____ street, in the city of New York, and that, at the request of J. K., now deceased, he drafted and caused to be prepared the instrument in writing now produced and shown him dated _____, purporting to be the last will and testament of J. K., deceased; and that he was present at the execution of the same, which took place at his office, _____, aforesaid, on the day of the date of said instrument. That immediately upon the execution of the same, the deceased J. K. delivered it to him for safe-keeping, and he thereupon placed the same in the safe in his said office, where it remained until the _____ day of _____, when he took it thence and delivered it personally to C. D., one of the executors named therein.

II. The said C. D., for himself, says that he personally received the said instrument from A. B., the person herein named, on the _____ day of _____, as above stated; that the same remained in his custody from that time until the _____ day of _____, when he brought the same to the office of the surrogate of the county of New York, where he deposited the same for probate.

III. The said A. B. and C. D. further say, that whilst the said instrument remained in their respective custodies, the same was in no respect altered or changed.

[*Jurat.*][*Signature.*]

III. Examination as to Handwriting of Testator.

[*Title and Venue.*]

A. R., of New York city, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the petitioner to prove said will, says, that he was well acquainted with J. T., late of the said city of New York, and with his manner and style of handwriting, having often seen him write, and that he verily believes that the signature of the said J. T., subscribed as testator to the instrument in writing now produced and shown to deponent, purporting to be the last will and testament of said deceased, bearing date the _____ day of _____, is the proper signature and handwriting of said testator.

[*Jurat.*][*Signature.*]

IV. Examination as to Handwriting of Attesting Witnesses.¹

[*Title and Venue.*]

E. D., being duly sworn as a witness in the above-entitled matter, and examined on behalf of the proponent of said will, says:

That he was well acquainted with E. S., late of the city of New York, and with his manner and style of handwriting, having often seen him write, and that he verily believes that the signature purporting to be his, subscribed as a witness to the instrument in writing now produced and shown to deponent, purporting to be the last will and testament of E. S., deceased, bearing date the _____ day of _____, is the proper signature and handwriting of said E. S.

[*Jurat.*][*Signature.*]

¹ As to when proof of handwriting of witness is competent, see *ante* § 169.

No. 28.

[Ante, § 159.]

Consent and Report of Special Guardian.

[Title.]

I, L. R., counselor-at-law, hereby consent to be appointed by the surrogate of the city and county of New York the special guardian of [*naming him or them*], infant [*or, infants*] for the sole purpose of appearing for and taking care of his [*or, their*] interests in the above-entitled matter, and I hereby state that I have no interest in the proceedings adverse to that of said infant [*or, infants*], and am not connected in business with the attorney or counsel of any party hereto.

Dated, New York,

[Signature.]

[Acknowledgment as of a deed.]

[Report.]

[Title and Venuc.]

L. R., being duly sworn, says: that he is a counselor-at-law; that since his appointment as special guardian herein, he has, to the best of his ability, made himself acquainted with the rights of his ward [*or, wards*], and that he has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and, as he believes, that he has examined into the circumstances of the case, the instrument offered for probate, the petition and other papers herein, that he has attended on the return of the citation and examined the testimony given by the subscribing witnesses [*naming them*], and that he has found no objections to the probate of said instrument, and that it appears to be for the best interest of his ward [*or, wards*], that the same should be admitted to probate.

[Jurat.]

[Signature.]

Special guardian.

No. 29.

[Ante, § 243.]

Decree Granting or Refusing Probate.

[Title.]

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper parties to be and appear before the surrogate of the county of Orange, on the day of , to attend the probate of the last will and testament of A. B., late of the town of Goshen, in the county of Orange, deceased, bearing date the day of , and C. D., one of the executors named in said will, the petitioner herein, having appeared in person, and by E. F., his attorney, in support of the proof of the same; and M. N., the widow of the said deceased, having appeared in person, and by W. M., her attorney, and filed an answer in opposition thereto [*or, and no objections having been made thereto*]; and G. H., the special guardian duly appointed of J. K. and E. L., minors, two of the heirs and next of kin of said deceased, having appeared for said minors, and no other parties or persons having appeared herein: * [And A. J., a legatee and beneficiary under said will, having appeared by his attorney, J. J. T., in pursuance of an order of this court permitting him to intervene and appear herein].

And witnesses having been examined and proofs taken touching the facts and circumstances attending the execution thereof, and the competency of the said A. B. to execute the same, as and for his last will and testament; and the said surrogate having heard the proofs and allegations of the parties and mature deliberation being had thereon, and the matter having been adjourned to this day:

IT IS ADJUDGED: That the said instrument in writing, purporting to be the last will and testament of the said A. B., deceased, was [*properly executed and is genuine and valid*]. That the said A. B., at the time of the execution of the said instrument, was in all respects competent to execute the same, and was

not under restraint or undue influence. And that the said instrument be, and the same hereby is, admitted to probate, and established as a will of real or personal estate, that the same be recorded, and that letters testamentary issue to the executor in said will named on his taking the oath required by statute — *or*, was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments; and that the said A. B., at the time of the execution of the said instrument, was not competent to execute the same; and that the execution thereof by him was procured while he was under restraint and undue influence, and that the said instrument in writing is null and void as or for the last will and testament of the said A. B., deceased].

[*Where probate is granted and construction is asked, add:* And on motion of J. J. T., counsel for said A. J. (intervening legatee), it is further adjudged that the true construction and legal effect of the following paragraph or clause of said will, to wit: — *state the paragraph*, — is to create a valid express trust in the executor as trustee, who is to receive and pay over the rents and profits and income of the decedent's estate (other than that otherwise devised or bequeathed) to said A. J., who is entitled to receive the same as a beneficiary, during his life].

AND IT IS HEREBY FURTHER ORDERED, adjudged, and decreed, that the objections to the probate not hereinbefore disposed of, be and the same are hereby dismissed as unproven and unsustainable.

AND IT IS FURTHER ORDERED, that the surrogate's charges, and the costs of the respective parties who have appeared herein, be paid out of the estate of said deceased.

[*Signature of surrogate.*]

No. 30.

[*Ante*, § 243.]

Decree, where there is no Contest; Common Form.

[*Title.*]

The citation in this matter having been duly issued, served, and returned [or, it appearing to the court, by the petition of A. B., the proponent, that the said A. B. is the sole executor named in the will propounded, and is the only heir-at-law of, and next of kin to, the said decedent, and that there is no widow — *or*, husband, *etc.*], such proceedings were thereupon had that the proofs were duly taken; and the allegations of the parties appearing having been heard, and the surrogate having inquired particularly into all the facts and circumstances, and being satisfied of the genuineness of the will and the validity of its execution, and the competency of the testator; and the probate of said will not having been contested:

IT IS ADJUDGED, that the instrument offered for probate in this matter is the last will and testament of the said testator. and, as such, is valid as a will of [real and] personal property, and the same is hereby admitted to probate as a will of [real and] personal property, and that letters testamentary be issued thereon to the executor A. B., who may qualify thereunder.

[*Signature of surrogate.*]

No. 31.

[*Ante*, § 234.]

Decree Establishing Lost or Destroyed Will.

[*As in Form 29 to the asterisk, but inserting before the word paper the words a lost or destroyed; and, it may be, stating approximate date; and continuing:* and no instrument in writing, purporting to be the last will and testament of M. N., deceased, having been produced, and after hearing the allegations and proofs of the parties, and due deliberation being thereon had, the surrogate having inquired particularly into all the facts and circumstances, and being satisfied of the genuineness of the said lost or destroyed will, and of the validity of its execution, and of its loss, and that it was in existence at the time of the testator's death [or, and that it was fraudulently destroyed in

the testator's lifetime], and its provisions having been clearly and distinctly proved to the satisfaction of the surrogate, by at least two credible witnesses [or, one credible witness, and a correct copy or draft]: Now, on motion of A. T., attorney and counsel for the said A. B.,

IT IS ADJUDGED, that M. N. duly made and executed his last will and testament in the year , and that such will contained the following provisions [stating them and conclude as in previous forms].

No. 32.

[Ante, § 246.]

Certificate of Probate.

Surrogate's Court, County of New York:

Be it remembered, that in pursuance of section 2629 of the Code of Civil Procedure, I hereby certify that on the day of , the last will and testament [with the codicil thereto attached] of T. G. S., deceased, being the foregoing written instrument, was upon due proof duly admitted to probate by the surrogate's court of the county of New York, and by the surrogate of said county, as and for the last will and testament of said deceased, and as a will valid to pass [real and personal] property. Said last will and testament and proofs are recorded in the office of said surrogate in Liber of Wills, page .

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of office of the surrogate of said county, this day of , one thousand nine hundred and .

[Signature.]

Clerk of the Surrogate's Court.

No. 33.

[Ante, § 281.]

Revoking Probate within One Year.

I. Petition.

[Title.]

To the Surrogate's Court of county:

The petition of H. M., of , in the State of , respectfully shows, as follows:

Your petitioner alleges¹ [upon his information and belief]:

I. That a paper writing, bearing date the day of , purporting to be the last will and testament of J. M., deceased, and appointing G. J. executor thereof, was duly admitted to probate by the surrogate of the county of , on the day of , as a will of personal property.

II. That the said paper writing is not the last will and testament of the said J. M., deceased.

III. That the said J. M., deceased, was not, at the time of the making and subscribing, or of the acknowledging by him, the said J. M., of the said paper writing purporting to be his last will and testament, of sound mind or memory, or in any respect capable of making a will.

IV. That the said J. M., deceased, did not, at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been made by him to the attesting witnesses to the said paper writing, declare the said paper writing to be the last will and testament of him, the said J. M.

¹ For other allegations against validity of will, see No. 22 ante. Where probate was granted by default or in consequence of a mistake, or where it was improperly obtained upon a false suggestion of fact, without notice to the party entitled to administration, or upon a fraudulent concealment of the truth with respect to a material fact, revocation may be had by motion on affidavit, instead of by petition. See ante, § 276.

V. That the attesting witnesses to said alleged will did not, nor did either of them, sign his name as a witness at the end of said alleged will, at the request of the said J. M.

VI. That the said paper writing, purporting to be such last will and testament, was obtained, and the execution thereof by said J. M. procured, by fraud and circumvention, and undue influence practiced against and upon the said J. M. by R. J., M. J., I. J., and G. J., or some one of them, or some other person or persons unknown to the subscriber.

VII. That the said paper writing was not freely and voluntarily executed or made as his last will and testament, by said J. M., deceased, but that the subscription thereto, and publication thereof, by him, the said J. M., were procured by fraud and coercion exercised upon him, the said J. M., deceased, by the said R., M., I., and G., or some one of them, or some other person or persons to the subscriber unknown.

VIII. That the said paper writing was not duly and sufficiently proved before the said J. C., as such surrogate, when so admitted to probate as aforesaid and that the proofs taken at the said surrogate's court, on such admission thereof to probate, did not and do not show or establish that the said J. M., deceased, was of sound mind or memory when the said alleged will was made, or that he was free from restraint when he made the same, or that the same alleged will was subscribed by the said J. M., or declared by him to be his last will and testament, in the manner required by the statute in that behalf, or that the same was duly attested as required by said statute.

IX. Your petitioner further alleges, that [the said G. J., named as executor in said will, has taken upon himself the execution thereof, and letters testamentary have been duly issued to him in accordance therewith — *or*, G. B. has been duly appointed administrator with the will annexed of the said J. M., and letters of administration issued to him], and such letters are now in full force and effect.

X. That the only legatees named in the said will are [E. F. and L. M., both of whom are now alive and of full age, and residing at New York city, in this State — *or*, E. F., who is a minor, and resides at 137 Hoyt street, in Brooklyn, Kings county, and State of New York, with B. F., who is his general guardian; and L. M., who has died since the said will was admitted to probate, and of whose estate J. K., residing at Yonkers, in Westchester county, in this State, has been duly appointed executor by the surrogate of said county, by letters bearing date the day of , which letters are now in full force and effect].

XI. Your petitioner further alleges, that he is the son of the said J. M., deceased, and one of his next of kin [*or*, that he is a person interested in the estate of the said — *etc.*, describing *hoir*].

WHEREFORE, your petitioner prays for a decree revoking said probate; and for such other and further relief as may be just; and that the said executor [*or*, administrator with the will annexed], and all of the devisees and legatees named in said alleged will, and all other persons who are parties to the proceeding in which said probate was granted, be cited to * show cause why said probate should not be revoked; * and why your petitioner should not have such other and further relief as may be just.

[Date.]

[Signature.]

[Verification.]

[Citation: insert in general Form (see No. 5) the words between the asterisks in above Form.]

II. Decree Revoking or Confirming Probate.

[Title.]

A verified petition containing allegations against the validity of the last will and testament of J. M., late of the city of , deceased, and against the competency of the proof thereof, having been presented to the surrogate's court of the county of , on the day of , by H. M. [one of the next of kin of said J. M., deceased, and a citation having been thereupon issued, requiring the executor — *or*, administrator with the will annexed] of said will, and all the devisees and legatees therein named [and all other

persons who were parties to the proceedings for said probate], to appear before said surrogate's [court], on the day of , , to show cause why the probate of the said will should not be revoked:

And the said citation having been returned, with proof of due service thereof on all the persons to whom it was directed; and on the return day of said citation, said executor [*or*, administrator with the will annexed] of said H. M., deceased, having appeared by T. B., his attorney and counsel, and interposed an answer [denying the facts and conclusions stated in said allegations]; and the said H. M., having appeared by A. T., his attorney and counsel, and S. G. having been appointed by the said surrogate special guardian for the minors E. F. and G. H., to appear for and take care of their interests in this proceeding, and having duly appeared herein as such special guardian, and no one else having appeared; and said surrogate having duly heard the allegations and proofs of the parties [and having proceeded to take the proofs of the subscribing witnesses to said will], and due deliberation being had thereon.^o And it appearing to the said surrogate that [*here state the objection to validity sustained; see No. 29.*]

Now, on motion of A. T., attorney for said petitioner:

IT IS ADJUDGED AND DECREED, that said paper writing is not sufficiently proved to be the last will of said H. M. [*or*, is invalid for the reason that—*stating it*], and that the probate thereof, and the decree therefor, entered the day of , , [and the letters testamentary—*or*, of administration with the will annexed—issued thereon, be, and the same hereby are, revoked].

[*Or, after reciting facts found by the surrogate, insert, in lieu of matter following the asterisk:.*] IT IS ADJUDGED AND DECREED, that said last will and testament of J. M., deceased, and the probate thereof, heretofore made, and the decree entered thereon in this court, on the day of , , be, and the same hereby are, in all respects, ratified and confirmed.

And it is further ordered: 1. That the above-mentioned allegations, filed in this proceeding, on the day of , , by H. M., be, and the same hereby are, dismissed [but that the expense of this proceeding shall not be charged personally against the said H. M.]. 2. That said G. J., as the executor of said will of J. M., deceased, pay to his counsel, out of any funds that are or may come under his control as such executor, the sum of dollars, for costs of this proceeding. 3. That the sum of dollars be, and the same is, hereby allowed to S. G., the special guardian appointed in this proceeding for the minors E. F. and G. H., one-half of such amount to be paid by each of said minors to said special guardian out of their respective estates.

[Signature of],

Surrogate.

No. 34.

[*Ante*, § 296.]

Renunciation of Letters.

[*Title.*]

I, C. D., of the city of New York, one of the executors named and appointed in and by the last will and testament of A. B., late of the city of New York, deceased, do hereby * renounce the said appointment, and all right and claim to letters testamentary on the said last will and testament, or to act as executor thereof.

[*If there is no executor appointed, or if the executor has renounced, say:.*] I, R. D. L., residuary legatee [*or*, special legatee] named in the last will and testament of A. B., deceased, do hereby renounce all right and claim to letters of administration with the will annexed, on the estate of said decedent.

[*Or, if there be no will, say:.*] I, R. D. L., a [*stating relationship to decedent*] of the decedent, A. B., do hereby renounce all right to letters of administration on the estate of the said decedent.

[*Date.*]

[*Signature.*]

[*To be authenticated as a deed, or attested by witness to surrogate's satisfaction.*]

No. 35.

[Ante, § 297.]

Retraction of a Renunciation.

[As above to the asterisk, continuing:] retract the renunciation of my said appointment, and of the right and claim to letters testamentary on said will, and the right to act as one of the executors thereof, which was filed in the office of the surrogate of county; and pray that letters testamentary may be granted to me, according to law, as one of such executors thereof.

[Date.]

[Signature.]

[Addressed] To

Surrogate.

[Authentication, same as of renunciation.]

No. 36.

[Ante, § 300.]

Oath or Affirmation of Executor or Administrator.

[Title and Venue.]

I, C. D., one of the executors named in [or, appointed by virtue of a power contained in] the last will and testament of [or, about to be appointed sole administrator of the estate of] A. B., late of the city of New York, deceased, do depose [or, solemnly, sincerely, and truly affirm] and say, that I am a resident of New York city, in the State of New York, and over twenty-one years of age, and that I will well, faithfully, and honestly discharge the duties of executor of the said last will and testament [or, of such administrator].

[Jurat.]

[Signature.]

No. 37.

[Ante, § 298.]

Proceedings to Compel Executor to Qualify.*I. Petition to Obtain Order to Qualify.*

[Title.]

To , Surrogate of the county of :

The petition of A. B. respectfully shows as follows: Your petitioner alleges [upon information and belief],

I. That your petitioner is [one of the legatees named in the will — or, a creditor — stating the amount of the debt, and how it arose] of C. D., deceased.

II. That the will of the said C. D. was on the day of , , duly admitted to probate by the surrogate's court of this county.

III. That one J. K., residing at No. , street, in the city of , is named as an executor [or, has been duly chosen executor by virtue of a power contained] in said will, and has not renounced, and has not yet appeared to qualify and take upon himself the execution of the said will, notwithstanding * more than thirty days have elapsed since said will was admitted to probate as aforesaid [or, since such choice was made]. [Or, if objections have been filed and dismissed, substitute, for what follows the *, five days have elapsed since objections to the granting of letters to him, filed on the day of , were dismissed by the surrogate.]

IV. That no previous application for such an order has been made.

WHEREFORE, your petitioner prays, that an order may be made, requiring the said J. K. to qualify as such executor, within a certain time therein to be specified, and that, in default thereof, he be deemed to have renounced the said appointment.

[Date.]

A. B.

[Verification.]

II. Order that *Executor Qualify or be Deemed to have Renounced.*

[*Title.*]

On reading and filing the petition of A. B., dated the day of , , and on motion of A. T., attorney and counsel for said petitioner, It is ORDERED, that J. K., of No. street, in the city of , qualify as an executor of the will of A. B., late of , deceased, on or before the day of , , and that, in default of so doing, he be deemed to have renounced his appointment as such.

III. *Order that Executor be Deemed to have Renounced.*

[*Title.*]

On reading and filing the order made in this matter, upon the petition of A. B., on the _____ day of _____, requiring J. K., the executor named in the will of C. D., deceased, to qualify as such executor, on or before the _____ day of _____, and directing that, in default thereof, he be deemed to have renounced the said appointment, and due proof of the due service thereof, on the said J. K., and the said J. K. having neglected to qualify as required by said order, and an order having on that day been entered, allowing him until this day to qualify, and he having failed to qualify within said time, and no further order extending the time having been granted,

ORDERED, that the said J. K., by reason of such neglect, has, and is to be deemed to have, renounced the appointment as executor as aforesaid.

[*Date.*]

[Signature of],
Surrogate.

No. 38.

[*Ante*, § 301.]

Letters Testamentary.

THE PEOPLE OF THE STATE OF NEW YORK,

To all to whom these presents shall come, or whom they may concern, send greeting:

KNOW YE, that at the city and county of New York, on the day of , in the year of our Lord, one thousand nine hundred and , before Hon. , surrogate of our said county, the last will and testament of A. B., deceased, was proved, and is now approved and allowed by us; and the said A. B., having been at the time of his death a resident of the county of New York [*or state other ground of jurisdiction*] by means whereof the proving and registering of said will, and the granting of administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and judicially settling the account thereof, doth belong to us, the administration of all and singular the goods, chattels, and credits of the said deceased, in any way concerning his will, is granted unto C. D., one of the executors in the said will named, he being first duly sworn well, faithfully, and honestly to discharge the duties of such executor.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of our said county, at the city of New York, the _____ day of _____, one thousand nine hundred and _____.

[Seal.]

[Signature of],
the Surrogate.

No. 39.

[*Ante*, § 306.]

Supplementary Letters.

I. *Pctition.*

[Title.]

To _____, Surrogate of the county of New York.

The petition of C. D., of _____ street, of the city of New York, respectfully shows:

I. That the will of A. B., deceased, late of _____ street, in the city of New York, was, on the _____ day of _____, _____, duly admitted to probate by the

surrogate of the county of New York, and recorded by him in Liber , page , of the records of Wills in his office, and on the day of , 19 , letters testamentary were issued thereupon, by the said surrogate, to M. N., one of the executors named therein.

II. That your petitioner is one of the executors named in said will, but at the time of the admission of the said will to probate, and the issue of letters thereon, he was a minor under the age of twenty-one years, by reason whereof letters testamentary could not issue to him.

III. That your petitioner, since the said will was admitted to probate, to wit, on the day of , arrived at the age of twenty-one years.

IV. That the execution of said will is not yet completed, but [*state what remains to be done to complete the will*].

WHEREFORE, your petitioner prays, that supplementary letters testamentary may be issued to him in the same manner as the original letters, and that he may be authorized to join in the execution of such will with the person already appointed.

[Date.]

[Signature.]

[Verification.]

Order for Supplementary Letters Testamentary.

[Title.]

WHEREAS, J. C. D., named in the last will and testament of A. B. as one of the executors thereof, was at the time said will was admitted to probate, an infant under the age of twenty-one years, by reason whereof letters testamentary could not issue to him; and whereas, the said J. C. D. arrived at the age of twenty-one years on the day of , 19 ; and the execution of said will is not yet completed; Now, on reading and filing the verified petition of the said J. C. D., It IS ORDERED AND ADJUDGED, that supplementary letters testamentary issue to the said J. C. D. on the will of A. B., deceased, in the same manner as the original letters, and he is hereby authorized to join in the execution of said will with the other executors already appointed.

No. 40.

[*Ante*, § 309.]

Staying Grant of Letters Testamentary.

I. Affidavit of Intention to File Objections against Grant of Letters.

[Title and Venue.]

J. B., of the city of New York, being duly sworn, says:

I. That she is the widow of A. B., late of the city of New York, deceased, whose last will and testament was, on the day of , , duly admitted to probate by the surrogate of the county of New York, and of which said will C. D. is named one of the executors.

II. That she is a legatee under the the said last will, and is advised and believes that there are one or more legal objections against the granting of letters testamentary thereon to the said C. D., and that she intends to file a specific statement of the same.

[Jurat.]

[Signature.]

II. Objections against the Granting of Letters Testamentary.

[Title.]

To Hon. , surrogate of the county of New York:

The objections of J. B., of the city of New York, widow, a legatee under the last will and testament of A. B., late of the city of New York, deceased, against the granting of letters testamentary of the said last will and testament to C. D., one of the executors therein named.

First Objection. That the said C. D. is incompetent to execute the duties of his trust as executor of the last will and testament, by reason of im-providence.

Second Objection. That the circumstances of the said C. D. are such that they do not afford adequate security to the creditors, legatees, and relatives of the said deceased for the due administration of the estate; that he has recently failed in his business as a merchant of the city of New York, and become insolvent; and that the debts owing by the said C. D. greatly exceed the amount of property belonging to him.

[Date.]

[Signature.]

[Vouch.]

J. B., of _____, in _____ [or the attorney may verify], being duly sworn, says he believes the foregoing statement of objections, by him subscribed, to be true.

[Jurat.]

[Signature.]

III. Answer to Objections.

[Title.]

C. D., one of the executors named in the last will and testament of A. B., deceased, in answer to the objections filed by J. B., in this matter, respectfully says:

I. That he is not incompetent to execute the duties of his trust as executor of the said last will and testament by reason of improvidence [or any other allegation in justification].

II. That his circumstances are such as to afford ample security to the creditors, legatees, and relatives of the said deceased for the due administration of the estate [may add amount of income if desired, and any other form of denial suited to the exigency of the case].

WHEREFORE, he prays the adjudication of the court upon such objections.

[Verification as in preceding form.]

[Signature.]

IV. Order for Inquiry.

[Title.]

On reading and filing the objections of J. B., the widow of A. B., late of the city of New York, deceased, and a legatee under his last will and testament, against the granting of letters testamentary of the said last will and testament of C. D., one of the executors therein named:

ORDERED, that the said C. D. personally appear before the surrogate of the county of New York, at his office in the city of New York, on the day of _____, at 10:30 o'clock in the forenoon of that day, and attend the inquiry into the said objections; and that the said J. B. appear at the same time and place, and proceed with the inquiry into the said objections.

[Signature.]

Surrogate.

V. Order on Objections.

[Title.]

J. B., the widow of A. B., late of the city of New York, deceased, and a legatee under his last will and testament, having duly filed her objections against the granting of letters testamentary of the said last will and testament to C. D., one of the executors named therein, and the surrogate having inquired into the said objections, and due proof having been taken, and after hearing counsel for the respective parties, and it appearing to the said surrogate that [the said C. D. is incompetent, by reason of improvidence, to execute the duties of his trust as such executor,

ORDERED, that letters testamentary of the said last will and testament be refused to the said C. D.].

[Or, the circumstances of the said C. D. are such that they do not afford adequate security to the creditors, legatees, and relatives of the said deceased, for the due administration of the said estate.

ORDERED, that such letters testamentary aforesaid be refused to the said C. D., until he shall give a bond, as required by law, in a penalty of _____ dollars.]

[Or, the said C. D. is, in all respects, competent to execute the duties of his trust as such executor, and that he is not disqualified therefrom by reason of

improvidence, and that the circumstances of the said C. D. are such that they do afford adequate security for the due administration of said estate,

ORDERED, that the objections filed by the said J. B. against the issuing of letters testamentary to the said C. D. be dismissed.

IT IS FURTHER ORDERED, that the said J. B. pay the costs of the said C. D. on this proceeding, and the fees and expenses thereof to be taxed.

[Signature],
Surrogate.

No. 41.

[Ante, § 313.]

Granting Ancillary Letters on Foreign Probate.

I. Petition.

[Title.]

To the Surrogate's Court of the county of _____ :

The petition of C. D., residing at _____, State of _____, respectfully shows [upon information and belief] that your petitioner is [*here state in what capacity the petitioner applies to the court*] of said deceased.

I. That said deceased was, at the time of his death, a resident of Chicago, State of Illinois, and departed this life in Chicago, State of Illinois, on the _____ day of _____, leaving personal property within this county.

II. That, on the _____ day of _____, the will of said deceased was duly admitted to probate by the county court of Cook county, in the State of Illinois, a court of competent jurisdiction for that purpose, being a court within the State [*or, territory — or, county*] where said will was executed [*or, where said testator resided at the time of his death*], and said will was duly recorded in the office of the said county court, on the _____ day of _____, the same being the proper office therefor, as prescribed by the laws of said State of Illinois, and the said will with the proofs and records thereof remains in said office.

III. That, on the _____ day of _____, letters testamentary upon the estate of the said A. B., deceased, were duly issued to your petitioner, as the sole executor named in said will, and by virtue thereof your petitioner, under the laws of the State of Illinois, became and is solely entitled to the possession of the personal estate of the said A. B. situated in the State of Illinois [*or state that letters testamentary have not been granted*].

IV. That an exemplified copy of the [record of] said will, and of the decree admitting the same to probate [and of the letters issued thereupon] is hereto annexed, and marked "Exhibit A."

V. That said will relates to personal property, and that the value of such property, left by the deceased, * does not exceed in value the sum of _____ dollars, and the amount of debts due or claimed to be due from the decedent to residents of this State is _____ dollars, or thereabouts, and does not exceed the sum of _____ dollars.

VI. That the decedent left personal property in the county [*of the surrogate applied to, or other jurisdictional facts*].

VII. Your petitioner further alleges, that he has made diligent search to discover who are the creditors of the said A. B., residing in the State of New York, as follows, to wit: [*Here state the efforts made to ascertain the creditors, as that he has advertised, etc.*], and that, according to the best information and belief of your petitioner, the only creditors of the said A. B. who reside in the State of New York, and the only persons so resident who may make any claim against the estate of the said A. B., are J. K. and L. M., both of New York city.

VIII. That no previous application for ancillary letters testamentary has been made to this or any other surrogate's court of this State.

Your petitioner, therefore, prays that ancillary letters testamentary upon the estate of the said A. B. may be issued to him, upon his qualifying as prescribed by law, and to that end that a citation may issue according to law.

[Date.]

[Signature.]

[Verification.]

II. *Exemplification of Record.*

THE PEOPLE OF THE STATE OF NEW YORK, by the grace of God free and independent.

To all to whom these presents shall or may concern, greeting:

KNOW YE, that we, having examined the records and files in the office of the surrogate of the county of _____, do find there remaining a certain record of the last will and testament of A. B., deceased [or other papers], in the words and figures following, to wit: All which we have caused by these presents to be exemplified, and the seal of our said surrogate's court to be hereunto affixed.

WITNESS, Hon. _____, surrogate of the county of _____, at the city [Seal.] of _____, the _____ day of _____, in the year of our Lord, one thousand nine hundred and _____ [Signature.]

Clerk of the Surrogate's Court.

STATE OF NEW YORK, } ss.:
COUNTY OF _____, }

I, _____, surrogate of the county of _____, and sole presiding judge of the surrogate's court of the county of _____, in the State of New York, the same being a court of record, having a seal, do hereby certify that [clerk of the surrogate's court], whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the clerk of the surrogate's court of the county of _____, afore-said, and keeper of the records and seal thereof, duly appointed and qualified, and that full faith and credit are, and of right ought to be given to all his official acts, as such, in all courts of record and elsewhere, and that the said attestation is in due form of law, and made by the proper officer, and that the seal annexed is the seal of said court.

WITNESS my hand [etc.].

[Signature.]

Surrogate.

STATE OF NEW YORK, } ss.:
COUNTY OF _____, }

I, _____, clerk of the surrogate's court of the county of _____, do hereby certify that _____, whose name is subscribed in the preceding certificate, is the sole presiding judge of the surrogate's court of the county of _____, duly elected, sworn, and qualified, and that the signature of said judge to said certificate is genuine.

IN TESTIMONY WHEREOF [etc.]

[Signature.]

Clerk of the Surrogate's Court.

III. *Affidavit as to Legatees, Heirs, etc., may be Adopted from Form on page 961, ante.*

IV. *Citation.*

[Insert after "greeting" in No. 5:]

WHEREAS, C. D., of _____, has lately applied to our surrogate's court of the county of _____, for ancillary letters testamentary under the last will and testament of the said A. B., deceased, an exemplified copy of which was, on the _____ day of _____, filed in this office; therefore, you and each of you are cited to appear before our said surrogate, at his office, in the city of _____, on the _____ day of _____, at _____ o'clock in the _____ noon of that day, then and there to show cause why such letters should not issue.

[Teste, Seal, and Signatures as in No. 5.]

V. *Decree awarding Ancillary Letters Testamentary.*

[Title.]

An exemplified copy of the [record of the] will of A. B., late of the [_____ of _____, and State of _____], deceased, and of the judgment, decree, or order of the _____ court of _____, within said [State], entered the day of _____, duly admitting the same to probate [and of the letters testamentary issued thereon to C. D., the executor in said will named], having been filed in this court, on the _____ day of _____, [together with an in-

strument duly executed by said C. D., authorizing E. F., of No. , street, in , to receive ancillary letters or administration with the will annexed, upon the estate of said A. B.]; and the said C. D., having therewith presented to and filed in this court his duly verified petition, praying for a decree awarding to him [or, to E. F.] ancillary letters testamentary on said will [or, of administration with the will annexed, upon the goods, chattels, and credits] of said A. B., deceased [and the surrogate having ascertained, to his satisfaction, that there are no creditors or persons claiming to be creditors of the said decedent residing within the State of New York]:

Now, on motion of A. T., attorney and counsel for said C. D.,

IT IS ADJUDGED AND DECREED, that administration with the will annexed, on the goods, chattels, and credits, within this State, of A. B., deceased, be, and the same is hereby, awarded to said C. D., and that ancillary letters testamentary on said will [or, of administration with said will annexed] issue to the said , upon his taking and subscribing the statutory oath or affirmation, and executing, according to law, a bond, with sufficient sureties, in a penalty of dollars. [Signature of], Surrogate.

VI. *Ancillary Letters.*

THE PEOPLE OF THE STATE OF NEW YORK, by the grace of God free and independent.

To all to whom these presents shall come, or whom they may concern, send greeting:

KNOW YE, that on the day of , in the year of our Lord, one thousand nine hundred and , the last will and testament of L. R., late of Boston, in the State of Massachusetts, deceased, was duly admitted to probate by the court, a competent court within the State of Massachusetts, where the said will was executed and the said L. R. resided at the time of his death, and letters testamentary thereon were by said court duly issued to E. G., residing in the said city of Boston, and the said will and testament was, together with the said letters, duly filed and recorded in and by our surrogate's court of the city and county of New York, upon an application duly made for that purpose, accompanied by a duly exemplified and authenticated copy of the said will and of said letters and of the decree of the said court, admitting said will to probate, and of said letters, and the said L. R. having died, leaving personal property within the county of New York, by means whereof the filing and recording of said will and the granting administration of all and singular the goods, chattels, and credits of the said testator, and also the auditing, allowing, and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels, and credits of the said deceased, and any way concerning his will, is granted unto the said E. G., executor in the said will named, he being first duly sworn well, faithfully, and honestly to discharge the duties of such executor.

IN TESTIMONY WHEREOF we have caused the seal of the surrogate's court of the county of New York to be hereunto affixed.

WITNESS, Hon. , surrogate of our county, at the city of New York, the day of , in the year of our Lord one thousand nine hundred and . [Signature.]

Clerk of the Surrogate's Court.

No. 42.

[*Ante*, § 330.]

Administration with the Will Annexed.

I. *Petition for Letters.*

[*Title.*]

To the Surrogate's Court of county:

The petition of C. C. G., of , in the county of , and State of New York, respectfully shows to this court:

I. That the will of A. B., late of , in the county of , and State of , was duly admitted to probate, by a decree of this court, rendered on the day of , .

II. That no person is named as executor in said will, and that the same contains no power authorizing the selection, as executor, of a person not named therein. [Or, II. That E. F., named as sole executor in said will, duly renounced his appointment as such, by an instrument filed and recorded in the office of the surrogate of this county, on the day of , — or state other cause of vacancy.]

III. That your petitioner has to the best of his ability estimated and ascertained the value of the personal property of which the said testator died possessed, together with the probable amount to be recovered by reason of any right of action granted to his executor or administrator by special provision of law, and the value of the real property, or of the proceeds thereof, which may come to the hands of such executor or administrator by virtue of provisions contained in the will, and that the same will not exceed, in all, the sum of dollars, according to the best of your petitioner's information and belief.

IV. That your petitioner is over the age of twenty-one years, and is one of the next of kin of the said testator [or, a specific — or, residuary — legatee named in said will]. That G. H. and M. N. are the only specific legatees named in said will, and the only persons entitled to a prior right of administration, there being no residuary legatees therein named.

V. That the said G. H. resides at , in the county of , and State of , and that said M. N. resides at No. , street, in the city of , in the State of .

WHEREFORE, your petitioner prays that a decree may be made by this court, granting letters of administration with the will annexed, of the goods, chattels, and credits of the said testator, to your petitioner; and that all the persons aforesaid, having a prior right to such administration, may be cited to show cause why such letters should not be granted.

[Date.]

[Signature.]

[Verification.]

[Renunciation, and Retraction of Renunciation, as of Executor.]

[Form of Decree. See No. 44, III.]

II. Letters of Administration with the Will Annexed.

THE PEOPLE OF THE STATE OF NEW YORK,

To C. D., send greeting:

WHEREAS, A. B., lately departed this life, having previously duly made and executed his last will and testament; AND WHEREAS said will was, on the day of , in the year one thousand nine hundred and , duly admitted to probate by the surrogate's court of the county of , the said deceased having been at the time of his death a resident of the county of [or state other ground of jurisdiction], by means whereof the proving of said will, and the ordering and granting administration of all and singular the goods, chattels, and credits, whereof the said testator died possessed in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us; and we, being desirous that said will should be observed and performed, and that the goods, chattels, and credits of said testator should be well and faithfully administered, applied, and disposed of, do grant unto you, the said C. D., full power and authority, by these presents, to administer and faithfully dispose of all and singular the said goods, chattels, and credits, and to ask, demand, recover, and receive the debts which unto the said testator, whilst living and at the time of his death, did belong, and to pay the debts which the said testator did owe as far as such goods, chattels, and credits will hereto extend and the law require, hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named executor thereof. And we do, by these presents, depute, constitute, and appoint you, the said C. D., administrator with the will annexed of all and singular the goods, chattels, and credits which were of said A. B., deceased.

IN TESTIMONY WHEREOF [etc., as in No. 38].

No. 43.[*Ante*, § 333.]**Granting Ancillary Letters of Administration with the Will Annexed.****I. Petition.***[See Form No. 41, suiting the wording to the exigencies of the case.]***II. Ancillary Letters of Administration with Will Annexed.**

THE PEOPLE OF THE STATE OF NEW YORK,

To E. G., send greeting:

WHEREAS, A. B., lately departed this life, having previously executed his last will and testament:

AND WHEREAS, the said will has been duly admitted to probate by the court, a competent court within the State [*or*, Territory — *or*, county] where the said will was executed, and the testator resided at the time of his death;

AND WHEREAS, the said E. G. has made an application to our surrogate's court of the county of New York, a court having jurisdiction to entertain the same, for the issuance to him of ancillary letters of administration with the will annexed.

AND WHEREAS, the said application is accompanied by an exemplified copy of the said will and of the judgment, decree, and order admitting the same to probate, and also of the foreign letters; and we being desirous that said will should be observed and performed, and that the goods, chattels, and credits of said testator should be well and faithfully administered, applied, and disposed of, do grant unto you, the said E. G., full power and authority, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels, and credits, and to ask, demand, recover, and receive the debts which unto the said testator whilst living and at the time of his death did belong, and to pay the debts which the said testator did owe, as far as such goods, chattels, and credits will thereto extend and the law require, hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named executor thereof.

AND we do by these presents depute, constitute, and appoint you, the said E. G., ancillary administrator with the will annexed, of all and singular the goods, chattels, and credits which were of said A. B., deceased.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate's court of the city and county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of said county, at the city of New York.
this _____ day of _____, in the year of our Lord, one thousand nine hundred and _____.

[*Signature.*]

Clerk of the Surrogate's Court.

No. 44.[*Ante*, § 351.]**Letters of Administration.****I. Petition.**

To the Surrogate's Court of the county of [New York]:

The petition of A. B. respectfully shows:

I. That C. D., the decedent, was, at or immediately previous to his death, a resident of this State [*or state other jurisdictional facts as to residence and location of real or personal property, as in No. 16. ante*], and died [in the city of New York] on the _____ day of _____, without leaving any last will and testament, to the best of your petitioner's knowledge, information, and belief; [that your petitioner has made diligent search for a will of said decedent, and has not found any or obtained any information that he left any].

II. That the said decedent died possessed of certain personal property within this State; and that, as your petitioner is informed and believes, the value of the personal property of which the said decedent died possessed [together with the probable amount to be recovered, by reason of any right of action granted to an executor or administrator of the said decedent, by special provision of law], does not exceed the sum of dollars. [*See No. 16, ante.*]

III. That [as far as they are known to the petitioner or can be ascertained by him with due diligence] the [widow — or, husband — and] only next of kin of said decedent are as follows: [*enumerate them, giving ages of minors, as in No. 16.*]

IV. That your petitioner is a [son] of the said decedent, and, as such, is entitled to administration upon the estate of said decedent [*or, if another has a prior right, continue, on the failure of the said D. G., who is the only person having a prior right to your petitioner, to apply for and take out such administration, the above-mentioned D. G., who is equally entitled with your petitioner to such administration, being willing to renounce her right to the same in favor of your petitioner.*]

V. That no petition for a grant of letters of administration upon said estate has been filed in any surrogate's court of this State.

WHEREFORE, your petitioner prays for a decree, awarding letters of administration upon the goods, chattels, and credits of the said C. D., deceased, to your petitioner; and that a citation may be issued to all persons having a right to administration, prior or equal to that of your petitioner, to show cause why such a decree should not be made. [*In case the petitioner desires another person joined with him in the administration, the prayer of the petition shall be as follows:* Your petitioner, therefore, prays that letters of administration may be granted to him, and to J. W., residing in the city of New York, merchant, to be joined with him in the administration, pursuant to the statute in such case made and provided; and he hereby consents to have the said J. W. so joined in such administration].

[*Signature.*]

[*Verification.*]

[*The Form of renunciation to be filed is as follows:*]

[*Title.*]

I, J. D., of Poughkeepsie, Dutchess county, widow of C. D., late of the city of New York, deceased, do hereby renounce all right to letters of administration on the estate of said C. D.

[*Signature, attestation, and authentication as in No. 34.*]

[*The consent to have another person joined in the administration, where it is not contained in the petition, may be in the following Form:*]

I, E. K., of the city of New York, the widow of J. K., late of the city of New York, deceased, intestate, and entitled to the administration of the goods, chattels, and credits of the said intestate, do hereby consent that such administration be granted to J. W., of the city of New York, to be joined with me therein.

[*Date and authentication.*]

Affidavit as to Heirs, Next of Kin, etc.

[*May be Adapted from Form 17.*]

II. Citation.

[*Commence as in Form 5, stating object, as follows:*] To show cause why letters of administration of the goods, chattels, and credits of C. D., late of the [city of New York], deceased, intestate, should not be granted to A. B., of the [said city], a [son] of said decedent, who has made application for the same.

III. Decree Granting Letters of Administration.

[*Title.*]

A duly verified petition having been, on the day of , presented and filed in the surrogate's court of the county of New York, by

A. B., praying for a decree awarding letters of administration of the goods, chattels, and credits of C. D., deceased, to said petitioner A. B.; and that all persons having a right to such administration, prior or equal to said petitioner, be cited to show cause why such a decree should not be granted; and the petitioner having proved to the satisfaction of the surrogate, by said petition [and the affidavits of O. P. and Q. R. filed therewith], that [*here set forth the jurisdictional facts; see No. 44*]; and a citation having been thereupon issued out of said court, directed to all such persons, and said citation having been returned, with proof of the due service thereof, on all of said persons [*or recite services and appearances; and adjournments, if any*]; and on reading and filing the written renunciation of J. D.—the widow—or, son—of said decedent, of all her right and title to administer said estate; and the consent and request of said A. B., that such administration be granted to J. W., of ; and that said J. W. be joined with said petitioner, in the administration to which he might be entitled herein]; and due consideration having been given to all the papers and proceedings in this matter;

[And it appearing, that the only party having a prior right, to the petitioner A. B., to such administration, has failed to appear in this proceeding and claim such administration; and it further appearing, that the said A. B. is entitled to such administration; and it also appearing, that said J. W. is a proper and competent person to be joined in such administration, with the said A. B.];

Now, on motion of J. L. H., attorney for said petitioner, it is hereby ORDERED, ADJUDGED, AND DECREED, that letters of administration of the goods, chattels, and credits of said C. D., deceased, be, and the same are hereby awarded to said A. B., of [and to J. W., of , to be joined with the said A. B. in the administration, and letters are hereby granted to him], upon his [*or, their severally*] taking and subscribing the statutory oath, and executing a bond, according to law, with sufficient sureties, in the penalty of dollars.

[*In case of limited letters, say, and modified security having been given, the letters of administration issued pursuant to this decree are limited to the prosecution of an action under section 1902 of the Code of Civil Procedure to recover damages for causing the death of said decedent, and said administrator is restrained from a compromise of such action and the enforcement of any judgment recovered therein until the further order of this court on additional further satisfactory security.*]

IV. Letters of Administration.

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B. and C. D., send greeting:

WHEREAS, E. F., lately departed this life, intestate, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed, in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us; and we being desirous that the goods, chattels, and the credits of the said intestate may be well and faithfully administered, applied, and disposed of, do grant unto you, the said A. B. and C. D., full power, by these presents, to administer and faithfully dispose of all and singular the said goods, chattels, and credits; to ask, demand, recover, and receive the debts which unto the said intestate, whilst living and at the time of his death, did belong; and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend and the law require; hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York, within three months from the date of these presents; and, if further personal property or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make or cause to be made, in like manner, a true and perfect inventory thereof; and return the same within two months after

the discovery thereof, and also to render a just and true account of administration, when thereunto required; and we do, by these presents, depute, constitute, and appoint you, the said A. B. and C. D., administrators of all and singular the goods, chattels, and credits of the said E. F., deceased.

[In cases of limited administration say, and it appearing that a right of action is granted by special provision of law to said administrator; and it appearing to be impracticable for said administrator to give a bond sufficient to cover the probable amount to be recovered, and the surrogate having accepted modified security from said administrator, we do, therefore, hereby authorize and empower said administrator to prosecute said action, but he is restrained from compromising said action and from enforcing any judgment recovered therein until the further order of the surrogate on additional further satisfactory security.]

IN TESTIMONY WHEREOF [etc.].

V. *The Same — A Short Form.*

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B., of the city of Rochester, in the county of Monroe, New York, send greeting:

WHEREAS, E. F., late of the city of Rochester, aforesaid, died on or about the day of , intestate;

AND WHEREAS, on the day of , at a surrogate's court held at Rochester, in and for our county of Monroe, a decree was duly made, awarding letters of administration upon the estate of the said deceased to you: And you having taken your official oath, and duly filed, with the surrogate of our said county of Monroe, the said oath, and the bond required by law:

NOW, THEREFORE, know ye, that we, having full faith and confidence in your competency, have granted, and by these presents do grant, unto you, the said A. B., the administration of all and singular the goods, chattels, and credits which were of the said deceased, hereby constituting and appointing you administrator thereof.

WITNESS, Hon. , surrogate of our said county of Monroe, and the [Seal.] seal of our said surrogate's court, this day of .

[Signature of],

Surrogate.

No. 45.

[Ante, § 470.]

Bond of Executor or Administrator.

KNOW ALL MEN BY THESE PRESENTS,

That we, A. B., of , in the city of ; and C. D., of street, in the city of ; and E. F., of , in the county of , are held and firmly bound unto the people of the State of New York, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the day of , one thousand nine hundred and *.

The condition of this obligation is such, that if the above bounden A. B. shall faithfully discharge the trust reposed in him as executor [or, administrator] of all and singular the goods, chattels, and credits of G. H., late of the city of New York, deceased, and obey all lawful decrees and orders of the surrogate's court of the county of New York, touching the administration of the estate committed to him, then this obligation to be void, else to remain in full force and virtue.

[Signatures and seals.]

[Sealed and delivered in presence of]

[Authentication as of a deed.]

[Append an affidavit of each surety as to his sufficiency, in the following form:]

[Vener.]

C. D., of street, in the city of , a surety named in the annexed bond, being duly sworn, deposes and says, that he owns in his own right real estate in the State of New York, consisting of the house and lot No. , street, in the city of , and that the same is of the value of not less than five thousand dollars, and is subject to no incumbrance, except a mortgage of two thousand dollars, held by the Mutual Life Insurance Company of New York city; and that he owns personal estate in the city of , and that its value is not less than three thousand dollars, that it consists of the fixtures and stock of goods in the grocery store, No. , street, in said city, and that it is subject to no incumbrance; and that there are no unsatisfied judgments or executions against him, and that he is under no recognition; and that he is worth in good property, exclusive of such as is exempt by law from execution, not less than two thousand dollars, over and above all debts, liabilities, and lawful claims against him, and all liens, incumbrances, and lawful claims upon his property.

[Jurat.]

[Signature.]

[Same Form, mutatis mutandis, for bond of administrator with will annexed.]

No. 46.

[Ante, § 370.]

Administration de Bonis Non.

I. Petition.

[Title.]

To the Surrogate's Court of the county of New York:

The petition of C. D. respectfully shows:

I. That your petitioner is a grandson, of full age, of the said A. B., deceased, who died in New York city on the day of .

II. That letters of administration of the goods, chattels, and credits of the said A. B., deceased, were duly granted by the surrogate of the county of New York, on the day of , unto J. B., the widow of said decedent.

III. That said J. B., the administratrix aforesaid, departed this life on the day of , leaving certain property and assets of the said A. B. still unadministered.

IV. That your petitioner has, to the best of his ability, ascertained and estimated the personal estate of which the said A. B. died possessed, and the value of the same does not exceed the sum of one thousand dollars.

V. That, as your petitioner has been informed, and believes, the said deceased left him surviving [state names and residences of next of kin, as in No. 16], his only next of kin.

Your petitioner, therefore, prays that letters of administration *de bonis non* of the goods, chattels, and credits of the said deceased, so left unadministered as aforesaid, may be granted by the surrogate of the county of New York to your petitioner.

[Signature.]

[Verification.]

II. Decree on Forgoing.

[May be adapted from Form No. 44, III.]

III. Letters of Administration De Bonis Non.

THE PEOPLE OF THE STATE OF NEW YORK,

To C. D., one of the next of kin of A. B., late of , deceased, intestate:

WHEREAS, E. F. was duly appointed the administrator of the goods, chattels, and credits which were of the said intestate, and letters of administration were duly granted and issued by the surrogate of Westchester county to the said E. F., on the day of ;

AND WHEREAS, the said E. F. has since departed this life, leaving property and assets of the said intestate still unadministered;

AND WHEREAS, the said A. B., at or immediately previous to his death, was an inhabitant of the county of Westchester, having, whilst living and at the time of his death, goods, chattels, and credits, within this State, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits, and also the auditing, allowing, and final discharging the accounts thereof, doth appertain unto us: and we being desirous that the goods, chattels, and credits of the said deceased may be well and faithfully administered, applied, and disposed of, do grant unto you, the said C. D., full power and authority, by these presents, to administer and faithfully dispose of all and singular the goods, chattels, and credits left unadministered: to ask, demand, receive, and recover the debts which unto said intestate, whilst living and at the time of his death, did belong: and to pay the debts which the said intestate did owe at the time of his death, so far as such goods, chattels, and credits will thereunto extend, and the law requires; hereby requiring you to make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of said intestate, which have or shall come to your possession or knowledge, and the same so made to exhibit or cause to be exhibited and filed in the office of the surrogate of the county of Westchester, on or before the expiration of three months from the date hereof, and also to render a just and true account of your administration when thereunto required.

And we do by these presents depute, constitute, and appoint you, the said C. D., administrator *de bonis non* of all and singular the goods, chattels, and credits which were of the said A. B., deceased, intestate, left unadministered as aforesaid.

IN WITNESS WHEREOF [etc.].

No. 47.

[*Ante*, § 373.]

Granting Ancillary Letters of Administration.

I. *Petition.*

[*Title.*]

To the Surrogate's Court of the county of _____ :

The petition of E. G., residing at _____, State of _____, respectfully shows:

I. That said deceased was at the time of his death a resident of _____, State of _____, and departed this life in _____, State of _____, on the _____ day of _____, leaving personal property within this county.

II. That on the _____ day of _____, _____, letters of administration were duly issued to your petitioner upon the estate of the said deceased by the court of the county of _____, State, a court of competent jurisdiction for that purpose, being a court within the State [or, Territory—*or*, county] in which the said decedent resided at the time of his death, and said letters were duly recorded in the office of the said _____ court, on the _____ day of _____.

III. That an exemplified copy of said letters, and of the decree granting the same, is hereto annexed and marked "Exhibit A."

IV. That the value of the property left by deceased [etc., *continuing as in No. 41 from the *, suiting the prayer to the exigencies of the case*].

[*Date.*]

[*Signature.*]

[*Verification.*]

II. *Decree.*

[*May be adapted from Form No. 41. IV.*]

III. *Ancillary Letters of Administration.*

THE PEOPLE OF THE STATE OF NEW YORK,

To E. G., send greeting:

WHEREAS, letters of administration upon the estate of A. B., an intestate, were duly granted to E. G. by the _____ court of the State of _____, the said

court being a competent court in the State [or, county — or, Territory] where the said intestate resided at the time of his death; AND WHEREAS, the said E. G. has presented to the surrogate's court of the county of New York, letters of administration upon the said estate, duly authenticated, and applied for the issuance to him of ancillary letters of administration, by means whereof the ordering and granting administration of all and singular the goods, chattels, and credits whereof the said intestate died possessed, in the State of New York, and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us, and we, being desirous that the goods, chattels, and credits of the said intestate may be well and faithfully administered, applied, and disposed of, do grant unto you, the said E. G., full power by these presents to administer and faithfully dispose of all and singular the said goods, chattels, and the credits, ask, demand, recover, and receive the debts which unto the said intestate, whilst living and at the time of his death, did belong; and to pay the debts which the said intestate did owe, as far as such goods, chattels, and credits will thereunto extend, and the law require; hereby requiring you to make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York, within three months from the date of these presents; and if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make or cause to be made in like manner, a true and perfect inventory thereof, and return the same within two months after the discovery thereof, and also to render a just and true account of administration, when thereunto required; and we do by these presents, depute, constitute, and appoint you, the said E. G., ancillary administrator of all and singular the goods, chattels, and credits of the said A. B., deceased.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate's court of the city and county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of said county, at the city of New York,
the _____ day of _____, in the year of our Lord, one thousand nine hundred
and _____.

[Signature],

Clerk of the Surrogate's Court.

No. 48.

[Ante, § 376.]

Proceedings by Public Administrator.

I. Affidavit to Obtain Order to Sell Perishable Property.

[Title and Venue.]

M. N., being duly sworn, says, that he is a clerk in the office of S. R., Esq., the treasurer [or, public administrator] of the county of _____; that on the _____ day of _____, A. B., of _____, died intestate at said city, leaving certain goods, chattels, and effects therein; that no notice has been received by the said treasurer [or, public administrator] that any one entitled to a distributive share in the estate of said A. B. is a resident of the said county; and that the said S. R., by virtue of his office as public administrator, did, on the _____ day of _____, take possession of, and now holds, the said goods, chattels, and effects of the said A. B., deceased, which were in said county of _____ at the time of his decease, or which have since come therein; that the said deceased was in his lifetime a dealer in country produce, at _____; and that the stock of goods in the said store, which has been taken possession of by the said public administrator, consists of the butter, eggs, vegetables, and dressed poultry shown by the annexed inventory, marked Exhibit A, and that the whole thereof is now in a perishing condition.

[Jurat.]

[Signature.]

II. Order on the Foregoing.

[Title.]

On reading and filing the affidavit of M. N., hereto annexed, by which it appears that S. R., Esq., the treasurer [or, public administrator] of _____, has

in his charge, by virtue of his office, certain property (which is described in an inventory attached to, and made part of, said affidavit), and that such property is in a perishing condition;

ORDERED, that the said S. R., Esq., public administrator of _____, sell at public auction the property described in the said affidavit and inventory, and that such sale take place on the _____ day of _____, _____, or on such adjourned days as the said public administrator shall designate.

III. *Petition for Order to Seize Personal Property to Prevent Waste.*

[Title.]

To the Surrogate's Court of the county of New York:

The petition of S. R., public administrator in the city of New York, respectfully shows, upon his information and belief, that A. B., late of Chicago, Illinois, died in the city of New York, on the _____ day of _____, _____, intestate, leaving certain goods, chattels, and effects in the city and county of New York, and that the said property is in danger of waste and embezzlement. He further shows, upon his information and belief, that the said A. B. left him surviving, M. B., his widow, of full age, and W. B. and S. B., both minors under the age of twenty-one years, his only children, and only next of kin, all, at the time of the death of the said intestate, and still, residents of the city of New York, and for proof of the allegations herein contained the public administrator refers to the affidavit of W. S., a creditor of the said intestate, hereunto annexed.

The public administrator, pursuant to the statute in such case made and provided, applies to the surrogate for an order authorizing him to take charge of, seize, and secure the goods and property of the said A. B., deceased, intestate.

[Signature.]

[Verification.]

IV. *The Affidavit to Accompany the Petition.*

[Title and Venue.]

W. S., of the city of New York, being duly sworn, says, that he is a creditor of A. B., late of Chicago, Illinois, the person referred to in the annexed petition. That the said A. B. died in the city of New York, on the _____ day of _____, _____. That he left him surviving, M. B., of full age, his widow, and W. B. and S. B., minors, his only children, and only next of kin, and that the said widow and next of kin of the said intestate resided at the time of his death, and still reside, in the city of New York. That the said A. B. died possessed of a stock of dry goods of the value of upwards of ten thousand dollars, in his late store, No. _____, _____ street, in the city of New York. That the said store, and the stock of goods therein contained, have been, since the death of the said A. B., in the possession of the clerks formerly employed in the said store. That no responsible person has been in charge thereof, and that portions of the said goods, to the amount of upwards of one thousand dollars, have been disposed of and carried away, apparently under the direction of the clerks in the said store. And this deponent further says, that the said goods are in danger of waste or embezzlement, and that, as this deponent believes, it will be for the benefit of the estate of the said deceased to have the said goods seized and secured.

[Jurat.]

[Signature.]

V. *Order on the Foregoing Petition.*

[Title.]

On reading and filing the application of S. R., the public administrator in the city of New York, and the affidavit of W. S., a creditor of the said A. B., deceased, by which it appears that the widow and next of kin of the said intestate, entitled to a distributive share in his estate, resided in the city of New York at the time of the death of the said intestate, and still reside in the said city; and that the stock of dry goods of the said deceased in his late store, No. _____, _____ street, in the city of New York, are in danger of waste and

embezzlement; and that it would be for the benefit of the estate of the said intestate to have the said stock of goods seized and secured;

ORDERED, that the said S. R., public administrator in the city of New York, be, and he hereby is authorized to take charge of, seize and secure the stock of dry goods, property, and effects of the said A. B., deceased, in the store lately occupied by the said deceased, at No. , street, in the city of New York.

VI. Notice of Application for Letters.

PUBLIC ADMINISTRATOR'S OFFICE.

Notice is hereby given to the relatives and next of kin of A. B., deceased, and who is alleged to have died intestate, that I shall apply to the surrogate of the county of New York, for letters of administration upon the estate of the said intestate, on the day of next, at ten o'clock in the forenoon.

[Date.]

[Signature of],

Public Adm'r.

VII. Affidavit on Application for Letters.

[Venue.]

H. J. C., Jr., the public administrator in the county of Kings, being duly sworn, says, that he is informed and believes that the said A. B., late of Brooklyn, Kings county, deceased, departed this life at Brooklyn, on the day of last, leaving property and effects of which this deponent is authorized by law to take charge, the value of which is about the sum of seventy-five dollars. That deponent has caused the service and publication of the notice required by law, as appears by affidavit annexed hereto; that no claim has been made according to law, and that deponent has taken upon himself the administration of the estate of the deceased.

[Jurat.]

[Signature.]

[Annex to this an affidavit showing due service and publication of foregoing notice.]

No. 49.

[Ante, § 405.]

Appointment of Temporary Administrator.

I. Notice of Motion.¹

[Title of the principal proceeding.]

Take notice, that on the proceedings heretofore had herein [and on the affidavit of L. H., a copy of which is hereto annexed], a motion will be made to the surrogate of this county, at his office in the [city of New York], on the day of [at least ten days after date of notice], at o'clock in the noon of that day, for an order appointing a temporary administrator of the goods, chattels, and credits of B. B., above named, deceased.

[Date.]

[Signature of attorney.]

To [each party to proceeding, or his attorney.]

II. Affidavit on Motion.

[Venue.]

L. H., being duly sworn, says:

1. That he is the sole executor named in the paper writing purporting to be the last will and testament of B. B., late of the city of New York, deceased, propounded for probate and now pending in the court of the surrogate of the county of New York.

2. That he is the younger brother of the said decedent, and that by said will, after several small legacies and a legacy to the wife of the said decedent, the rest, residue, and remainder of the real and personal estate of the said decedent are given, devised, and bequeathed unto deponent, as executor in

¹The application for the appointment of a temporary administrator may be by motion in the original proceeding or by a petition, in a case where the ground of the application is one of those mentioned in subd. 1 of § 2668 of Co. Civ. Proc. But the application must be by petition, where the ground is the absence of the party, as provided by subd. 2 of the same section.

trust. That the proof of the said will is contested, whereby delay is necessarily produced in granting letters testamentary or administration in this matter, and it is uncertain when such contest will be terminated [*or specify other cause of delay*].

3. That the property of the said deceased consists in part of personal property and in part of real estate, and that it is advisable and necessary that immediate steps be taken for the collection of the income from the same and the rentals thereof, and for the re-renting of certain portions of the real estate for the ensuing year.

4. That your petitioner has, to the best of his ability, ascertained and estimated the value of the real and personal property of which the said deceased died possessed, and that the real property does not exceed in value the sum of dollars, and the annual rentals therefrom being about dollars; and that the value of the personal property does not exceed dollars.

5. That all the [widow and] heirs and next of kin of said decedent are parties to the proceeding for the proof of said paper writing.

[*Jurat.*]

[*Signature.*]

III. *Petition for Letters in Case of Absentee.*

To the Surrogate's Court of the county of New York:

The petition of A. B. respectfully shows:

I. That your petitioner, residing in the city of New York, is the son of C. D. [*or a creditor, etc., stating particulars of debts.*] who resided at No. street, in said city, up to and on the day of . That on said day the said C. D. took passage in the steamer Saratoga, from the port of New York, to Havana, Cuba. That it was the intention of the said C. D. to find employment as a civil engineer in Cuba, and, as your petitioner is informed and believes, he was, for some months after his arrival at Havana, engaged in the construction of a railroad in the vicinity of , Cuba, from which place he communicated, from time to time, with deponent, by mail. That since the day of , your petitioner has received no communication from the said C. D., by mail, or otherwise, and has no information as to his present whereabouts, if living. That your petitioner has caused diligent search to be made for the present abode of the said C. D., through the U. S. Consul at Matanzas, Cuba, in the vicinity of the last known place of abode of C. D., and his communications are hereto annexed, from which it appears that, shortly before the disappearance of said C. D., an insurrection broke out among the negro slaves in the district of his abode, in which several white persons in the vicinity were massacred, since which no trace of said C. D. can be found; and there is reason to believe that the said C. D. is dead [*or, that he has been secreted, confined, or otherwise unlawfully made away with — or, after stating the presumptive circumstances, that he has become a lunatic*].

II. [*State particulars as to names, residences, and ages of next of kin, widow, etc., of absentee, as in the case of an application for letters in case of deceased intestate.*]

III. That there is now on deposit to the credit of the said C. D., in the Savings Bank, in the city of New York, the sum of dollars [*or state other property, and necessity for temporary administration for the preservation or disposal thereof*].

IV. That your petitioner has, to the best of his ability, estimated and ascertained the value of the personal property in this State belonging to the said C. D., and that the same does not exceed dollars.

WHEREFORE, your petitioner prays that a temporary administrator of the goods, chattels, and credits of the said C. D. may be appointed, and that letters may be issued to him pursuant to the statute in such case made and provided, and that a citation may be issued [*etc.*].

[*Date and Verification.*]

[*Signature.*]

IV. *Order for Letters of Temporary Administration.*

[*Title.*]

On reading and filing the petition of A. B., dated the day of ,
 , [*or, On all the proceedings in the above-entitled matter, and the papers*

herein heretofore filed, and on reading and filing the affidavit of A. B., verified the day of ,], to the surrogate of the county of [New York], for an order appointing a temporary administrator of the goods, chattels, and credits which were of the late M. N., deceased, together with proof of due service of notice of motion [or, citation— or, and affidavit] on all necessary parties [none of the parties having appeared pursuant to said notice— or, citation,—except Y. Z., who appeared by his attorney, B. T., and opposed said application]; and the surrogate being satisfied that the case is a proper one for the appointment of a temporary administrator, and that A. B. is a competent and qualified person therefor; * Now, on motion of A. T., attorney for said A. B.:

IT IS HEREBY ORDERED, that temporary administration on the goods, chattels, and credits of said M. N., late of , deceased,¹ be, and the same hereby is, granted to said A. B., and that letters of temporary administration upon the goods, chattels, and credits [and estate] of said decedent issue to the said A. B., upon his [*here direct him to qualify as in No. 44, III.*]

AND IT IS FURTHER ORDERED, that said A. B. be, and he is hereby, authorized to take possession of the buildings, and lots on which they stand, known as Nos. street, in the city [New York], being property of which said M. N. died seized and possessed, and receive the rents and profits thereof, as the same become due and payable, until the further order of this court. [*The order may also authorize the leasing of premises for not more than a year, or other acts, except selling, necessary for preservation or benefit of the estate.*]

IT IS FURTHER ORDERED, that the said A. B., within ten days after any money belonging to the estate comes into his hands, deposit the same in the Bank [or, in New York, in the Trust Company], to the credit of this proceeding.

V. Letters of Temporary Administration.

THE PEOPLE OF THE STATE OF NEW YORK,

To E. G., send greeting:

WHEREAS, a paper has been propounded for probate before the surrogate of the county of New York, as the last will and testament of L. R., late of the city and county of New York, deceased, and a contest exists relative to such probate [or, other cause], and a delay is thereby necessarily produced in granting letters testamentary or of administration upon the estate of said deceased:

KNOW YE, that we, being desirous that the goods, chattels, and credits of said deceased may be collected and preserved, do grant unto you, the said E. G., full power by these presents to take into your possession the personal property of the said deceased, and to secure and preserve it with all the authority and power conferred upon you by law, hereby requiring you to make, immediately, a true and perfect inventory of all and singular the goods, chattels, or credits of said deceased, and return the same to our said surrogate, within three months from the date of these presents, and also to render a just and true account of your administration as such temporary administrator whenever required by our said surrogate, and faithfully to deliver up the goods, chattels, and credits of said deceased to any person or persons who shall be appointed executors or administrators of the said L. R., deceased, or to such other person as shall be authorized to receive the same by said surrogate.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate of the county of the city and county of New York to be hereunto affixed.

WITNESS, Hon. , surrogate of said county, at the city of New York, this day of , in the year of our Lord, one thousand nine hundred and .

[Signature],

Clerk of the Surrogate's Court.

¹ In case of administration of an absentee's estate, substitute *now or late*, for *late of deceased*.

No. 50.

[Ante, § 417.]

Payment of Debt by Temporary Administrator.*I. Petition.*

[Title.]

To the Surrogate [or, the Surrogate's Court] of the county of [New York]:

The petition of A. B. respectfully shows:

I. That your petitioner [or, if the petition is by a creditor, That C. D.] was heretofore appointed temporary administrator of the goods, chattels, and credits of M. N., late of , deceased [or, of the property of M. N., now or late of , an absentee], by an order duly made by the [surrogate's court of this county, on the day of , and thereupon your petitioner [or, said C. D.] qualified, and letters of temporary administration were issued to him as such.

II. That, on the day of , in pursuance of an order theretofore duly made by the said surrogate, your petitioner [or, said C. D.] commenced the publication of notices to creditors of said M. N., to present their claims, and continue said publication, agreeably to the statute, for the period of six months.

III. That more than one year has elapsed since said letters of temporary administration were issued.

IV. That the assets of the estate of said M. N. amount to over dollars, and the debts amount to dollars; and your petitioner [or, said C. D.], as such temporary administrator, has sufficient assets in hand, applicable to the payment of the debts of said M. N., to pay, with interest [one-half of] the claim of L. M. [or, of your petitioner], hereinafter mentioned, and the same may be so applied, without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.

V. That one L. M. [or, your petitioner] has a valid claim against said M. N. [deceased], consisting of [state it briefly, e. g., thus] a promissory note made by said M. N., in his lifetime, to the order of said L. M., dated the day of , for dollars, payable months after date, and that no portion of the same has been paid [as your petitioner is informed and believes]. That said claim, with proof thereof, was duly presented to your petitioner [or, by your petitioner to said temporary administrator,] and a copy of said note, and [a copy of] the proof of the validity of said claim are hereto annexed and marked, respectively, A and B.

WHEREFORE your petitioner prays that a decree be entered herein, directing him [or, said temporary administrator] to pay [one-half of] said claim, with interest from the day of . [or, so much of said debt as it may be proper and just now to pay; and if the petition is by the creditor, add: and that a citation be issued requiring him and all parties interested to show cause why he should not render an account, and why such decree should not be made].

[Signature.]

[Verification.]

II. Decree on the Foregoing.

[The decree on the foregoing petition, after the proper recitals, may be:] That the said temporary administrator be, and he is hereby directed to pay [state claim as in petition; and if the petition was by a creditor, add: and that a citation be issued therefor and a citation having been duly issued thereupon out of this court, requiring—names—to appear and show cause why an account should not be rendered, and the said claim should not be paid, and said citation having been returned and filed, with proof of due service thereof, on all said parties]; and it having been proved to the satisfaction of said surrogate by the said petition [and the affidavit of Q. R., verified the day of , and herewith filed], that the assets of said decedent [or, absentee], in the hands of said temporary administrator, exceed the debts [and if the petition was by a creditor, add: and that the

petition may be granted, without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction];

Now, on motion of A. T., attorney for said A. B.,

IT IS ADJUDGED, that said A. B., the temporary administrator of the property of M. N., the said deceased [*or, absentee*], pay to said L. M. [one-half] the full amount of his said claim, to wit, dollars, with interest thereon, at per cent., from the day of , , the whole amounting to \$.

No. 51.

[*Ante*, § 438.]

Revocation of Letters.

I. *Petition.*

[*Title.*]

To the Surrogate's Court of the county of :

The petition of A. D. respectfully shows:

I. That your petitioner is one of the legatees under the will of C. D., late of the [city of New York], deceased [*or state other interest, as next of kin, creditor, etc.*], which was admitted to probate by the surrogate[*'s*] [court] of county, on the day of , , and recorded in the office of said surrogate, in Liber of Wills, at page ; and thereupon letters testamentary were duly issued by said surrogate to Y. Z., the sole executor in said will named. [*Or, where letters of administration are sought to be revoked, allege the interest of the petitioner and the issue of letters of administration*].

II. That the circumstances of said Y. Z. are such that they do not afford adequate security to your petitioner, nor to the creditors of said C. D., nor to other persons interested, for the due administration of the said estate [*adding particulars, for instance*] that the estate which has come into the hands of the said Y. Z., as such executor, exceeds dollars; that the said Y. Z. is insolvent and owes large sums of money, and on the day of , , made an assignment of all his property for the benefit of creditors. [*Or state other cause for revocation, with facts and circumstances, c. g.,* That the said Y. Z., at the time of the issue of letters testamentary to him as above stated, was an alien (not being a citizen of the United States, but being a citizen of the kingdom of Great Britain, resident at New York city, in the State of New York, and that since such appointment he has ceased to be a resident of the State of New York, and did, on or about the day of , remove from the city of New York, and take up his residence at Jersey City, in the State of New Jersey, and he is now a resident of that State].

WHEREFORE, your petitioner prays, that a decree be made revoking the said letters heretofore issued to said Y. Z., and that he be cited to show cause why such a decree should not be made; [and that, in the meantime, the said executor be enjoined from further acting in the premises].

[*Signature.*]

[*Verification.*]

II. *Order Enjoining Executor.*

[*Title.*]

A. D. of the city of New York, a legatee under the will, and interested in the estate of C. D., late of said city, deceased, having, on the day of , , filed a verified petition, by which complaint is made that the circumstances of Y. Z., the executor of the said will, are such that they do not afford adequate security for the due administration of the estate of the said deceased [*or, that the said executor has become by law incompetent to serve as such*]; and it appearing to the surrogate that there are good grounds for such complaint, and the said surrogate having thereupon issued a citation to the said Y. Z., requiring him to appear at a day and place therein

specified, to show cause why letters testamentary granted and issued to him, as executor, on the day of , should not be revoked,

IT IS ORDERED, that the said Y. Z. be, and he hereby is, enjoined from further acting in the premises until the matter in controversy shall be disposed of.

III. Order Revoking Letters.

[Title.]

On reading and filing proof of the due and personal service of Y. Z., the executor of the last will and testament of C. D., late of the city of New York, deceased, of the citation heretofore issued in this matter, requiring him to appear in this court, on this day, to show cause why the letters testamentary issued to him on said will should not be revoked; and the said Y. Z. having appeared, and A. D., the complainant herein, having also appeared, and after hearing the proofs and allegations of the parties, and it appearing that the circumstances of the said Y. Z., executor as aforesaid, are such that they do not afford adequate security for his due administration of the estate.

ORDERED, that the said Y. Z. give a bond, with sureties like those required by law of administrators, within five days from this day, or, in default thereof, that his letters testamentary be revoked [*or if cause of revocation cannot be cured by giving security, say, instead: That the letters testamentary heretofore issued to the said Y. Z. be, and they are hereby revoked. And all authority and rights of the said Y. Z., as such executor, are hereupon to cease*].

No. 52.

[*Ante*, § 443.]

Revocation of Letters upon Resignation.

I. Petition for Discharge.¹

[Title.]

To the Surrogate's Court of the county of :

The petition of A. B., the executor of the will [*or, administrator of the estate*] of M. N., late of the city of New York, deceased, respectfully shows:

I. That, by this court, on the day of , said will was duly admitted to probate, and letters testamentary thereon issued to your petitioner [*or allege letters of administration*].

II. That the only persons interested in the estate of M. N., the decedent, as creditors or persons claiming to be creditors, husband [*or, wife*], legatees, next of kin, or otherwise, and the only persons who are entitled, absolutely or contingently, by the terms of said will, or by the operation of law, to share in the fund, or in the proceeds of property, held by your petitioner, in the application of such estate or fund, and the places of residence of all such persons, to the best of the knowledge, information, and belief of your petitioner, are as follows, viz.: [*stating them*].

III. [*State grounds of application, for instance:*] That your petitioner is an alien and a citizen of the republic of France, having resided in the city of New York for a number of years past, but is now about to take up his residence in the city of London, England: and is now desirous to render an account of all his proceedings as such [executor], and be discharged.

WHEREFORE, your petitioner prays that his account of his proceedings, as such [executor], may be judicially settled, and that a decree be thereupon made revoking his said letters, and discharging him accordingly as [executor], and that the creditors and persons claiming to be creditors of the decedent, and the decedent's husband [*or, wife*], next of kin, and legatees, and other persons interested, may be cited to attend the judicial settlement of such an account.

[Signature.]

[Verification.]

¹ For forms of petition, decree, etc., upon resignation of testamentary trustees, see *post*.

II. *Order Allowing Accounting for Purpose of Discharge.*

[Title.]

A. B., one of the executors of the will of M. N., late of the city of New York, deceased, having presented to this court his petition, duly verified, on the day of , praying that his account be judicially settled, and that a decree be thereupon made, revoking his letters testamentary, and service charging him accordingly, and a citation thereon having been issued, directed to [names], and returnable on the day of , and the said citation having been returned on that day and filed, with proof of due service on all the persons named therein; and C. D. having appeared by Z. T., his attorney, and none other of the persons cited having appeared; and the said petitioner having appeared by his attorney, A. T., and the surrogate having heard the proofs and allegations of the parties: Now, on motion of A. T., the attorney for said A. B.,

IT IS ORDERED AND ADJUDGED, that sufficient reasons exist for granting the prayer of the petition, and that said A. B. be, and he hereby is, allowed to account for the purpose of being discharged as [executor of the will] of M. N., deceased.

III. *Decree Revoking Letters and Discharging the Representative.*¹

[Title.]

Letters [testamentary, on the will] of M. N., late of , deceased, having been heretofore issued by this court, on the day of , to A. B., as [executor], and the said A. B., having, on the day of , filed a petition in the office of said surrogate, praying that his account be judicially settled, and a decree made revoking his said letters and discharging him, and that a citation be issued, requiring the necessary parties to show cause why the petition should not be granted; and such citation having been thereupon duly issued, requiring [insert names] to show cause, on the day of , why such a decree should not be made; and the said citation having been returned on that day, and filed, with proofs of due service thereof on the persons named, and none of the persons therein named having appeared [except C. D., the co-executor of said A. B., who appeared by B. T., his attorney, and waived the account of said A. B., and a judicial settlement thereof]; and the said A. B. having appeared [in person and] by his said attorney and counsel, and it satisfactorily appearing to the surrogate that none of the money, books, papers, or other property of the estate of the said M. N., are in the hands of said A. B.: Now, on motion of A. T., attorney and counsel for said A. B.:

IT IS ORDERED, ADJUDGED, AND DECREED, that the said letters heretofore issued to A. B., as such [executor], be, and the same hereby are, revoked;

AND IT IS FURTHER ORDERED AND ADJUDGED, that the said A. B. be charged as such executor [here insert provision as to charges and credits, as in a decree settling an executor's accounts see 72, XXI, post].

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the said executor has fully accounted for all property belonging to the said estate coming into his hands, as such, and he, having paid over the sum of dollars, found due from him as aforesaid, and delivered all books, papers, and other property of the said estate in his hands, to the clerk of this court [or, to his co-executor — or, to J. S., who is hereby appointed the successor of the said A. B.] as directed by the surrogate, it is ordered and adjudged that the resignation of the said A. B. as executor of the last will and testament of M. N., deceased, be and the same is accepted, and that he be discharged of and from all liability and duty on account thereof.

¹See post, for form of decree revoking letters for failure to give new or additional sureties.

No. 53.

[Ante, § 460.]

Depositing Securities, to Reduce Penalty of Official Bond.*I. Petition for Leave to Deposit, etc.*

[If the application is made on applying for letters, insert this in the petition for letters; if made subsequently, may entitle this in the same proceeding, reciting briefly the former steps, and continuing, for instance, thus:]

That the said deceased died possessed of certain personal property situate in the county of _____ and State of New York; and that the aggregate value of all the personal property, wherever situated, of which the deceased died possessed, together with the probable amount to be recovered by reason of all or any right of action granted to an executor or administrator of the said deceased, by special provision of law [in case of executor, or administrator with the will annexed add, and also the value of the real property, or of the proceeds thereof, which may come to the hands of the executor — or, administrator — by virtue of any provision contained in the will, does not exceed the sum of three hundred and fifty thousand] dollars, and that the same largely consists of securities for the payment of money, and that all the goods, chattels, effects, and [personal] property of said deceased, over and above said securities, does not exceed the sum of [fifty thousand] dollars. A true description of said securities is contained in Schedule "A" hereunto annexed.

That it is inconvenient for your petitioner to furnish security in the full amount prescribed by law, but he is able to effect an arrangement by which the _____ Company of New York, a trust company, which is authorized by law to receive the same, will become the depository and custodian of the said estate under the direction of the surrogate.

WHEREFORE, your petitioner prays that an order be made directing the deposit with said _____ Trust Company of _____, of the aforesaid securities for the payment of money belonging to the estate, and that the amount of the bond to be given by your petitioner be fixed with reference to the remainder of said estate or fund, amounting to _____ dollars.

[Signature.]

[Verification.]

II. Order Thereon Allowing Deposit and Reduction of Bond.

[Title.]

On reading and filing the verified petition of A. B., dated the _____ day of _____, asking an order directing that certain securities for the payment of money belonging to the estate of said deceased, in said petition specified and described, be deposited with the _____ Trust Company of _____, to the end that the amount of the bond to be given by him, as such administrator, may be fixed and determined with respect to the remainder only of the estate or fund amounting to [fifty thousand] dollars or thereabouts;* and these facts appearing to the satisfaction of the surrogate, and he deeming it inexpedient to require of said A. B. security in the full amount required by law: Now, on motion [etc., as in other orders].

[Insert in ordering part] That the said securities for the payment of money, the description of which is contained in Schedule "A," annexed to said petition, belonging to the estate of said deceased, be deposited with the _____ Trust Company of _____, to the order of said A. B., as administrator as aforesaid, countersigned by the surrogate.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that letters of administration upon the goods, chattels, and credits of said decedent issue to said A. B., upon his subscribing the statutory oath that he will well, honestly, and faithfully discharge his duty as such administrator, according to law, and upon making the deposit aforesaid, and upon filing the receipt of the said _____ Trust Company for the said securities, and upon executing a bond in the penalty of [one hundred thousand] dollars to the people of New York State, with two or more competent sureties, for the faithful discharge of the trust reposed in him as such administrator. AND IT IS FURTHER ORDERED, ADJUDGED,

AND DECREED, that, as such administrator, he shall be, and hereby is, empowered to collect and receive all interest, income, and dividends now due or to grow due upon the securities so deposited as aforesaid, and in case the interest, income, or dividends upon any of said securities cannot be collected without the production of the certificate or security itself, the same may be collected by the said Trust Company, the depositary aforesaid, and, after collection, shall be paid over by said company to said administrator, upon such terms as may be agreed upon.

And the said Trust Company is ordered to keep possession of the said securities, subject to the order of the administrator aforesaid, countersigned by the surrogate, or subject to the special order of the surrogate.

III. Receipt by Depositary of Securities.

[Title.]

The Trust Company, of , does hereby acknowledge having received, on this date, from A. B., the following securities, together with the certified copy of an order [or, decree] of the surrogate of the county of , made in the matter above entitled, and dated , .

SECURITIES.

[Here follows description of the securities.]

IN WITNESS WHEREOF, the said Trust Company of has hereunto caused its corporate seal to be affixed, and the same to be duly attested, on this day of , .

[Seal.]

[Signature of],

President.

[Authentication as of a deed.]

No. 54.

[Ante, § 462.]

Proceedings to Compel New Official Bond, or New Sureties.

I. Petition by Person Interested.

[Title.]

To the Surrogate's Court of the county of :

The petition of M. N., of the city of New York, respectfully shows:

I. That your petitioner is one of the children and next of kin of S. N., late of the city of New York, deceased, intestate, and has not yet received the share of the estate of the said S. N., to which by law he is entitled.

II. That letters [of the administration of the estate] of the said S. N., deceased, were issued by the surrogate of the county of New York to C. D., of the city of New York, on the day of , .

III. Your petitioner further alleges, that C. R. [lately a resident of the city of New York, is one of the sureties of the said C. D., in his bond given by him on the granting of the said letters, and that the said C. R. has removed out of the State of New York, as your petitioner is informed and believes, and has gone to Boston, in the State of Massachusetts — or other facts showing insufficiency of sureties or inadequacy of amount of bond].

IV. That E. N., of the city of New York, is the only other surety of the said administrator in his said bond.

WHEREFORE, your petitioner prays that C. D. may be required to give new [or, additional] sureties [or, a new bond, in a penalty of dollars], or, in default thereof, that he may be removed from his office, and that letters issued to him may be revoked; and that the said C. D. may be cited to show cause why the prayer of this petition should not be granted.

[Signature.]

[Verification.]

II. Order for New or Additional Sureties, etc.

[Title.]

The citation issued to C. D., administrator of the estate of A. B., deceased, on the day of , requiring him to show cause why he should not be required [*etc., as above*], having been returned with due proof of service on the said C. D., and the said C. D. having appeared by W. M., Esq., his attorney, and it satisfactorily appearing that C. R., one of his sureties, has [*removed from this State—or stating other facts showing insufficiency of surety, or inadequacy of amount of bond*].

ORDERED, that said C. D. give new [*or, additional*] sureties [*or, a new bond, in a penalty of dollars*], in the usual form, as such administrator as aforesaid, within five days from this date, or, in default thereof, that his letters of administration be revoked.

III. Decree Revoking Letters on Failure to Give New Bond.

[Title.]

WHEREAS, by an order made and entered by the surrogate's court on the day of , C. D., administrator of the estate of A. B., deceased, was required within five days from that date to give a new bond in the penalty of dollars, of which order the said C. D. had notice; AND WHEREAS, the said C. D. has failed to furnish a new bond, approved by the surrogate, as required by said order [*or, has filed a new bond, approved by the surrogate, as required by said order*]. Now, on motion of . IT IS ORDERED AND DECREED, that the said C. D. be, and he is hereby, removed from his office as administrator aforesaid, and that the letters of administration heretofore issued to him be, and they are hereby, revoked [*or, if new bond has been given and approved, say, instead, that this proceeding be, and the same is hereby, dismissed, with costs and disbursements of the same, to be paid by to*].

No. 55.

[*Ante*, § 464.]

Releasing Sureties in Official Bond.

I. Petition of Surety to be Released.

[Title.]

To the Surrogate's Court of New York county:

The petition of J. K., of the county of , respectfully shows to the court as follows:

Your petitioner alleges that he is one of the sureties of C. D., as administrator of the goods, chattels, and credits of A. B., late of the city of New York, deceased, and that he desires to be released from responsibility on account of any future breach of the condition of the bond of the said administrator. He, therefore, prays for a decree releasing him accordingly, and that C. D., the said administrator, may be cited to show cause why he should not give new sureties.

[Signature.]

[Verification.]

II. Citation Thereon.

[*The command of the citation is*] to show cause why you should not give new sureties, in your official bond as administrator [*etc.*], pursuant to the statute.

III. Decree Releasing Surety.

[Title.]

J. K., of the city of New York, one of the sureties of C. D., as the administrator of all and singular the goods, chattels, and credits of A. B., late of the city of New York, deceased, having heretofore presented his petition, dated [*etc.*], to this court, setting forth that he desired to be released from responsibility on account of any future breach of the condition of the bond of the said administrator, and praying for relief, pursuant to the statute; and the surro-

gate having thereupon issued a citation requiring the said C. D., administrator as aforesaid, to [state substance of citation],* and the said C. D. having appeared in compliance with the said citation, and having given new sureties, to the satisfaction of the surrogate:

IT IS ADJUDGED AND DECREED, that the said J. K. shall not be liable on the bond bearing date on the day of , in the year one thousand nine hundred and , executed to the people of the State of New York, by the said C. D., as principal, and the said J. K. and one L. M., as sureties, on the granting of the letters of administration of all and singular the goods, chattels, and credits of the said A. B., deceased, to the said C. D., by the said surrogate, for any breach of the condition of the said bond, occurring after the date of this decree.

No. 56.

[Ante, § 467.]

Suing on Bond of Executors, etc., after Letters Revoked.¹

I. *Petition for Leave to Sue, by Person Aggrieved.*

[Title.]

To the Surrogate of county:

The petition of C. D. respectfully shows to the court, as follows: Your petitioner alleges [upon information and belief]:

I. That letters of administration [with the will annexed or letters testamentary] on the estate of A. B., late of , deceased, were granted by a decree of the surrogate's court of this county, on the day of , to G. H., of , who entered upon the discharge of his duties as such administrator with the will annexed [or, executor], accordingly, and as such received, in his official capacity as aforesaid, certain property belonging to the estate of said A. B., viz.: [describe it], which he has not duly administered, but, on the contrary, has wholly converted to his own use.

II. That your petitioner is a creditor of said A. B., and has a valid claim against his estate, and that upon his petition as such creditor [or otherwise], the said surrogate on the day of , made a decree requiring that said G. H., to whom said letters had been granted, should, within thirty days, render an account of his proceedings, or pay the same [or, otherwise, state briefly the object of the decree made].

[Or where the applicant seeks payment of a legacy, substitute for the first part of the foregoing paragraph: That he is a legatee under the will of the said A. B., deceased, and entitled to the payment of a legacy given him thereby; and that upon his petition — and continue as above.]

[Or, where the applicant seeks payment of a distributive share: That he is one of the next of kin of said A. B., deceased, and is entitled to the payment of a distributive share of the estate; and that upon his petition — and continue as above.]

III. That said G. H. has refused to perform said decree, and has not rendered an account [or, has not paid the same], although on the day of , he had due notice of said decree, and was requested so to do.

IV. That a certified copy of the bond of said A. H. is hereto annexed.

V. That the letters of administration [with the will annexed — or, letters testamentary] so granted to the said A. B., were revoked by a decree of the surrogate's court of this county, rendered on the day of , and no successor has been appointed in said administration.

WHEREFORE, your petitioner prays for an order permitting him to maintain an action upon the bond given by the said G. H., as such administrator, for the faithful discharge of the trust reposed in him, in behalf of himself and all others interested in the estate of the said A. B., deceased, to recover the value of the property so received by the said administrator and not duly administered by him.

[Signature.]

[Verification.]

¹ Each of the next of kin having a separate certificate in his favor may sue for his share. *Brawley v. Forman*, 15 Hun, 144. See *Hood v. Hood*, 85 N. Y. 561; *Bieder v. Steinhauer*, 15 Abb. N. C., 428.

II. *Order Permitting Suit.*

[Title.]

Upon reading and filing the verified petition of C. D. setting forth [*recite substance of allegations of petition*]: Now, on motion of Y. Z., attorney for said petitioner, it is

ORDERED, that the said C. D. be, and he hereby is, permitted to maintain, in behalf of himself and of all others interested, an action upon the official bond given by said G. H., as administrator [*etc.*], dated the day of , and now on file in the office of the surrogate of this county, to recover the value of [*describing property*]; and that the moneys recovered in such action be paid by the officer collecting them into the surrogate's court of this county, to be distributed according to law.

[Signature of],

Surrogate.

III. *Same; in Action by the People.*¹

[Recitals as above.]

ORDERED, that the bond given by said G. H. [*describing it as above*], be prosecuted by said C. D., in the name of the people of this State, joining his name as relator; and that the moneys collected therein, in satisfaction of such decree, be applied in the same manner as the same ought to have been applied by said G. H.

[Signature of],

Surrogate.

No. 57.

[Ante, § 494.]

Appraisal of Assets and Making Inventory.

I. *Petition.*

[Title.]

To the Hon. , Surrogate.

Application is hereby made by L. R., as executor [*or, administrator*] of the estate of A. B., deceased, to have appraisers appointed to estimate and appraise the personal property of said deceased, which consists of [*describing it*].

Dated,

[Signature of],

Executor.

II. *Order Appointing Appraisers.*²

[Title.]

Upon the application of C. D., administrator, etc., of the said A. B., deceased, it is ordered that J. K. and L. M., both of the town of Yonkers, in the county of Westchester, two disinterested persons, be, and they are hereby, appointed appraisers of the personal property of the said A. B., deceased, to estimate and appraise the same; and they are hereby authorized and required to truly, honestly, and impartially appraise the personal property of said deceased, which shall be exhibited to them, according to the best of their knowledge and ability.

[Signature of],

Surrogate.

III. *Appraiser's Oath.*

[Venue.]

I, J. K., of the town of , in said county, appraiser, duly appointed by the surrogate of the said county of Westchester, do swear and declare, that I will truly, honestly, and impartially appraise the personal property of A. B., late of the said county of Westchester, deceased, which shall be for that purpose exhibited to me, to the best of my knowledge and ability.

[Jurat.]

[Signature.]

¹ People *ex rel.* Becar v. Struller, 16 Hun 234. The action may be brought by an assignee of the bond. See Cridler v. Curry, 66 Barb. 336, and Rowe v. Parsons, 6 Hun, 338, as to what is a sufficient assignment.

² As to duties and compensation of appraisers, see Co. Civ. Proc., §§ 2565, 2711, as amended 1893; and page 494 *et seq.*, ante.

IV. Notice of Appraisement.

To the legatees, next of kin, and to all persons interested in the estate of A. B., late of the city of Yonkers, in the county of Westchester, deceased:

Notice is hereby given, that the undersigned, the administrator, etc., of said deceased, with the aid of J. K. and L. M., the sworn appraisers appointed by the surrogate of the county of Westchester, to estimate and appraise the personal property of the said deceased, will proceed to make an appraisement of all the goods, chattels, and credits of said deceased, at the late residence of said deceased, No. street, in the said city, on the day of , at ten o'clock in the forenoon.

[Date.]

[Signature of representative.]

V. Inventory.

A true and perfect inventory of all the goods, chattels, and credits which were of A. B., late of the city of Yonkers, in the county of Westchester, deceased, made by the administrator, etc., of the said deceased, with the aid and in the presence of J. K. and L. M., both of said county of Westchester, they having been duly appointed and sworn appraisers, containing a full, just, and true statement of all the personal property of the said deceased which has come to the knowledge of the said administrator, and particularly of all moneys, bank bills, and other circulating medium belonging to the said deceased, and of all just claims of said deceased, against said administrator, and of all bonds, mortgages, notes, and other securities for the payment of money, belonging to the said deceased, specifying the names of the debtors in each security, the date, the sum originally payable, the indorsements thereon, with their dates, and the sum which, in the judgment of the appraisers, may be collectible on such security.

Upon the completion of this inventory, duplicates thereof have been made, and signed at the end thereof by the appraisers.

[I.] *Specific articles set off to widow, husband, or minors.*

[Here enumerate the articles coming within Code Civ. Proc., § 2713, as amended 1893, subs. 1, 2, 3, ante, § 495, and which are included in the inventory without being appraised. State, in addition, the articles specified in subd. 4, and that they do not, in the aggregate, exceed \$150 in value.]

[II.] *\$150 worth of personal property set off to widow, husband, or minors.*

In addition to the above enumerated articles exempt from appraisal, the appraisers, pursuant to the statute, set apart the following articles of necessary household furniture, provisions, and other personal property, selected in their discretion, for the use of the widow and minor children [or, in case of a widow dying, of the minor children] of the deceased, the same not exceeding in value one hundred and fifty dollars:

[Here enumerate the articles set apart to the widow, under Code Civ. Proc., § 2713, as amended 1893, subd. 5, and which are to be appraised.

[III.] *Chattels in possession having an ascertainable value.*

[Here enumerate and describe such articles as household furniture, stock in trade, tools, farming implements, etc., other than those specified above, and set opposite each its appraised value, e. g.:]

HOUSEHOLD FURNITURE AT No. , STREET, NEW YORK.

First Floor — Front Parlor.

About sixty yards of Brussels carpet.....	\$50 00
Set of window curtains and ornaments.....	150 00
Pair of window shades, \$6; mahogany sofa, \$25.....	31 00
Two mahogany couches, \$40; rocking-chair, \$7.....	47 00
Six mahogany chairs, \$18; two mahogany tabourets, \$8.....	26 00
Large mirror, \$80; one pair of candelabras, \$40.....	120 00
Mahogany stand, \$3; astral lamp, \$9.....	12 00

[Back Parlor, similar list; and so with the other rooms of the house.]

[IV.] *Things in action considered good.*

[Here enumerate and describe the stocks, bonds, etc., in the manner required by 2 R. S. 84, § 11, c. g.:]

Bond made by Jonathan Little to the deceased, dated the first day of October, in the year 18 , conditioned for the payment of the sum of nine thousand dollars, on the first day of October, in the year 18 , with interest at the rate of seven per cent. per annum, payable half-yearly; secured by a mortgage of real estate in the city of New York, made by the said Jonathan Little and his wife, bearing even date with the bond.....	\$9,000 00
(The payment of interest is indorsed on this bond up to the first day of April, 18 .)	
Interest now due on this bond.....	\$
Promissory note, made by Thomas Shaw to the deceased, or order, dated the first day of February, 18 , for three thousand dollars, payable on demand, with interest.....	3,000 00
Interest now due on this note.....	\$

The following accounts are due to the deceased:

Account against John Green, 20th March, 18	125 00
“ Henry Jones, 15th April, 18	280 00
Twenty-five shares of the capital stock of the Greenwich Insurance Company, in the city of New York; certificate number 198—par value, twenty-five dollars each share; present actual value, one hundred and five per cent.	656 25
Due to the deceased from C. D., the said administrator, for money borrowed, without interest, two thousand dollars.....	2,000 00
The interest of the deceased in the stock in trade, effects, and credits of the late firm of “T. & B.” hardware merchants in the city of New York, composed of the said deceased and J. T., and in which the said testator owned the one-half share and interest. The accounts and affairs of the said partnership not having been adjusted and closed, the appraisers are not able to state the exact value of this interest. From the information they have obtained, the value of the said interest is, in their judgment, not less than ten thousand dollars.....	10,000 00
Money—in specie, at the residence of the testator, at the time of his death	220 00
“ in bills of the Bank of America.....	1,575 00
	<hr/>
	\$26,856 25
	<hr/>

[V.] *Things in action not considered good, and chattels having no ascertainable value.*

The following stock, securities, and accounts the appraisers consider of no value:

Thirty-two shares of the capital stock of the “President, Managers, and Company for erecting a bridge over the river Delaware, near the town of Milford,” of which the par value was \$50 per share.	
Bond made by James Hazen to the testator, dated 21st June, 18 , conditioned for the payment of \$600 one year after the date, with interest.	
Promissory note made by Samuel Ward to the order of John King, and by him indorsed to the testator, dated 2d October, 18 , for \$400, payable six months after date, duly protested.	
Account against George Brown	\$78 00
“ Thomas Jackson	95 00

The value of the following chattels the appraisers have not been able to ascertain:

A large collection of autographs [etc.].

VI. *Oath to Inventory.*

[Venue.]

C. D., of the said county, being duly sworn, says, that he is the administrator, etc., of A. B., late of the city of Yonkers, in said county, deceased, and that the foregoing is an inventory of the personal property of the said deceased; that the said inventory is in all respects just and true; that it contains a true statement of all the personal property of the said deceased, which has come to the knowledge of this deponent, and particularly of all moneys, bank bills, and other circulating medium, belonging to the said deceased; and of all just claims of the said deceased against the deponent, according to the best knowledge of the deponent.

[Jurat.]

[Signature.]

No. 58.

[Ante, § 500.]

Returning Inventory.

I. *Petition for Further Time to Return Inventory.*

[Title.]

To the Surrogate's Court of the county of New York:

The petition of J. B., of the city of New York, widow, respectfully shows:

I. That on the day of , last past, your petitioner was duly appointed the administratrix of the goods, chattels, and credits of A. B., late of the city of New York, deceased, intestate, her late husband.

II. That the personal property of said A. B. consists, for the most part, of the undivided distributive share to which the said A. B. was entitled in and of the personal estate of P. B., lately deceased, intestate, his brother. That W. B. was appointed by the said surrogate the administrator of the goods, chattels, and credits of the said P. B., deceased, on or about the day of . That the period for the settlement of the estate of the said P. B., deceased, has not yet arrived, and that the amount of the share thereof to which the said A. B., or his estate, may be entitled, cannot yet be ascertained. That your petitioner will, therefore, be unable to exhibit a perfect inventory of the personal property of the said A. B., deceased, within the three months limited by law. Your petitioner prays that she may be allowed four months further time to return such inventory.

[Signature.]

[Verification.]

II. *Order for Further Time to Return Inventory.*

[Title.]

On reading and filing the petition of J. B., the administratrix of the goods, chattels, and credits of A. B., late of the city of New York, deceased, intestate, praying that she may be allowed four months further time to return an inventory of the personal property of the said intestate, and reasonable cause therefor being shown:

ORDERED, that the said J. B., administratrix as aforesaid, be allowed four months further time to return such inventory.

III. *Affidavit of Failure to Return Sufficient Inventory.*

[Title and Venue.]

C. D., being duly sworn, says:

I. [Allege residence and creditorship, or interest in estate.]

II. That letters testamentary [or, of administration with the will annexed — or, of administration] on the estate of said deceased were granted by the surrogate's court of the county of , to J. B., of , by a decree duly made by said , on the day of , .

III. That more than has elapsed since said appointment, and the said J. B. has not returned any inventory of the personal property and effects of

said A. B. [*or, any sufficient inventory of the property and effects of said A. B., — specifying defect*].

[*Jurat.*]

[*Signature.*]

IV. *Order to Return, or Show Cause.*

[*Title.*]

Upon reading and filing the affidavit of C. D. [*refer to contents*], and the surrogate being satisfied that J. B., administrator [*etc.*], is in default, as alleged, and, on motion of A. T., attorney for the said C. D., it is

ORDERED, that the said J. B. return an [*or, a further*] inventory of the personal property of the said A. B., deceased, on or before the day of , or, in default thereof, that he show cause on said day, at o'clock in the forenoon, before me, at my office in the city of New York, why he should not be attached.

No. 59.

[*Ante, § 510.*]

Compelling Setting Apart Exempt Articles.

I. *Petition by Person Aggrieved.*

[*Title.*]

To the Surrogate's Court of the county of :

The petition of C. D., an infant, by J. H., his general guardian, respectfully shows to the court as follows: Your petition alleges [upon information and belief]:

I. That letters testamentary upon the will of A. B., late of , deceased, which was admitted to probate by a decree of the surrogate's court of this county, rendered on the day of , were duly issued to E. F., as sole executor, by said court, on the day of ; and that said E. F. thereafter duly qualified as such executor, and entered upon the discharge of the duties of his office.

II. That an appraisal and inventory of the personal property of the said A. B. has been made, and the said inventory is now on file in the surrogate's office of this county.

III. That the said A. B., immediately before his death, had a family, and left him surviving [no widow but] your petitioner, his only child, who is of the age of 15 years.

IV. That the said E. F. has failed to set apart any property [*or if sufficient property has been set aside so state*] for your petitioner, as prescribed by law, although, as appears by said inventory, the said A. B., deceased, left personal property to a large amount, including [*describe articles, if desired*].

WHEREFORE, your petitioner prays for a decree requiring E. F., executor as aforesaid, to set apart property for your petitioner, as prescribed by law, or, if the same or any part thereof has been lost, injured, or disposed of, requiring him to pay the value thereof, or the amount of the injury thereto, and that he may be cited to show cause why such a decree should not be made.

[*Signature of*],

General Guardian.

[*Verification.*]

II. *Citation Thereon.*

[*Adapt from general form, inserting, as the command*] to show cause why a decree of this court should not be made requiring you [*etc., as above*].

III. *Decree to Set Apart, or Pay Value, etc.*

[*Title.*]

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter [*or, if the executor appeared upon the return day, so state*], requiring E. F., executor [*etc.*], to show cause why he should not be required [*stating substance of citation*]; the petitioner having appeared by G. H., his general guardian, and the said E. F. failing to appear; and the

court having heard the proofs and allegations of the parties, upon mature deliberation it is

ADJUDGED AND DECREED, that E. F., as executor as aforesaid, having wholly failed to set apart for the petitioner any property out of the estate of the said A. B., deceased, which was ample for such purpose, but having disposed of the same [*stating how*], be, and he hereby is, directed to pay to G. H., the general guardian of the petitioner C. D., the sum of dollars, being the value of the property which should have been set apart by said E. F., as executor, for said petitioner, C. D., pursuant to law.

No. 60.

[*Ante*, § 520.]

Deposit of Property, where Executors, etc., Disagree.

I. Petition.

[*Title.*]

To the Surrogate of county:

The petition of A. B. respectfully shows and alleges [upon information and belief]:

I. That letters [of administration] were, on the day of , , duly issued upon the estate of the above-named [decedent], out of the surrogate's court of this county, to C. D. and your petitioner [*or*, to C. D. and E. F.], each of whom has duly qualified and entered upon the discharge of his official duties. [*If petitioner is a creditor or person interested, set forth facts showing claim or interest.*]

II. That said administrators are unable to agree respecting the custody of certain moneys [*or other property, describing it*], belonging to the estate of said decedent, viz.: the sum of dollars, now in the hands of the said administrators [*or*, of the said C. D. and your petitioner — *specifying particulars of disagreement, e. g.* — that said C. D. claims the sole control of said money — *etc.* — *If petition relates to executors, guardians, or testamentary trustees, adapt accordingly*].

WHEREFORE, your petitioner prays for an order to the said C. D. [*or*, the said administrators] to show cause why the surrogate should not give direction in the premises.

[*Signature of adm'r, or creditor, etc.*]

[*Verification.*]

II. Order to Show Cause.

[*Title.*]

[*Recite presentation and tenor of petition and conclude*] ORDERED, that C. D., administrator [*etc.*] of the said G. H., deceased, show cause before me, at my office, in the town of , on the day of , , at o'clock in the noon of said day, why the surrogate should not give directions concerning the custody of the said money [*or*, property], and why the petitioner should not have such other or further order in the premises as justice requires.

III. Order for Deposit.

[*Title.*]

[*Recite issue and return of order to show cause, appearance and hearing, adding*] Now, on motion of A. T., attorney for the said A. B., IT IS ORDERED, that C. D., administrator [*etc.*] be, and he hereby is, directed to deposit the sum of dollars belonging to the estate of J. H., deceased, and now in the hands of himself and A. B., as administrators, as aforesaid, in the Trust Company, at No. , street, in the city of New York, to the joint credit of the said A. B. and C. D., and to be drawn out only upon their joint order [AND IT IS FURTHER ORDERED, that the said C. D. pay to A. B., the petitioner herein, the sum of dollars for the costs and expenses of this application.]

No. 61.

[*Ante*, § 575.]**Discovery, etc., of Property, withheld from Executor or Administrator.***I. Petition for Inquiry.*[*Title.*]To the Surrogate's Court of the county of _____ :¹

The petition of A. B., of _____, respectfully shows [upon information and belief]:

I. That he is [the executor of the last will and testament of J. D., late of said town, deceased — *or*, the administrator of the goods, chattels, and credits of J. D., deceased], and that letters testamentary [*or*, of administration] were issued to your petitioner, by this court, on the _____ day of _____, last past.

II. That your petitioner has made search and inquiry for the goods, chattels, and credits of said deceased, and from such inquiry believes that some of such chattels, to wit: [*describe the property*] which were in possession of the said deceased at the time of his death [*or*, which were in the possession of the deceased within two years prior to his decease,] are in the possession or under the control of L. M. [who was about the person of the deceased, prior to his decease — *or*, in whose hands the said effects of the deceased have fallen], and who withholds the same from your petitioner [*or*, conceals — *or*, refuses to exhibit — the same], so that they cannot be inventoried or appraised.

III. That your petitioner has demanded such articles from the said L. M., who has refused to deliver the same to your petitioner.

IV. Your petitioner further alleges, that the reasons and grounds for his belief that such property belongs to the estate of the deceased are [his personal knowledge that the said deceased owned them — *or*, information derived from R. S. and T. U., whose affidavits are hereunto annexed].

WHEREFORE, your petitioner prays for an inquiry respecting the property aforesaid, by this court, and that the said L. M. may be cited to attend the inquiry, and to be examined accordingly.

[*Signature.*][*Verification.*]*II. Citation Thereon.*

[*Addressed to L. M., and commanding him*] to attend before the surrogate of _____ county, at his office, in _____, forthwith [*or*, on the _____ day of _____, at _____ o'clock in the forenoon], to attend the inquiry concerning certain personal property belonging to the estate of J. D., late of _____, deceased, alleged to be in your possession or control, and to be examined personally in respect to the same. [*If person cited does not reside in the surrogate's county, it may be returnable before a judge, surrogate, etc., in the county of his residence.*]

III. Order to Attend.[*Title.*]

ORDERED, that L. M., the party to whom the within [*or*, annexed] citation is addressed, be, and he hereby is, directed to attend personally, at the time and place, and for the purpose therein specified.

[*Signature of*].

_____, Surrogate.

IV. Answer.[*Title.*]

The answer of L. M. to the petition of A. B., praying for an inquiry respecting the property of J. D., deceased, alleged to be in his possession, shows:

He denies each and every allegation in said petition set forth [*or, if title is denied, say:*] He admits that said property is in his possession, and alleges

¹ See *ante*, § 576, as to the officers to whom the petition may be presented, in case a surrogate is absent.

that he is the owner thereof, and entitled to its possession by virtue of a lien thereon and special property therein [*stating circumstances upon which his ownership is founded*].

[*Verification.*]

V. *Order as to Requisites of Bond to Prevent Decree.*

[*Title.*]

It appearing, from the testimony in this matter, that there is reason to suspect that certain effects of the above-named deceased, to wit: [*Describe the property*], of the value of , are concealed [*or, withheld*] by L. M., of No. , street, in the city of New York,

ORDERED, that the bond, if any, to be given by the said L. M. to J. D., executor of the will of the said deceased, be in the penalty of , with sureties, to be approved by the surrogate, conditioned as prescribed by law.

VI. *Bond to Prevent Decree.*

KNOW ALL MEN BY THESE PRESENTS, that we, L. M., of , W. X. [and Y. Z.], of , are held and firmly bound to A. B., executor [*etc.*], in the sum of [such a penalty as the surrogate approves], lawful money of the United States of America, to be paid to A. B., as such executor, or to his certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our executors and administrators jointly and severally, firmly by these presents. Sealed with our seals. Dated the day of ,

The condition of this obligation is such, that if the above bounden L. M. shall pay to the above-named A. B., or his successor, the sum of dollars, with interest thereon from the day of , [*or, shall deliver to the above-named A. B., or his successor, the following described property—giving description—*or, in default thereof, pay to him the full value of the said property], and that he will pay all damages awarded against him for withholding the same, whenever it is determined, in an action or special proceeding to be brought by the said A. B., or his successor, that it belongs to the estate of J. D., deceased, then this obligation is to be void, otherwise to remain in full force and virtue.

[*Signatures and seals.*]

[Sealed and delivered in presence of]

[*Authentication and Justification.*]

VII. *Decree for Delivery.*

[*Title.*]

[*Recite presentation of petition, issuing and return of citation, attendance of parties, etc., and add*] and it appearing to the surrogate who issued the said citation, that there is reason to suspect that the sum of dollars [*or, the following described property—giving description*] is in the possession or under the control of the said L. M., and is withheld [*or, concealed*] by him, from the said A. B., executor [*etc.*] and on motion of A. T., attorney for the said executor,

IT IS ADJUDGED AND DECREED, that L. M. be, and he hereby is, directed to pay to A. B., executor [*etc.*] the sum of dollars [*or, to deliver to—the same party—the property above described*], and that he pay to the petitioner the sum of dollars for the costs and expenses of this proceeding.

[*Signature.*]

VIII. *Warrant to Seize Property.*

THE PEOPLE OF THE STATE OF NEW YORK,

To the sheriff of any county [*or, any constable of the county,—or, any marshal of the city*] where the following described property may be found, greeting:

WHEREAS, a decree was, on the day of , rendered by the surrogate's court of the county of , requiring L. M. to deliver to A.

B., executor [etc.] of J. D., deceased, the following described property: [particularly describing it].

YOU ARE THEREFORE commanded to search for said property; to seize it, if it is found in the possession of the said L. M., or his agent, or a person deriving title from him since the day of , [the day on which petition was presented], and for that purpose, if necessary to break open any house in the day-time; to deliver the property so seized to the said A. B.; and to return this warrant to the surrogate's court of the county of , within sixty days after your receipt thereof.

WITNESS, E. D. W., surrogate of our said county of , at his office, at , this day of , .

[Signature of.]

Surrogate.

[Seal.]

No. 62.

[Ante, § 636.]

Liquidation of Claims Against Decedent's Estate.

I. Application for Order to Publish Notice to Creditors.

To the Surrogate of the county of New York:

W. C. D. and E. F., administrators of G. H., deceased, hereby apply for an order of the surrogate of the county of , designating the newspapers in which to publish notice to creditors of said deceased, to present their claims according to law.

Six months have elapsed since the granting and issuance of letters of administration to your applicants.

Said deceased, at the time of his death, resided in the town of , county of , and was engaged in [describing his business and the supposed residence of any creditors known to the applicants].

Dated , .

[Signatures.]

II. Order to Publish Notice.

[Title.]

On reading and filing the petition of C. D. and E. F., administrators of G. H., deceased, setting forth, among other things, that six months and upwards had elapsed since they were appointed the administrators of said deceased, and that they are desirous of giving such notice to the creditors of said deceased to present their claims, as is authorized by law, and praying that the surrogate would make an order directing such notice published in such newspapers as he might deem necessary to give notice to said creditors; it is ordered that a notice be published once in each week for six months successively, in the newspaper published in the city of Brooklyn, Kings county, called the Brooklyn Eagle, and in the newspaper published in the city of New York, called the Daily Register, requiring all persons having claims against said deceased to present the same, with the vouchers thereof, to C. D. and E. F., the administrators of said deceased, at the office of the said C. D., No. 800, Fulton street, in the city of Brooklyn, on or before the 10th day of May next.

III. Notice to Prove Claims.

Pursuant to an order of W. L. L., surrogate of the county of Kings, notice is hereby given to all persons having claims against G. H., late of the city of Brooklyn, in said county, deceased, to present the same, with the vouchers thereof, to the undersigned, at his office, No. 800, Fulton street, in the city of Brooklyn [or, at the office of L. A. L., 69 Liberty street, N. Y.], on or before the day of , , [specifying a day at least six months after first publication.]

[Date.]

[Name of administrator.]

IV. *Proof of Claim.*¹[*Title and Venue.*]

A. B., being duly sworn, says:

I. That the estate of said G. H., deceased, is justly indebted unto deponent, in the sum of three hundred dollars and fifty cents, and interest thereon from the day of , [as specified in the annexed account,—or specify the facts giving rise to the claim, as, e. g.,—in payment for fifty barrels of flour, sold and delivered to the said C. D., on the day of , for the agreed price of \$300.50].

II. That the said sum of \$300.50 and interest is now justly due and owing to deponent, and that no payment has been made thereon, and that there are no offsets thereto, and the same is not secured by judgment or mortgage upon, or expressly charged on, the real estate of said deceased, or any part thereof.

[*Jurat.*][*Signature.*][*Serve pursuant to notice, if one has been published; otherwise personally.*]²

To A. B., Esq.:

You will please take notice, that I doubt the justice and validity of your claim of \$300.50 against the above-named estate, and I hereby dispute the same, and offer to refer it under the statute, to some suitable and proper person as referee, to be approved by the surrogate, to hear and determine the same according to the statute.

[*Date.*]

C. D., Administrator of G. H.

[*This offer may also be sent by the claimant to the administrator.*]V. *Consent to Determination of Claim by the Surrogate.*[*Title.*]

A claim having been filed by the undersigned, A. B., against the estate of G. H., deceased, a copy of which is hereto annexed, and made part hereof; and the undersigned C. D., the executor of said estate, having disputed the same, it is hereby agreed and consented, by and between the parties, that the said claim may, and shall, be submitted to the surrogate of the county of , for determination by him, upon the accounting of the said executor.

Dated,

VI. *Agreement to Refer Claim.*

WHEREAS, A. B. has lately presented a claim to C. D., the [executor of the last will and testament] of G. H., late of the city of Brooklyn, deceased, for \$300.50, a copy whereof is attached hereto, the justice of which claim is doubted by the said executor, it is hereby agreed that the matter in controversy be referred to M. N., counselor-at-law, as sole referee, to hear and determine the same.

[*May add stipulations, if desired, as to place of hearing, the taking of testimony, etc.*].[*Date.*][*Signatures of creditor and executor.*][*Indorsed.*]

I hereby approve of the referee named in the foregoing agreement.

[*Date.*][*Signature of surrogate.*]VII. *Order of Reference.*³[*Title.*]

On reading and filing the annexed agreement to refer the claim of A. B., above named, against the estate of J. K., deceased, to M. N., Esq., counselor-at-law, as sole referee to hear and determine the same, and the approval by the surrogate of county, of said referee, and on motion of H. W., Esq., attorney for the said C. D., as executor, etc.

¹The effect of neglect to present the claim is to deprive the claimant of costs if he sues. Co. Civ. Proc., § 1836; *Horton v. Brown*, 29 Hun, 654.

²Service on one of two executors is sufficient. *Lambert v. Craft*, 98 N. Y. 342.

³This order must be entered in the office of the clerk of the supreme court, in the county in which the parties, or either of them, reside. Co. Civ. Proc., § 2718, as am'd 1893.

ORDERED, that the said M. N., Esq., be, and he is hereby, appointed referee to hear and determine the matter in controversy mentioned in the said agreement.

[Add clauses stipulated for, as to hearing, etc., if any.]

[Date.]

[Signature of,]

County Clerk.

VIII. Report of Referee on Claim against Decedent.

[Title of court and cause.]

To the [Supreme] Court:

The undersigned, appointed by this court a referee to hear and determine the claim of A. B. against the estate of J. K., deceased, and the offsets thereto, by order dated , having taken the oath of office hereto annexed, and considered the allegations and proofs of the parties, and having heard J. O. H., Esq., for the claimant, and H. W. G., Esq., for the executors [or, administrators], reports to the court as follows: [Insert findings of fact and conclusions of law, with direction as to judgment and as to costs, as in an action].

[Date.]

[Signature,]

Referee.

[Annex oath of referee.]

IX. Judgment on Reference of Claim against Decedent.

[Title of court and cause.]

The claim of the above-named A. B. against the estate of J. K., deceased, having been duly presented to the above-named C. D., her executor, and the same having been disputed and rejected by him, and by consent of the parties, and with the approval of the surrogate, the same having been referred to M. N., Esq., as sole referee, to hear and determine the matters in controversy, pursuant to the statute, and after trial had, on due notice to all the parties, said referee having on the day of , duly made and filed his report, stating his findings of fact, and conclusions of law thereon, and directing judgment as hereinafter stated, and an order having been made and entered the day of , awarding costs to the above-named claimant, to be taxed, and to be paid out of the property of the decedent [or, out of the individual property of said C. D.] and the claimant's costs having been duly adjusted at dollars, Now, on motion of I. H., attorney for the claimant,

IT IS ADJUDGED, that the said A. B. do recover of the said C. D., as executor of the last will and testament of the said J. K., deceased, the sum of dollars, so found due by the referee, as appears by his report, and dollars interest thereon from said date to the date of this judgment, and dollars for costs, amounting in the whole to dollars, to be levied and collected out of the goods, chattels, and credits of said J. K., deceased.¹

No. 63.

[Ante, § 629.]

Compromise of Claims.

I. Petition for Leave to Compromise.

[Title.]

To the Surrogate of the county of New York:

The petition of C. D. respectfully shows:

I. That the will of the above-named A. B., deceased, was duly admitted to probate by the surrogate of the county of New York, on the day of , and on the same day letters testamentary thereon were duly issued to your petitioner as the sole executor therein named.

¹ As to form of judgments against representatives in actions, see § 570, ante.

II. That among the assets of the estate of the said deceased, is a debt of \$150 on a book account due from the firm of N. & Co., lately doing business at No. , street, in the city of New York, which deponent has hitherto been unable to collect. That on the day of , the said firm suspended business and made a general assignment of all their property to one L. M., for the benefit of their creditors.

III. That the said firm have offered to pay their creditors fifty per cent. of the amount of their respective debts, in consideration of receiving a full discharge and release of all liability thereon, and as appears by the affidavit of R. S., hereto annexed, that offer has been accepted by a majority, in number and value, of all their creditors, and your petitioner verily believes, after a careful examination of the affairs of said N. & Co., that the said firm have acted honestly and in good faith, and are not able to pay any larger percentage of their debts, and that it will be for the benefit and advantage of the estate of the said A. B., to compromise on the terms offered.

WHEREFORE, your petitioner prays that he may be authorized to compromise the said claim by receiving fifty per cent. of the amount thereof as a full satisfaction.

[Signature.]

[Verification.]

II. Order Allowing Compromise.

[Title.]

On reading and filing the petition of C. D., executor of A. B., deceased, and the affidavit of R. S., annexed thereto, and it appearing thereby that there is good and sufficient cause for allowing the said C. D. to compromise the debt therein referred to, and the terms of compromise therein named being approved of,

ORDERED, that the said executor be, and he is hereby, authorized to accept fifty per cent. of the amount of the debt owing from the firm of N. & Co., late of No. , street, in New York city, to the said deceased, as a full satisfaction and discharge of said debt.

No. 64.

[Ante, § 68.]

Enforcing Judgment Rendered Against Executor, or Administrator.

I. Petition for Leave to Issue Execution.

[Title as in next form.]

To the Surrogate of the county of New York:

The petition of M. N., of the city of New York, respectfully shows as follows: Your petitioner alleges [upon information and belief]:

I. That he is a creditor of A. B., deceased, whose last will and testament was duly admitted to probate by the surrogate of the county of New York, on the day of , and letters testamentary thereon duly issued to C. D., of No. , street, in the city of New York, on the day of

II. That, on the day of , your petitioner commenced an action against the said C. D., as executor of the last will, etc., of the said A. B., deceased, in the supreme court of this State; that such action was to establish the liability of the said A. B., as indorser of a certain note made by one J. K., to your petitioner, for \$400, dated the day of , and payable three months from that date; that the said C. D. duly appeared, and interposed an answer admitting the indorsing of the said note by the said A. B., but denying that the note had been duly presented for payment to the maker thereof, or notice of dishonor duly given to the said A. B. That the issues of fact hereby raised came on for trial at a circuit court, held in the city and county of New York, on the day of , and the said C. D. then and there appeared and gave evidence

in support of the allegations of his answer. That the issues were submitted to the jury upon the charge of the court, and a verdict rendered for your petitioner for dollars, the amount due on said note, with interest. That, upon a special application to the court, costs were awarded to your petitioner, which were duly taxed at the sum of dollars, and on the day of , judgment for dollars was duly entered in favor of your petitioner, and against the said C. D., as executor, etc.

III. That the said judgment was duly docketed in the office of the clerk of the city and county of New York, on the day of ,

IV. That the said judgment has not been paid, nor any part thereof, although duly demanded, and the same is now in full force, and that, as your petitioner is advised and believes, there are [sufficient] assets of the decedent in the possession of the defendant, or under his control, which are applicable to such judgment, and that an execution against the said executor, in his representative capacity, is necessary to collect the amount due thereon.

[Where notice cannot be personally served, insert: V. That your petitioner has made diligent effort to make personal service of notice of this application upon the said C. D.,—stating nature of efforts—but has been unable to do so, and your petitioner believes that it will be impossible to make such service upon him.]

Your petitioner, therefore, prays,* that the said C. D., the executor of the last will, etc., of the said A. B., aforesaid, be required to show cause why an execution on such judgment should not be issued [or, where notice can be personally served, continue, after,* that an execution may issue upon such judgment] for such sum as the surrogate shall determine, not to exceed your petitioner's just proportion of the assets of said decedent's estate.

[Signature.]

[Give six days' notice to the executor or administrator, where practicable; otherwise, an order to show cause is to be granted.]

II. Notice of Application to Surrogate for Leave to Issue Execution upon Judgment against an Executor or Administrator as Such.

[Title.]

Please take notice, that on the day of , , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, the undersigned will apply to the surrogate of county, at his office in the [city] of , for an order permitting an execution to be issued upon the judgment recovered by M. N. against C. D. in his representative capacity as executor [or, administrator], of A. B., in the court of , and docketed in the office of the clerk of said court [or, of the county of], on the day of , , or for such other or further relief as may be just.

[Date.]

[Signature and office address of],

Attorney for [judgment creditor].

To C. D., executor [or, administrator] of A. B., deceased.

III. Order to Show Cause.

[Title.]

On reading and filing the verified petition of M. N., of the city of New York, by which it appears that the said M. N., on the day of , obtained a judgment against the said C. D., as executor of the said A. B., deceased, in the supreme court of this State [after a trial at law upon the merits], and that said judgment was duly docketed in the office of the clerk of said court on the day of : and that such judgment was for dollars, and that no part thereof has been paid, although duly demanded.

[*] ORDERED, that the said C. D., executor as aforesaid, personally be and appear before the surrogate of the county of New York, at his office in the city of New York, on the day of next, at 11 o'clock in the forenoon of that day, and show cause why an execution on the said judgment should not be issued.

Service of this order and the said affidavit [or, petition] upon which it is granted, upon [naming the persons to be served] either personally, or by de-

positing it in a post-office at , on or before the day of , a copy of this order and said affidavit [or, petition], contained in a securely-closed post-paid wrapper, directed to each of the said persons [or in such other manner as the surrogate shall designate], shall be sufficient.

[The surrogate, upon the filing of the petition, may order executor to render an intermediate account. The order for such an accounting may be as above down to the *, and continue,]

ORDERED, that the said C. D., executor as aforesaid, appear in this court on the day of next [the return day of the above order], at 11 o'clock in the forenoon of that day, and [render an intermediate] account [of his proceedings] as such executor.

IV. Undertaking by Legatee or Next of Kin before Issuing Execution on Judgment against Executor or Administrator.

[Title.]

WHEREAS, in an action in the court of the , judgment was rendered in favor of M. N., as legatee [or, next of kin] of A. B., deceased, and against C. D., as executor [or, administrator], for the sum of dollars, which judgment was entered and docketed in the office of the clerk of the county of , on the day of ,

AND WHEREAS, the said M. N. has made application to the surrogate of the county of , from whose court letters testamentary [or, of administration with the will annexed] upon the estate of said deceased were issued to the said C. D., for leave to issue an execution upon the said judgment;

NOW, THEREFORE, pursuant to the requirement of the said surrogate upon such application, and according to the statute in such case made and provided, we, G. H., of No. , street, in the of , county of and State of New York, by occupation a ; and E. F., of No. , street, in said county and State, by occupation a , do hereby jointly and severally undertake and become bound in the sum of dollars to the said C. D.; that if, after the collection of any sum of money by virtue of the execution which the said surrogate shall, upon said application, permit to be issued upon the said judgment, the remaining assets are not sufficient to pay all sums for which the said C. D. are chargeable for expenses, claims entitled to priority as against the said M. N. and the other legacies [or, distributive shares] of the same class as the said M. N.'s, then the said M. N. will refund to the said C. D. the sum so collected, or such ratable part thereof, with the other legatees [or, representatives] in the same class as the said M. N. as shall be necessary to make up the deficiency.

[Date.]

[Signature.]

[Acknowledgment, affidavit of sufficiency, and approval, as in No. 45.]

[File in surrogate's court, and serve copy with notice of filing.]

V. Order that Execution Issue.

[Title.]

On the application of M. N., a creditor of the said A. B., deceased, who obtained a judgment at law upon the merits against the said C. D., as executor, etc., in the supreme court of this State, on the day of , for dollars, no part of which has been paid, an order having been heretofore duly made against the said executor, and served upon him, to show cause why an execution on the said judgment should not be issued: and an order having also been made and served upon the said executor, requiring him to appear in this court, on the day of last past, and render an intermediate account as such executor: and the said parties having duly appeared, and the said C. D. having produced and rendered his intermediate account as such executor aforesaid: and the said matter having been heard on several days, and duly adjourned from day to day until this day: and it appearing, from the said account, that there are still in the hands of the said C. D., as such executor, assets of the estate of the said A. B., deceased, to the amount of dollars: and that the debts and outstanding liabilities of the said deceased do not exceed the sum of dollars; and that there are assets in the hands of

the said executor properly applicable to the payment in full of the said judgment, and no cause to the contrary being shown;

ORDERED, that execution be issued in due form of law against the said C. D., executor as aforesaid, for the whole amount of the said judgment and interest.

AND IT IS FURTHER ORDERED, that the fees and expenses of this proceeding be paid [out of the estate of the said deceased].

No. 65.

[*Ante*, § 688.]

Execution Against Property, of a Judgment Debtor, Having Died Since Judgment.¹

I. *Petition.*

[*Title.*]

To the Surrogate of the county of New York:

The petition of A. B. respectfully shows:

I. That your petitioner, on the day of , , in the court of the of [or, before J. P., Esq., a justice of the peace of the town of —or, in the district court for the judicial district of the city of New York], in the county of , recovered a final judgment against the [defendant], the said Y. Z., for [or, directing the payment by the said Y. Z. to the said A. B., of] the sum of dollars and cents damages and dollars and cents costs. [*And add facts showing the judgment to be a lien on the property described, as for instance:*] That the judgment-roll upon said judgment was duly filed and the judgment duly docketed in the office of the clerk of the [city and] county of [or, of the court of], on the day of , [*and in case of a judgment of any court other than the supreme, and including cases where execution is to be issued to another county, add:*], and a transcript of said judgment was duly filed, and the judgment was duly docketed, in the county clerk's office, on the day of , .

II. That said Y. Z. died on the day of , , intestate, leaving C. D. and E. F. as his only heirs-at-law [or, leaving a last will and testament, which has been duly admitted to probate by the surrogate of the county of , whereby the real property hereinafter described was devised to C. D. and E. F.], and letters of administration [or, letters testamentary under said will] were duly granted upon the estate of the said deceased judgment debtor by the surrogate of county, to [naming administrator— or, to , the executor named in said will], on the day of , , and the said administrator [or, executor] has duly qualified as such [and more than three years have elapsed since the said letters were duly granted].

[*Or in cases specified in the fourth sentence of Code Civ. Proc., § 1380, substitute the following:*]

III. That said Y. Z. died intestate at , on the of , , and that, although three years have elapsed since said death, letters of administration upon his estate have not been granted by the surrogate's court of the county of , in which the decedent resided at the time of his death [or, that said Y. Z. died at , on the day of , , and resided out of this State at the time of his death at —specifying place— and that, although three years have elapsed since said death, neither letters testamentary or letters of administration have been granted by the surrogate's court, of the county of , in which the property on which the said judgment is a lien, is situated]; and the said decedent did not leave any personal property within this State upon which to administer [*state evidence or means of information*].

IV. That at [or, after] the time the said judgment was duly docketed in said county [and at the time of death], the said Y. Z. was the owner of real property situated therein upon which the said judgment was and still is a lien, to wit: [*add a particular description, if practicable*].

¹Co Civ. Proc., §§ 1379 to 1381. No notice is necessary of the presentation of the petition to the surrogate. *Kerr v. Kreder*, 25 Hun, 452.

V. That [no execution on said judgment has ever been issued, and] the said judgment remains wholly unsatisfied and unpaid [or, remains partly unsatisfied, in that the sum of dollars is still due and unpaid thereon].

VI. That on the day of , an order, a certified copy of which is hereto annexed, was duly made by said court¹ of granting your petitioner leave to issue execution therefrom on said judgment [or, if application therefor is pending or not yet made, state the fact].

WHEREFORE, your petitioner prays that a decree be made by this court, allowing said judgment to be enforced by execution against the said property on which it is a lien, with like effect as if the said Y. Z. were still living, and that [the said administrator—with the will annexed—or, executor of said Y. Z. and C. D. and E. F. [naming all others whose interests may be affected by sale] may be cited to show cause why such decree should not be granted, and for such other and further relief as may be just.

[Signature.]

[Verification.]

[Citation as usual in surrogate's court directed to representative and to all persons whose interests would be affected by the sale.]

II. Answer of Representative.

The answer of M. R. as executor [or, administrator] of the estate of Y. Z., deceased, to the petition of A. B., shows:

I. He denies the validity of the petitioner's claim and alleges that the same is illegal and void by reason of the following facts: [stating them, as thus].—that on the day of , and before the death of the decedent, the said A. B. received from said decedent two certain promissory notes in writing [describing them] in payment and full satisfaction of the judgment mentioned in said petition, or,—that the obligation of the decedent upon which said judgment was rendered was that of a surety: that as such he was discharged from liability by reason of the fact, that on or about the day of , the said A. B. and L. F. [principal] entered into an agreement by the terms of which the time of the said L. F. to pay the note in suit was extended for the period of three months, and that in any event the liability of the decedent was discharged by his death.

II. That there is not money or other property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction.

[Signature.]

[Verification.]

III. Decree of Surrogate's Court allowing Execution against Property of Judgment Debtor, having died since Judgment.²

[Title.]

The written petition of A. B., of , duly verified the day of , having been presented to the surrogate of the county of New York for a decree granting permission to issue an execution against the property of Y. Z., deceased [and mention any other papers relied on], and due proof having been made thereby that [here recite concisely the facts upon which the application is based, as they appear in the petition]: and a citation having been duly issued thereupon directing the said executor [or, administrator] and [naming the other persons cited], the parties entitled to such notice, to show cause before this court on the day of , why the prayer of the said petition should not be granted, and the said citation having been returned on that day and filed, together with the proof of said due service thereof on

¹This order is made by the court from which the execution is to be issued. Co. Civ. Proc., § 1380. Either application to the court or surrogate may precede the other, although it is better practice to apply first to the court.

²Co. Civ. Proc., §§ 1379-1381. Three years must have elapsed before execution can issue where the lien of the judgment was created, as prescribed in Id., § 1251. See Duell v. Alvord, 41 Hun, 196, and case cited in note.

each of the persons therein named, and the said executor [*or, administrator*] having appeared on the return day of the said citation, by A. T., his attorney [and also produced and filed his intermediate account pursuant to an order of this court returnable on that day], and [*naming the parties, if any appearing*] having also appeared on said day by [*naming attorneys*], their attorneys respectively, and the allegations and proofs of the respective parties having been duly heard [*may recite facts as to amount due, etc., established, if desired*], and due deliberation having been had thereon: Now, on motion of M. N., Esq., attorney for the said petitioner A. B., it is

ADJUDGED AND DECREED, that the said A. B. be, and he is hereby, permitted to issue an execution upon the said judgment against the property hereinafter described, upon which the said judgment is a lien, with like effect as if said judgment debtor was still living, for the sum of dollars and cents, together with interest from the day of [*naming date of entry of judgment*]. The property hereinbefore mentioned is described as follows: [*description*].

[*Signature of*],
Surrogate.

No. 66.

[*Ante*, § 718.]

Enforcement of the Transfer Tax.

I. Petition.

[*Title*.]

To the Hon. , Surrogate:

The petition of A. B. respectfully shows:

First. Your petitioner is one of the executors named in the last will and testament of the above-named decedent, and as such is a person interested in the estate of the above-named decedent.

Second. That the said decedent departed this life on the day of , in the city of New York, and that he was a resident of this State [*or otherwise, as the case may be*].

Third. That the said decedent left a last will and testament, which was, on the day of , duly admitted to probate, and that deponent and G. H., of the city of New York, are executors of said will, and that their post-office addresses are: [*naming them*].

Fourth. That, as your petitioner is informed and believes, the property of said decedent, passing by said will, or some portion thereof, or some interest therein, is subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all the persons who are interested in the said estate, and who are entitled to notice of all proceedings herein, including the comptroller of the State of New York [*or, the treasurer of the county of*], and their post-office addresses are as follows, viz.: [*naming them*].

Sixth. That each of said persons is of full age and sound mind [*or otherwise, as the case may be*].

WHEREFORE, your petitioner prays that you will appoint some competent person as appraiser, as provided by law.

And your petitioner will ever pray.

[*Signature*.]
Petitioner.

[*Verification*.]

II. Order Appointing Appraiser.

[*Title*.]

On reading and filing the petition of A. K. praying for the appointment of an appraiser under and in pursuance of the law in relation to taxable transfers of property, it is

ORDERED, and I hereby direct, that , Esq., of , the county treasurer of county, as appraiser, appraise and fix the fair market value of the property of the decedent. [*In counties where the office of*

appraiser is salaried say: And I hereby direct , Esq., one of the appraisers appointed by the State comptroller, to fix, etc.]

IT IS FURTHER ORDERED, that said appraiser shall give the notice required by the said law, in the manner and at the time therein set forth [and said notice shall be days], to the following persons, and to all other persons known to have or claim an interest in the property of M. N., the decedent in the above-entitled proceeding, subject to the payment of said tax, viz.: [insert names of persons to be served with notices.]

AND IT IS FURTHER ORDERED, that at said time and place said appraiser proceed to value and appraise the transferred property of said deceased, upon which there is, or in any contingency there may be, a tax imposed upon the transfer thereof, at its fair market value, at the time of the death of said deceased, or at the time of the transfer thereof as the law directs, and make a report thereon, in writing, to the surrogate of said county, of the value of said property; and also report the aggregate amount of the debts, funeral expenses, expenses of administration and of judicial settlement, incurred and to be incurred, including commissions of the executor, [or, administrator], and the expense of this proceeding, and the value of the legacies passing under the will of said deceased to the respective legatees [or, distributive shares passing to the respective distributees], subject to taxation herein, and the amount of tax due on each of such legacies [or, distributive shares], Surrogate.

III. Notice of Appraisal.

[Title.]

You will please to take notice, that, by virtue of an order of Hon. , surrogate of the county of New York, made and dated the day of , and pursuant to the provisions of article X of chapter 908 of the Laws of 1896, I shall, on the day of , at o'clock in the noon of that day, at the office of , No. , street, in the city of New York, proceed to appraise at its fair market value all the property of said M. N., deceased, late of said city, passing by his last will and testament, or by the intestate laws of the State of New York, which is subject to the payment of the tax imposed by the said act.

New York, , .

[Signature.]

Appraiser.

To J. P. and S. T.,

Next of Kin.

B. L., Comptroller [etc.].

IV. Affidavit as to Decedent's Property.

[Title.]

STATE OF NEW YORK, } ss.:
COUNTY OF , }

A. B., being duly sworn, doth depose and say:

I. I reside in the town of , in said county of ; I am the executor [or, administrator] of the will of C. D., late of the town of , in said county of , deceased.

II. I further say that this deposition is made for the purpose of having the surrogate of the county of determine the cash value of the real and personal property of which said decedent died seized and possessed, and the amount of tax to which the same is liable, under chapter 908 of the Laws of 1896, and all acts supplementary thereto and amendatory thereof.

III. I further depose and say that the following inventory correctly sets forth all of the real property of which said decedent died seized, coming to my knowledge, and that opposite each parcel of real property I have conscientiously set down the fair market value thereof when said decedent died [specify it in detail].

IV. I further depose and say that the following inventory correctly sets forth all of the personal property of which said decedent died possessed, coming to my knowledge, and that opposite each article of personal property

I have conscientiously set down the fair market value thereof, when said decedent died [*specify it*].

V. I further depose and say that the following contains a just and true statement of all demands against said decedent actually allowed by me as valid claims against said decedent; that said statement sets forth the name of the creditor, and opposite thereto, the general nature of the demand and the amount allowed [*specify them, giving names, nature, and amount*].

VI. I further depose and say that according to the best of my knowledge, the following is a true and correct statement of all moneys actually paid by me for funeral and other expenses of the administration of the estate of said decedent, and also the names of the persons to whom and for what purpose the same were paid [*specify names, purpose, and amount*].

VII. I further depose and say that the following statement contains my estimate of the amount of moneys to be expended in the necessary prospective expenses of the administration of the estate of said decedent, and upon the judicial settlement of my account [*specify them*].

VIII. I do further depose and say that the following persons, with their names, places of residence, and relationship to the deceased set opposite their names, respectively, are the only persons having an interest in the real or personal property of said decedent, or any part thereof, with a statement of the nature of the interest, and the fair market value thereof when said decedent died [*specify in detail their names, residence, relationship, nature of interest, and the approximate value thereof*].

IX. I do further depose and say that said C. D. died in the town of , in said county of , on the day of , and that he was at that time a resident of said county.

[*Jurat.*]

V. Report of Appraiser.

[*Title.*]

To Hon. , surrogate of county of New York:

I, the undersigned appraiser, who was by an order of the surrogate of county, duly made and entered on the day of , directed to appraise the property of said decedent, at its fair market value at the time of the transfer thereof, in pursuance of the laws in relation to taxable transfers of property, do respectfully report:

First. That pursuant to chapter 908 of the Laws of 1896, as amended, I duly took and subscribed the oath prescribed by statute, and filed the same as therein provided.

Second. That on the day of , I gave notice by mail, postage prepaid, to such persons, corporations, etc., known to have, or claim an interest in any property of said decedent subject to the payment of any tax imposed by said laws, including the comptroller of the State of New York, and those persons and corporations named by the surrogate in his said order, of the time and place at which I would appraise said property, a true copy of which notice together with proof of mailing is hereto annexed; that the names of those to whom I mailed such notices, properly addressed, as appears by proof of mailing, are as follows: [*name them*].

Third. At the time and place in said notice stated, namely, on the day of , [and at other and subsequent times and divers places to which these proceedings were regularly adjourned], I appraised all the property, real and personal, of which the said decedent died possessed, and subject to the payment of said transfer tax, at its fair market value at the time of said transfer, as follows, namely:

Personal Estate.

[*It is desirable that the appraiser should classify the property in the following order: (1) Bonds, (2) Stocks, (3) Bonds and Mortgages on Real Estate, Promissory Notes, etc., (4) Cash in Banks, (5) All other Personal Property. Briefly describe each parcel, and specify its fair market value at time of decedent's death.*]

Fourth. I further report that decedent's estate is subject to the following deductions on account of debts, claims, expenses of administration and commissions, as follows: [*specify the items, with nature of each*].

*Recapitulation.**Fifth.*

Total amount of decedent's personal estate..... \$

Total amount of decedent's real estate devised to persons, corporations, or institutions, or passing by the statute of descent to persons, other than such as are exempt by said acts.....

Total \$

From which debts, expenses of administration, etc., as enumerated in the "Fourth" finding above, are to be deducted, amounting to

Leaving the sum of..... \$

which is the net estate transferred by testator's will [*or, the intestate laws of the State*], as follows: [*Here set forth the names and residences of the persons, corporations, or institutions receiving any property; relationship to decedent; nature of interest, and the value of the property or interest transferred.*]

Sixth. I further report that all of said persons interested in said estate are of sound mind, and of full age, except [*naming them, if any*].

Seventh. I further report that the following appearances were made before me in this proceeding: [*naming them*].

Eighth. I further report as follows: that the name of decedent is ; the date of his death was the day of . Decedent was a resident of the town of , county of , State of . He left a [*or, no*] will. Letters testamentary [*or, of administration*] were issued by the surrogate of the county of , to , whose post-office address is . That the six months' limitation expires on the day of ; and the eighteen months' limitation expires on the day of .

Ninth. I further report that attached hereto is all the testimony taken by me, and the copies of all papers presented to me in this proceeding.

Tenth. I do further report, that the said deceased made no transfer of any property by deed, grant, bargain, sale, or gift in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of said deceased.

I further report that there was no necessary litigation, or unavoidable cause of delay, by reason of any claim made upon the estate of said deceased, or any litigation pending in which the estate of said deceased was interested.

Eleventh. [*In counties where county treasurer acts as appraiser*] That my actual and necessary traveling expenses, including the fees paid witnesses, amount to dollars, as appears by an itemized statement thereof, herewith presented.

Dated at , New York,

All of which is respectfully submitted, in duplicate, at the city of , this day of .

[Signature.]

VI. Oath of Appraiser.

[Title and Venue.]

I, D. V. S., who was appointed the appraiser in the above matter, by an order made and entered on the day of , do solemnly swear, that I will faithfully and fairly perform the duties of such appraiser, and make a just and true report according to the best of my understanding.

[Jurat.]

[Signature.]

VII. Certificate of Appraiser's Expenses.

[Title.]

STATE OF NEW YORK, }
COUNTY OF , SURROGATE'S OFFICE, } ss.:

I, , surrogate of the county of , New York, do hereby certify that the actual and necessary traveling expenses of and fees paid witnesses by , of the county of , N. Y., treasurer of county, New York,

the appraiser heretofore appointed in the above-entitled matter, pursuant to article X of the tax law, as amended, in relation to taxable transfers, are the sum of dollars, as taxed and allowed by me.

The treasurer of county, New York, is hereby directed to pay the said sum to the said appraiser, upon the presentation of this certificate, as authorized by said law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at the village of , county, New York, this day of , Surrogate.

The foregoing has been examined and is hereby audited by comptroller at the sum of dollars.

Dated, Albany, N. Y., this day of , State Comptroller.

VIII. *Notice to Superintendent of Insurance to Ascertain Annuities.*

NEW YORK, , .

In pursuance of article X of chapter 908, Laws of 1896, you are hereby requested to determine and ascertain the values of the following estates, annuities and interests:

Name.	Age.	Legacy or Estate.	Value or Amount.

To the Superintendent of the Insurance Department.

[Signature of],
Surrogate.

IX. *Notice of Motion to Confirm Appraiser's Report.*

[Title.]

You are hereby notified that at the surrogate's court of the county of New York, to be held on the day of , at 10:30 A. M., at the county courthouse in the city of New York, I shall, from the return and report of the appraiser filed herein on the day of , assess and fix the cash value of all such interest, estate, annuity, legacy, or property as you and each of you are given or entitled to receive from or out of the estate left by the said M. N., deceased, and the amount of the tax to which the same is liable under article X of chapter 908 of the Laws of 1896.

[Date.] [Signature of],
Surrogate.

X. *Order Confirming Appraiser's Report.*

[Title.]

On reading and filing the report of S. J., the appraiser herein, and after hearing A. A. R., in support of said report, and B. D. P., in opposition thereto, IT IS ORDERED:

I. The cash value at the date of decedent's death, of the property mentioned and described in said report, which is subject to the payment of the tax imposed by law taxing gifts, legacies, and collateral inheritances is as follows: [stating it].

II. That the tax to which the said property is liable is as follows, viz.: [stating it].

III. That if said tax is paid within six months from the day of , [date of decedent's death], a rebate of five per cent. thereon will be allowed, but if not paid within eighteen months after such date, a penalty at the rate of ten per cent. per annum from said date will be imposed.

[Signature of],
Surrogate.

XI. *Petition by District Attorney for Appointment of Appraisers.*

To the Surrogate's Court of the county of _____ :

The petition of D. N., of the city of _____, respectfully shows:

I. That your petitioner is the district attorney of the county of _____.

II. That on or about the _____ day of _____, _____, at the city of _____, M. N. _____ died, and was at the time of his death a resident of the county of _____ of _____.

III. That said deceased left a last will and testament which, on the day of _____, _____, was duly admitted to probate by the surrogate of the county of _____, in and by which he appointed as the executor thereof, A. B., [or, *in case of intestacy, say:—* that said deceased died intestate, and on the _____ day of _____, _____, letters of administration were duly issued to A. B.,] who duly qualified as such, and his letters are still in force.

IV. That said decedent died seized or possessed of property within this State or subject to its laws, and the value of which exceeded the sum of five hundred dollars.

V. That upon the death of said M. N., certain of the property of said decedent thereupon passed to [*giving names of legatees or distributees, other than those mentioned in the succeeding paragraph*].

VI. That none of the persons designated in the foregoing paragraph, No. V. of this petition, stood in the relation to the deceased of a father, mother, husband, wife, child, brother, sister, wife or widow of a son, husband of a daughter, a child adopted as such in conformity with the laws of this State, a person to whom said deceased, for not less than ten years prior to such transfer, stood in the mutually acknowledged relation of a parent or a lineal descendant of said deceased, born in lawful wedlock; nor is any person so designated a bishop or a religious corporation.

VII. That the property so passing or some part thereof is subject to taxation under article X of chapter 908 of the Laws of 1896, in relation to taxable transfers of property. The foregoing allegations are made on information and belief.

VIII. Your petitioner further shows that the treasurer of the county of _____ has notified your petitioner in writing of the refusal or neglect of the persons interested in said property to pay the same, and that no part of said tax has been paid, and your petitioner has probable cause to believe that the same still remains due and unpaid.

WHEREFORE, your petitioner prays that a citation issue herein to [*naming persons in paragraph V. above*], citing them to appear before this court on a day to be designated therein, and show cause why the tax under the act aforesaid should not be paid, and said property be appraised if necessary for that purpose.

[Date.]

[Signature.]

[Verification.]

XII. *Citation on Application of District Attorney.*

THE PEOPLE OF THE STATE OF NEW YORK,

By the grace of God, free and independent,

To A. B., C. D., E. F., etc., send greeting:

You and each of you are hereby cited and required personally to be and appear in the court of the surrogate of the county of New York, at the county courthouse, in said county, on the _____ day of _____, _____, at 10:30 o'clock in the forenoon, to show cause why the tax provided for by article X of chapter 908 of the Laws of 1896 of the State of New York, should not be paid on property passing to you and each of you under the will of M. N., late of said county, deceased, proved herein by decree, entered the _____ day of _____, _____, and why such property should not be appraised according to law, if necessary for that purpose.

And such of you hereby cited as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or

failure to do so, a guardian will be appointed by the surrogate to represent and act for you in the proceeding.

IN TESTIMONY WHEREOF, we have caused the seal of the surrogate's court to be hereunto affixed.

WITNESS, _____, Esq., surrogate of our said county, at the city of _____, the _____ day of _____, in the year of our Lord, one thousand nine hundred and _____.

[Signature],
Clerk of the Surrogate's Court.

XIII. Order Assessing Tax in Proceeding by District Attorney.

[Title.]

Upon reading and filing the report of M. C., the appraiser herein, and after hearing D. H. on behalf of D. N., district attorney of the county of _____, in support of said report, and R. L., attorney for executors in opposition thereto, it is:

ORDERED, 1st, that the cash value, at the date of decedent's death, of the property mentioned and described in said report, which is subject to the payment of the tax due, under the law in relation to taxable transfers of property, is as follows:

Interest of C. D. \$

Interest of E. F.

2d, that A. B., as executor of said M. N., deceased, make payment to X. Y., the comptroller of the [State of New York], of the sum of _____ dollars, being the amount of the tax upon the interest of said C. D., and the sum of _____ dollars, being the amount of tax upon the interest of said E. F., together with interest upon each of said sums, at the rate of ten per centum per annum from the _____ day of _____, to the day of payment.

AND IT IS FURTHER ORDERED, that said A. B., as executor as aforesaid, pay to D. N., district attorney, the sum of _____ dollars as and for his costs and disbursements herein.

XIV. Notice of Assessment of Tax.¹

[Title.]

You are hereby notified that I have, by order made the _____ day of _____, assessed and fixed the cash value of such interest, estate, legacy, or property as you and each of you are entitled to receive from or out of the estate left by said M. N., deceased, and the amount of the tax to which the same is liable under article X, chapter 908, of the Laws of 1896.

Beneficiary.	His interest or estate.	Cash value thereof.	Tax assessed thereon.

To,

[Signature],
Surrogate.

XV. Notice of Appeal to Surrogate.

[Title.]

You will please take notice, that A. R., sole surviving administrator of the goods, etc., of said deceased, and M. R., C. R., and D. R., next of kin of said deceased, hereby appeal to the surrogate from the appraisal of the value of the inheritance of said next of kin, made and filed the _____ day of _____, and also from the order or decree of the surrogate's court made and entered the _____ day of _____, confirming the said appraisement, and assessing

¹The subsequent proceedings against an executor to enforce the payment of the tax is by attachment and against a legatee by means of an execution.

the tax to which the property and interests of said next of kin are liable under article X of chapter 908, Laws of 1896, and from every part of said order.

You will please take further notice, that the grounds of said appeal are as follows: [*here specify with particularity each of the grounds to be relied on.*]¹

Dated, New York,

Yours, etc.,

[Signature,]

Attorney for the Administrator.

XVI. Bond on Appeal from Order Imposing Tax.

[*Proceed as in No. 45, to the * and continue thus:* WHEREAS, on the day of , , an order of the surrogate's court, held in and for the county of New York, was entered in a certain matter therein depending entitled in the matter of the estate of M. N., deceased, assessing the tax to which the property and interests of the collateral next of kin of said deceased is liable, to wit: on the interest of A. B., \$395.70; on the interest of B. C., \$395.70; on the interest of C. D., \$395.70, and ordering the payment by the administrator out of the funds of said estate to Hon. R. F., district attorney, the sum of dollars, as and for his allowance in said matter. AND WHEREAS, the said next of kin and the administrator of said estate have appealed from said assessment and order, pursuant to the provisions of article X of chapter 908 of the Laws of 1896,

Now, therefore, the condition of the foregoing obligation is such that if the above bounden A. R., administrator, etc., of W. R., deceased, shall pay all costs of said proceeding, and also whatever tax the court shall finally fix upon said several and respective interests, then this obligation shall be void, otherwise to remain in full force and effect.

XVII. Order of Affirmance by Surrogate.

[Title.]

The appeal of the administrator and of M. R., C. R., and D. R., next of kin of said deceased, from the appraisal of the value of the inheritances of said next of kin, made and filed the day of , , and also from the order or decree of this court made and entered the day of , , confirming said appraisal and assessing the tax to which the property and interests of said next of kin are liable, under article X of chapter 908 of the Laws of 1896, coming on to be heard, now upon the facts appearing before me, and after hearing R. L. R., attorney for the administrator and next of kin, appellants, and B. F. D., Esq., on behalf of the comptroller of the State of New York,

IT IS ADJUDGED [*insert facts to be found, as for instance*], that at the time of his death, the intestate decedent M. N., was domiciled in the State of Virginia; that he died unmarried, and his only next of kin were his brother, S. B. R. (since deceased), his sister, M. L. L., and the children of a deceased brother, to wit: M. R., C. R., and D. R.

IT IS ORDERED, ADJUDGED, AND DECREED, the property and interests of said collateral next of kin are subject to the operation of article X of chapter 908 of the Laws of 1896, and that the order or decree of this court confirming the report of the appraiser and assessing and fixing the tax upon the property and interests of said collateral next of kin, entered the day of , , be, and the same is affirmed, and the appeal is dismissed.

[Signature,]

Surrogate.

XVIII. Notice of Appeal to Supreme Court.

[Title.]

Take notice, that A. R., sole surviving administrator, etc., of said intestate and decedent, and M. R., C. R., and D. R., hereby appeal to the appellate division of the supreme court for the first judicial department from the order of the surrogate's court of the county of , made and entered the

¹No questions, other than those specified, will be considered on appeal. *Matter of Davis*, 91 Hun, 53; *affd.* 149 N. Y. 539.

day of _____, appointing an appraiser herein; and also appeal from the order or decree of said surrogate's court made and entered the day of _____, confirming the report of said appraiser and assessing the tax upon the property and interests of the collateral next of kin, and from every part of such order: and also from the order or decree of said surrogate's court, made and entered the _____ day of _____, dismissing the appellant's appeal from said order of assessment, and adjudging that the property and interests of said next of kin are subject to the operation of article X of chapter 908 of the Laws of 1896.

Dated, New York, _____,

Yours, etc.,

[Signature].

Attorney for Administrator.

To Honorable _____, District Attorney, and to _____, Clerk of Surrogate's Court.

No. 67.

[Ante, § 782.]

Compelling Payment of Debt, or Legacy, or Share.

I. Petition for Payment of Debt.

[As in next form to the asterisk, continuing: creditor of the estate of M. N., deceased, late of _____, whose will was—thence continuing as in next form from the dagger to the §, substituting six months for one year.]

II. [In case of administrator allege grant of letters.]

III. [Allege claim, for instance, as follows:] That, on the _____ day of _____, your petitioner, in an action brought by him in the _____ court against said Y. Z., as executor [or, administrator], upon a debt then justly due to him from the estate of said deceased, recovered a judgment, duly given by said court against said executor [or, administrator], for the sum of _____ dollars: and that no part of the same has been paid [except the sum of _____ dollars].

IV. [As in next form, substituting claim or judgment for legacy.]

V. That said executor advertised for the presentation of claims against the estate of the said deceased, and your petitioner duly presented his claim, which was not disputed, and your petitioner, after the expiration of six months from the granting of such letters, demanded payment of his said claim, from the said executor, who has hitherto neglected and refused to pay the same or any part thereof, wherefore your petitioner prays, etc. [as in the succeeding form.]

II. Petition for Payment of a Legacy or Distributive Share.

To the Surrogate's Court of the county of _____:

The petition of A. B. respectfully shows:

I. That your petitioner resides at No. _____ street, in the [city of New York]: and is a * [legatee named in the will of M. N., late of the city of New York, deceased, and by said will a legacy of _____ dollars was bequeathed to your petitioner].

II. That said will was † duly admitted to probate by the surrogate[s] court] of the county of _____, by a decree duly made by said _____, on the _____ day of _____, _____: and letters testamentary were thereupon and on said day [or, on the _____ day of _____, _____] issued to Y. Z., the sole executor therein named, and more than one year has elapsed since said letters were granted [or, if one year has not expired, state time and add: That the payment prayed for is necessary for the support—or, education—of your petitioner].

III. That said Y. Z. has filed an inventory of the personal property of said deceased.‡

IV. That, as your petitioner is informed and believes, the said executor [or, administrator] has sufficient assets in hand applicable to the payment of your petitioner's legacy [or, distributive share: if not enough to pay all insert, to pay one-_____th thereof], and that the same can be so applied without injuriously affecting the rights of others entitled to priority or equality of payment with your petitioner.

V. That your petitioner has applied to said Y. Z. for the payment of said legacy [or, distributive share], and that the same has not been paid.

WHEREFORE, your petitioner prays that a decree be made requiring said Y. Z. to [render an account of his proceedings and] pay said legacy [or, share], and that said Y. Z. be cited to show cause why he should not pay said legacy [or, share].

[Signature.]

[Verification.]

III. Answer of Executor to Petition.¹

[Title.]

Y. Z., executor of the above-named deceased, for answer to the petition of A. B., praying for the payment of the legacy bequeathed to him by said will, says:

I. That he admits that the said will contains a bequest of dollars, in favor of the said A. B., but notwithstanding that fact, this executor has found among the papers of the said deceased, a paper purporting to be a promissory note, and to be signed by the said petitioner, for an amount larger than the amount bequeathed to him, to wit, the sum of dollars, payable to the order of the decedent, and he verily believes that said note is a genuine security, and should be set off against the claim of said petitioner for said legacy.

II. That the petitioner, though named in the said will as a legatee, duly assigned the same to B. D., of the city of New York, for a valuable consideration.

III. That by the express terms of said will said legacy was to be paid after the sale of certain real property, therein directed to be sold, which sale has not yet taken place.

IV. That the petitioner, A. B., is not the same person as the A. B. mentioned in said will as a beneficiary thereunder.

WHEREFORE, said executor asks that the said petition of A. B. be dismissed.

[Signature.]

[Verification.]

IV. Citation to Pay Creditor, Legatee, etc.

[Command of citation:] to show cause why a decree should not be made directing you, as [executor of the will] of M. N., deceased, to pay the claim of A. B. against the estate of the said M. N., in the sum of dollars.

V. Decree for Payment of Debt.

[Title.]

A. B., of the city of New York, having, on the day of , presented his petition to the surrogate of the county of , by which it appears that he has a valid claim against M. N., late of the city of New York, deceased, for dollars, with interest thereon from the day of , ; and the said petition also setting forth the facts on which the said indebtedness arose, and also showing that more than six months have elapsed since the granting of the letters testamentary of the last will and testament of the said deceased; and praying a decree against Y. Z., the executor of the said M. N., deceased, for payment of the said claim; and the said executor having been duly cited to appear on the day of , last past, and show cause why such payment should not be decreed; and the said Y. Z., having appeared, and having assented to the said claim of the said A. B., and having produced and filed an account as such executor; and the said matter having been heard on several days, and duly adjourned until this day; and it appearing, from the said account and from the proofs herein taken, that there are in the hands of the said Y. Z., as such executor aforesaid, assets of the estate of the said M. N., deceased, to the amount of dollars, and

¹ It is sufficient to state facts showing that the petitioner's claim is *doubtful*, to warrant a dismissal of the proceeding.

that the debts and outstanding liabilities of the said deceased do not exceed the sum of dollars:

IT IS ORDERED AND DECREED, pursuant to the statute in such case made and provided, that the said Y. Z., executor as aforesaid, pay to the said A. B. the full amount of his said claim and interest, amounting in the whole to the sum of dollars and cents.

AND IT IS FURTHER ORDERED, that the said Y. Z. personally pay the fees of this proceeding, and the costs of the said A. B. therein to be taxed.

[Decree for payment of legacy or share: adapt from above, according to petition.]

VI. Execution on Money Decree.

THE PEOPLE OF THE STATE OF NEW YORK,

To the Sheriff of the county of [Westchester], greeting:

WHEREAS, on the day of , , the surrogate of the county of [Westchester] duly made a decree, directing the payment by Y. Z., executor of the last will [etc.] of M. N., deceased, to A. B., of the sum of dollars, for a debt due to the said A. B., and the sum of dollars, for his costs and expenses in the proceedings before said surrogate, making in the whole the sum of dollars. AND WHEREAS, there is now actually due on said decree the sum of dollars, with interest thereon from the day of

YOU ARE THEREFORE commanded and required to make said sum of dollars out of any the goods, chattels, and personal property of the said Y. Z. in your county, and if sufficient thereof cannot be found in your county, then out of the real property in your county of which the said A. B. was seized and belonging to him, on the said day of , or at any time thereafter, in whose hands soever the same may be, and that you return this execution, with your proceedings thereon, to the surrogate's court of said county, in sixty days after the receipt by you of the same.

WITNESS, O. T. C., surrogate of said county, at White Plains, the day of .

[Signature of surrogate, or of clerk to the surrogate's court.]

[Seal.]

VII. Bond to Refund Legacy Paid Pursuant to Decree.

KNOW ALL MEN BY THESE PRESENTS, that we, M. N., of the city of New York, and J. K. and L. M., of the same city, are held and firmly bound unto C. D., the executor of the last will and testament of A. B., late of the city of New York, deceased, in the sum of six hundred dollars, lawful money of the United States of America, to be paid to the said C. D., as such executor aforesaid, or to his certain attorney, successors, or assigns: to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the day of , one thousand nine hundred and .

WHEREAS, the said A. B., in and by his said last will and testament, did give and bequeath to the said M. N. the sum of one thousand dollars: AND WHEREAS, the said legatee has lately applied to the surrogate of the county of New York [previous to] the expiration of one year from the granting of the letters testamentary to the said executor, to be allowed to receive a portion of the said legacy, to the amount of three hundred dollars [as necessary for his education — or, support]: and reasonable notice of the said application having been given to the said executor, and the said surrogate being about to allow the said portion of the said legacy to be advanced to the said legatee, pursuant to the statute in such case made and provided, upon the execution and delivery of this obligation:

NOW, THE CONDITION of this obligation is such, that if the said M. N. shall return the said portion of the said legacy, with interest, whenever required, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered [etc.].

[Signatures and seals of obligors.]

[Acknowledgment and justification of sureties.]

No. 68.

[Ante, § 790.]

Bond to Refund Legacy Directed by the Will to be Paid before the Expiration of the Year.

[As in last above form to and including date.]

WHEREAS, the said A. B., in and by his said last will and testament, did give and bequeath to the said M. N. the sum of five hundred dollars, and directed the same to be paid to him in two months after the decease of the said A. B.: AND WHEREAS, the said M. N. has demanded payment of the said legacy from the said executor before the expiration of one year from the time of the granting of the letters testamentary of the said last will and testament to the said executor, and the said executor is about to pay the same, pursuant to the statute in such case made and provided, upon the execution and delivery of this obligation:

NOW, THE CONDITION of this obligation is such, that if any debts against the said deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, and the said M. N. shall refund the legacy so paid, or such ratable proportion thereof, with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, and the costs and charges incurred by reason of the said payment to him; and if the probate of the said will shall be revoked, or the will declared void, and the said M. N. shall refund the whole of the said legacy, with interest, to the executor or administrator entitled thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered [etc.].

[Signatures and seals of obligors.]

No. 69.

[Ante, § 792.]

Bond on Payment of Legacy to General Guardian.

KNOW ALL MEN BY THESE PRESENTS, that we, C. D., of , general guardian of the person and estate of A. B., a minor, and J. K., of , and L. M., of , are held and firmly bound unto the said A. B., the minor aforesaid [continue as in Form 67, VII].

WHEREAS, the above-named A. B. is entitled to a legacy of dollars, given and bequeathed to him in and by the last will and testament of G. H., late of , deceased, which last will has been duly admitted to probate and record by the surrogate of , and letters testamentary thereon duly granted and issued to W. M. and H. B., the executors in said will named; AND WHEREAS, the said A. B. is a minor, and the said C. D. has been duly appointed his general guardian; AND WHEREAS, the said surrogate having ordered that the said executors pay to the general guardian of the said A. B. the said legacy of dollars;

NOW, THEREFORE, THE CONDITION of this obligation is such, that if the above bounden C. D. shall and will faithfully apply said legacy, and render a true and just account of the application thereof, in all respects, to any court having cognizance thereof, when thereunto required, then this obligation to be void, else to remain in full force and virtue.

Sealed [etc.].

[Signatures and seals of obligors.]

[Acknowledgment and justification of sureties.]

[Indorsed.]

I approve of the within bond as to its form, manner of execution, and sufficiency of the sureties.

[Signature of surrogate.]

No. 70.

[Ante, § 850.]

Application of a Decedent's Real Property to Pay Debts.¹*I. Petition.*

To the Surrogate's Court of the county of _____ :

The petition of A. D. respectfully shows:

I. That your petitioner is sole executor [or, an executor] of the last will of M. N., late of _____, deceased [or, an administrator of the goods, chattels — etc.— or, a creditor of M. N.— etc.].

II. [In a case of testacy] That said M. N. died on the _____ day of _____, leaving a will which was duly admitted to probate [or, to record], by an order duly made by the surrogate[s court] of this county, on the _____ day of _____, by which will the testator appointed your petitioner [or if the petition is by a creditor, appointed C. D.] the [sole] executor thereof. [Or, in a case of intestacy, II. That on the _____ day of _____, the said M. N. died, and your petitioner — or, if the petition is by a creditor, that C. D. was thereupon duly appointed administrator of the goods, chattels, and credits of said E. N., by an order duly made by the surrogate—s court — of this county, on the _____ day of _____].

III. That thereupon your petitioner [or if petition is by a creditor, said C. D.] duly qualified; and thereupon, by an order of said surrogate[s court], duly made on the _____ day of _____, letters testamentary [or, of administration with the will annexed — or, of administration] were duly issued to your petitioner, who thereupon entered on the discharge of his duties as such [or, if the petition is by a creditor, say, duly issued to said C. D.], which letters still remain in force.

IV. [Where more than three years have elapsed] That, before the expiration of three years from the time of said issue of letters, and until the present time [or, until the _____ day of _____], an action was, and has been, pending between your petitioner [or, said C. D.] as such executor [or, administrator] and C. D., claiming to be [or, and your petitioner as] a creditor of the estate of said decedent [or, if the creditor was defendant, insert, in which said — creditor — sought, by his answer setting up a counterclaim], to recover upon the demand hereinafter mentioned; and that before the expiration of said three years said C. D. [or, your petitioner] duly filed in the office of the clerk of the county of _____, a notice of pendency of said action, with direction to index the same in the names of [names], which notice specified the names of the parties to said action, the object of the action [or, the nature of said counterclaim], and contained a description of the premises in said county, which are hereinafter described, and that they would be held as security for any judgment obtained by said _____ in said action.

V. That an inventory of the personal property was duly made and filed by _____, on or about the _____ day of _____; and that the personal estate of said decedent has been discovered to be insufficient for the payment of the debts [or, the funeral expenses — or both] of said decedent.

VI. [Where there has been advertisement for claims] That, on the _____ day of _____, pursuant to an order theretofore duly made by the said surrogate, your petitioner [or, said C. D.] commenced the publication of notices to creditors of said M. N., to present their claims, and continued said publication, agreeably to the statute, for the period of six months.

VII. [If an executor or administrator petitions] That the amount of personal property of said decedent, which has come to the hands of your petitioner as such executor [or, administrator.— or, if there are co-representatives not joining in the petition, say, to the hands of your petitioner and the said _____, or to the hands of either of them], is _____ dollars; and that the sources and the manner in which the said sum has been derived appear in the account hereto annexed [or, by the final account of said _____, duly judicially settled by a decree of this court made on the _____ day of _____; of which account and decree a copy is hereto annexed], marked Schedule A.

¹See Co. Civ. Proc., § 2752.

That your petitioner has expended of the said amount, in the due course of administration of said estate, the sum of dollars, and that the particulars of such expenditure also appear in the said account [or, copy account and decree] hereto annexed, marked Schedule A, leaving in the hands of your petitioner, as such executor, on this day of , , the sum of dollars.

That the sum of dollars is still due and owing your petitioner, as [executor], from [etc., stating any other available assets], and there are no other sums yet to be realized from the assets of said decedent.

That your petitioner has proceeded with reasonable diligence in converting the personal property of said testator into money, and applying the same to the payment of debts.

VIII. [If petitioner is a creditor allege claim, c. g., thus] That said decedent died indebted to your petitioner in the sum of dollars, and interest from the day of , , upon a promissory note made by said decedent payable to your petitioner or order, dated the day of , , and payable in days after date; that the said claim is justly due to your petitioner; that no payments have been made thereon, and that there are no offsets against the same to the knowledge of your petitioner; and that the same is not secured by judgment or mortgage upon or expressly charged on the real estate of the said deceased. [If a judgment is shown, state the amount, exclusive of costs; and if a mortgage be shown, let it appear that it is not a lien on the decedent's real property.]

That your petitioner has presented his said claim to the said [executor], and that the same has been admitted by him to be a valid and subsisting claim against the said decedent. [And if an accounting has been had, add] That on the day of last past, the said C. D. rendered to such surrogate an account of his proceedings as such executor [or, administrator], which said account has been judicially settled by a decree made by the said surrogate's court—a copy of which account and decree is hereto annexed and marked Schedule A, and that it appears from the said account, upon such settlement, that there are not sufficient assets to pay the debts of the said decedent.

IX. That the unpaid debts outstanding against the said decedent, and the particulars thereof, with the name and address of each creditor or person claiming to be a creditor, as far as the same can be ascertained by your petitioner, together with the name and address of each person holding or claiming to hold a lien by judgment, docketed against the decedent before his death, the date of docketing of each, and the portion of the real property of decedent affected thereby; also the amount of the unpaid funeral expenses of said decedent, and the name and address of each person to whom any sum is due by reason thereof, appear in the schedule hereto annexed, marked Schedule B.

That all the debts against the said decedent, not secured by mortgage, and which now remain to be paid, so far as the same can be ascertained by your petitioner, and as having been admitted by him [or, by said executor—or, administrator], upon due evidence, amount to dollars, exclusive of interest, as fully appears by said Schedule B.

That the claims against the said decedent, mentioned in the schedule hereto annexed, marked Schedule C, having been presented to your petitioner, as such [or, to said] executor [or, administrator], but have not been admitted by him, for the reason [as your petitioner is informed and believes] that [here indicate it, c. g., thus] that by the books of account of said decedent, it does not appear that such large sums are due to the parties presenting the claims.

X. That the following described real property is, as your petitioner is informed and believes, all the real property within the State of New York of which said decedent died seized, or which in anywise belonged to him at the time of his death [description in full, giving nature and amount of incumbrances thereon.—If there are several distinct parcels, say, PARCEL NUMBER ONE—description]. The value of said premises constituting parcel numbered one is, in the judgment of your petitioner, dollars. It is occupied by L. N., of {or, hereafter named}, as a pasture [or, not occupied].

[Where there are several parcels, may add:] Said parcel numbered one is not subject to any charge or lien [or, is subject to—stating the charge or lien, c. g., thus—a mortgage for dollars, made by said decedent to M. H.,

and due on the day of , but the same has not been paid]; and that said parcel [was not devised by said will, but] descended to the heirs of said decedent hereinafter mentioned; and has not been sold by them, or any of them [*or otherwise stating facts material to the order of sale*].

[*Where there is an interest in an executory contract*] PARCEL NUMBER [Two]. The interest of the said decedent, in certain real property held by him under a contract made by him with O. P., of , bearing date the day of , for the purchase by said decedent from said O. P., for the sum of dollars, of the said last-mentioned real property, being the following described premises: [*description in full*].

The sum of dollars was paid by said decedent thereon; and the sums remaining unpaid, which have heretofore become due, or hereafter are to become due, on said contract, are as follows: [*enumerating them, with date when each was or is to be due*].

The value of the interest of said decedent in the last-mentioned premises under said contract is, in the judgment of your petitioner, the sum of dollars.

The value of said last-mentioned premises is, in the judgment of your petitioner, dollars [*if there are several distinct parcels, state value of each*].

[*State situation as to improvement or otherwise, and occupancy or otherwise, as in other cases above.*]

XI. That none of the aforesaid real property of decedent was devised expressly charged with the payment of debts or funeral expenses, nor is such property subject to a valid power of sale for the payment of such debts, claims, or expenses.

XII. That the names and ages of the husband [*or, wife*] and of the heirs and devisees of the said decedent, and of every other person claiming under them, or either of them, and their residences are as follows, viz.: [*stating them and their relation to decedent. If any are infants, or absentees, state the facts, name of guardian, etc., as in No. 16*].

XIII. That no previous application has been made for a decree authorizing the disposition of the real property of said decedent, for the payment of his debts or funeral expenses.

WHEREFORE, your petitioner prays that a decree be made directing the disposition [*or, sale—or, mortgaging—or, leasing*] of the said real property of said decedent, or so much thereof as may be necessary for the payment of his debts [*or, funeral expenses—or both*]; and that [*names*] may be cited to show cause why such a decree should not be made. [Signature.]

[Verification.]

[Annex schedules with signature of petitioner to each.]

II. Creditor's Notice of Pendency of Action.¹

[Title.]

Notice is hereby given, under and in pursuance of section 2751 of the Code of Civil Procedure of the State of New York, of an action brought by J. S., plaintiff, against A. P., as executor of the last will and testament of [*or, administrator of the estate of*] M. N., deceased, late of the city of , county of , and State of New York, to recover judgment upon the following demand: [*describe claim briefly*].

The following real property, owned by the decedent in his lifetime and at the time of his death, situate in the of , bounded and described as follows: [*describe it by metes and bounds*], is affected by said action, and such real property will be held as security for any judgment obtained in the action.

[Date.]

[Signature].

Plaintiff's Attorney.

III. Order for Executor or Administrator to Account.

[Title.]

E. G., claiming to be a creditor of A. B., late of the city of New York, in the county of New York, deceased, having presented his petition to the surro-

¹ See Co. Civ. Proc., § 2751.

gate's court, duly verified, praying for disposition of the real estate of said decedent for payment of his debts, and the said petition not enumerating the said debts particularly or stating the same in detail,

Now, on motion of L. R., counsel for said petitioner, it is hereby

ORDERED, that P. M., the executor of the will [*or*, administrator of the estate] of said decedent, show cause before said surrogate's court, at the surrogate's office, in the county of New York, on the day of , at 10:30 o'clock in the forenoon of that day, why he should not be required to render an account of his receipts and disbursements as such executor [*or*, administrator], and to file a statement of any and all of the claims, debts, or demands against said decedent presented to and known by him, and to render an account of all personal property of said decedent.

Let a copy of this order to show cause be served upon said P. M., executor, personally, on or before the day of .

[*Signature*],
Surrogate.

IV. Order for Citation.

[*Title.*]

On reading and filing the petition of A. B. [the executor], aforesaid, verified the day of , and presented this day of , and praying for authority to mortgage, lease, or sell the real property of said decedent for the payment of his debts [*or*, funeral expenses — *or both*], it appearing to the surrogate that said petition has been presented within three years from the time the letters testamentary [*or*, of administration] on the estate of said decedent were granted; and the surrogate being satisfied by the said petition [and by the affidavit of C. D., verified the day of , and filed herewith, and by the testimony of E. F., a witness produced before and examined by said surrogate], and by due inquiry by him made, that all the facts specified in section 2754 of the Code of Civil Procedure have been ascertained, as far as they can be upon diligent inquiry, and are stated in said petition:

[*Or, where petitioner was ignorant of an essential fact, add, except as hereinafter stated: and it being alleged in said petition that, upon diligent inquiry, the said petitioner is unable to ascertain — indicating the fact, e. g. — the names of all the heirs of said M. N., and of every person claiming under them or either of them, — and the surrogate having inquired into the matter and being satisfied, by the allegations of the petition and the testimony of W. W., and the affidavit of A. F., verified the day of , and filed herewith, that such names cannot be ascertained with reasonable diligence:]*

And it appearing to the surrogate, in the manner aforesaid, that the debts [*or*, funeral expenses — *or both*] of said decedent cannot be paid without resorting to the real property [*or*, interest in real property — *or both*] of said decedent:

Now, on motion of A. T., attorney for said petitioner,

IT IS ORDERED, that a citation issue out of this court upon said petition, requiring [*names*] to appear before said surrogate, on the day of , at o'clock in the noon, and then and there to show cause why authority should not be given to the said executor [*or*, administrator] to mortgage, lease, or sell so much of the real property of the said decedent, as shall be necessary to pay his debts [*or*, funeral expenses — *or both*]. [*Where there are parties in interest not named in the petition*] And it further appearing to said surrogate, in the manner aforesaid, that U. V., of the city, county, and State of , and W. X., of the city, county, and State of , not named in the petition [*or*, certain persons], whose names and addresses cannot with reasonable diligence be ascertained, claim an interest in the property mentioned in the petition as [*or*, under the] heirs [*or*, devisees] of said decedent; let said citation be directed also to said U. V. and W. X. [*or*, to the , — inserting a general designation of the class].

[*If advertisement of claims is not alleged*] And it not appearing that due advertisement for claims against said estate has been had, and the time for presentation thereof elapsed, let said citation be directed also generally to all other creditors of said decedent M. N., as well as to those named in said petition.

V. *The Citation.*

[*The command of citation is:*] To show cause why a decree should not be made directing the disposition [*or according to the prayer of the petition, the sale — or, the mortgaging — or, the leasing*] of the real property of the said decedent M. N., or so much thereof as may be necessary for the payment of his debts [*or, funeral expenses — or both*].

VI. *Bond of Executor or Administrator.*

[*As in No. 45, to and including date.*]

WHEREAS, the above bounden A. B. [executor, etc., describing estate], lately applied [*or if creditor applied, state the fact*] to the surrogate's court] of the county of _____, for authority to dispose, by mortgage, lease, or sale, of as much of the real property of the said M. N., deceased, as shall be necessary to pay his debts [*or, funeral expenses — or both*]; AND WHEREAS, such proceedings in due form of law have been thereupon had, that the said surrogate has decreed a [sale] of so much of the real property whereof the said decedent died seized as shall be sufficient to pay the debts [and funeral expenses] of the said decedent, which the surrogate has adjudged valid and subsisting pursuant to the statute,

NOW, THE CONDITION of this obligation is such, that if the said A. B. shall faithfully perform the duties imposed upon him by said decree, and shall pay into the said surrogate's court, within twenty days after the receipt thereof by him, all money arising from any such mortgage, lease, or sale, and shall deliver to the said surrogate, within the same time, all the securities taken thereupon, and shall account for all money received by him, whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force and effect.

[Sealed and delivered in presence of]

[Signature and seals.]

[Affidavit of sufficiency, as in No. 45.]

[Bond of freeholders same as above mutatis mutandis.]

VII. *Order Appointing Special Guardian of Infants.*

[See ante, No. 11. IV.]

VIII. *Order for Trial by Jury in a Proceeding to Sell Real Estate to Pay Debts.*

[Title.]

A. B., having presented to the surrogate, upon the return of a citation to the creditors, heirs-at-law, and administrator of the estate of the above-named deceased, a claim against the said deceased, arising upon a promissory note claimed to have been made by the said decedent in his lifetime, of which the following is a copy:

[Here insert copy of note, or account.]

And C. D., the said administrator, having disputed said claim and alleging that said decedent did not make said note, and that he did not deliver to the payee; and the surrogate having decided that the issue should be tried at a circuit court to be held within this county [in the county court of the county]:

IT IS ORDERED, that such controverted questions of fact, to wit: whether the said decedent made said promissory note in his lifetime, and whether he delivered said promissory note in his lifetime, to the payee, for value, be tried by a jury at a circuit court, to be held as aforesaid.

[Signature of],

Surrogate.

IX. *Order Appointing Appraisers.*

[Title.]

All the facts specified in section 2759 of the Code of Civil Procedure, having been satisfactorily established in this matter, _____, the said surrogate of said county _____, in order to inquire and determine whether suffi-

cient money can be raised advantageously to the persons interested in the real property, by a mortgage or lease of the real property of which the said C. D. died seized, or of a part thereof, does hereby order that O. P., Q. R., and S. T., three competent and disinterested persons, be, and they are, hereby appointed to examine and appraise each parcel of real property of which the said decedent died seized, and each parcel of real property, mentioned and described in the petition in this matter, and its rental value at its just and fair market value; and it is further ordered that they, the said appraisers, shall forthwith so appraise the same, and make a report thereof, signed and verified by at least two of them, describing each parcel, and stating its value and rental value, and file the same in the surrogate's office. The premises to be appraised are described as follows, to wit: [*describe property by metes and bounds*].

X. Oath of Appraiser.

STATE OF NEW YORK, }
COUNTY OF , } ss.:

I, O. P., an appraiser duly appointed by the surrogate of the county of _____, do swear and declare, that I will truly, honestly, and impartially examine and appraise each parcel of the real property of C. D., deceased, and its rental value, at its just and fair market value, to the best of my knowledge and ability.

[*Jurat.*]

XI. Report of Appraisers.

[*Title.*]

WE, THE UNDERSIGNED, persons duly appointed by an order of this court, bearing date the _____ day of _____, to examine and appraise each parcel of the real property, of which the said C. D., deceased, died seized, and its rental value at its just and fair market value, and each parcel of real property mentioned and described in said order, at its rental value at its just and fair market value, do hereby report:

First. That we have examined and appraised each parcel of real property of which the said C. D. died seized, and its rental value at its fair market value, which are the same parcels of real property and all thereof, mentioned and described in said order.

Second. That parcel No. 1 consists of about six acres of land, upon which are two buildings [*or, otherwise describing property*]; that about three acres of the same are under cultivation and the balance is [*describing it*]; that the fair market value of said parcel is the sum of _____ dollars; and the annual rental value is the sum of _____ dollars, [*and so on with respect to each parcel*].

Third. And we do further report, that we have each been actually engaged in examining and appraising said real property, and making this report, ten days' time.

All of which is respectfully submitted.

Verification of Report.

[*Venue.*]

O. P., Q. R., and S. T., appraisers of the real property of C. D., being severally duly sworn, deposes and says, each for himself, that he has examined and truly, honestly, and impartially appraised, to the best of his ability, each parcel of the real property of the said deceased, as hereinafter set forth, and its rental value at its just and fair market value, and that the foregoing appraisal is in all respects correct and true.

[*Jurat.*]

XII. Decree for Disposal of Real Property.¹

[*Title.*]

A. B., of _____, the executor of the will [*or, administrator — or, a creditor — of the estate*] of M. N., deceased, late of _____, having heretofore, and within three years after the issue of letters on said estate, duly presented to

¹ This decree should be recorded.

the surrogate[*'s court*] of the county of _____, his petition, dated the _____ day of _____, praying for a decree for the sale, mortgaging, or leasing of the decedent's real property to pay his debts [*or, funeral expenses*]; and the said surrogate having been duly satisfied, upon proper inquiry and evidence, that a proper case was made and duly presented, and having thereupon caused a citation to be issued out of this court, requiring [*names*] to appear before him, the said surrogate, upon such application; and the said citation having been returned on that day, and filed, together with proof of due service thereof on each of the persons therein named; and the said surrogate having, by an order duly made and entered herein, on the _____ day of _____, appointed S. G. special guardian for the minors I. F. and J. F., for the protection of their interests herein; and the said A. B. having appeared by A. T., his attorney and counsel, and C. D., one of the heirs of the said decedent, having also appeared by B. T., his attorney and counsel, and the said guardian having appeared in person, and the proper proceedings, in due form of law, having been thereupon had [and duly adjourned to this day]:

[*Where heirs or devisees — or their assigns not cited — have intervened*] And said Y. Z. [*or, one Y. Z. of _____, claiming as _____*], having filed an answer, verified the _____ day of _____, contesting the necessity of applying said property to the payment of debts or funeral expenses, and the validity of the alleged debts, and the reasonableness of the said alleged expenses; and setting up a counterclaim against the demand of the petitioner: [*Where creditors not cited have intervened*] And C. D., of the city, county and State of _____, a creditor of the said decedent, having also appeared and become a party hereto by presenting and proving his debt:

[*Or, And the matter being regularly called in open court by said surrogate, and no one appearing in opposition thereto, and the surrogate having, upon the return of the citation as aforesaid, proceeded to hear the allegations and proofs of the parties — or, and it having been thereupon referred by said surrogate to R. F., Esq., as referee herein, to take proof of the facts and circumstances, and claims against the estate of said M. N., and report the evidence thereon — and to examine the account of the said A. B., and report thereon — the said referee having duly made his report as ordered, and the same having been duly confirmed in all respects:*]

And after due examination so as aforesaid had, it having been established to the satisfaction of said surrogate:

1. That the said petitioner has fully complied with the requisite provisions of the statutes concerning the disposition of a decedent's real property for the payment of debts or funeral expenses; and that the proceedings herein have been in conformity to title 5 of chapter 18 of the Code of Civil Procedure.

2. That the following claims, for the purpose of paying which this decree is made, are valid and subsisting debts against said decedent's real property, and [that the charge for funeral expenses below mentioned is just and reasonable, and that all said claims are] justly due and owing,—to wit:

[*Enumerate them, with statement of nature, amount, and when due, in form of a schedule.*]

3. That the claims above allowed amount in the aggregate [exclusive of interest] to _____ dollars; and that none of them are secured by any judgment or mortgage [which is a lien upon the decedent's real property], nor expressly charged by said decedent's will upon his real property, or upon any interest in real property [except the debt of said Q. R., which was expressly charged upon the real property of said decedent: but the remedies of said Q. R., by virtue of which charge, have been exhausted — indicating how:]

4. That the following liens by judgment have been established, as valid and subsisting debts against the estate [*set forth in schedule form a list of persons holding such judgments, the date of docket of each, and a specification of the property affected by each judgment*].

5. That the property hereinafter described was not effectually devised or expressly charged with the payment of debts or funeral expenses, and is not subject to a valid power of sale for the payment thereof [*or, that, although the property hereinafter described is expressly charged with the payment of*

the debt of said Q. R., it is not practicable to enforce the charge, for the reason that — *etc.* — and the said Q. R. has effectually relinquished the same]:

6. That all the personal property of said decedent which could have been applied to the payment of his debts, judgment liens, and funeral expenses has been so applied [or, that the executor of the will — or, administrator of the estate — of said M. N. has proceeded, with reasonable diligence, in converting the personal property into money, and applying it to the payment of the debts, liens, and funeral expenses of said decedent], and that it is insufficient for the payment of the same, as established by this decree:

And said surrogate having thereupon duly inquired whether sufficient money can be raised advantageously to the persons interested in said real property, by a mortgage or lease of the real property of which the said decedent died seized; or of a part thereof, and having ascertained * that sufficient money cannot be so raised advantageously as aforesaid:

† Now, on motion of A. T., attorney for said A. B.,

IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the claims of [insert names of all creditors whose claims are allowed] hereinbefore named, in the amounts hereinbefore respectively stated, are valid and subsisting debts against said decedent's estate: that the claim of said S. T. is a reasonable charge for the funeral expenses of said decedent; and that the claim of W. S. hereinbefore named is rejected.‡

2. That, for the purpose of paying the debts hereinbefore established, a sale of the following described real property, of which said decedent died seized, or so much thereof as may be necessary to pay such debts, be made by A. B., the said executor [or, administrator], upon his executing and filing with the surrogate of this county, the bond prescribed by law, in the penalty of dollars, and with sureties; or, in case of his failure so to do, by a freeholder to be appointed by the surrogate as prescribed by law [if at a private sale add: at a price not less than the value thereof, as appraised pursuant to statute].

The premises so to be sold are bounded and described as follows: [*description: if there are several distinct parcels, it is convenient to enumerate them: see petition*].

[Where part cannot be sold without prejudice] And it appearing to the said surrogate that a sufficient part of said real property [or, interest in real property — or both] to pay the debts [or, funeral expenses — or both] of said decedent, to which it is justly applicable, cannot be sold separately, without manifest prejudice to the persons interested in said real property [if because title is in controversy, add, by reason of a controversy between and

— and others — as to the decedent's title thereto or interest therein]. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that [here direct sale of several parcels together, or postponement of sale as to part].

[Where the order of selling several distinct parcels is to be fixed] And it appearing to the said surrogate that it is just that the sale of the several distinct parcels be made as hereinafter directed [or, state devise or alienation, e. g., thus: that the house and lots in the village of M., numbered parcel above, were devised by the said M. N. to Y. Z., and have not been sold by him; and that the three lots in the town of O., numbered parcels two to four above, descended to the heirs of said decedent: and that the lot, parcel two, has not been sold by the said heirs, and the lots, parcels three and four, have been sold by them]. IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED, that the sale of said premises [so far as necessary to raise the said sum of dollars] be made in the following order: [indicating separate parcels].

[Where interest under a contract is sold subject to payments] AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the sale of the interest of said decedent in the premises [or, the parcel numbered herein] shall be made subject [to all payments heretofore due upon said contract and now unpaid, as well as] to all payments hereafter to become due upon said contract: and that the purchaser and purchasers of said interest must, before the sale is confirmed, execute to the said executor [or, administrator] his or their bond agreeably to the statute, and with sufficient sureties, in the penalty of [at least double all payments above required to be made] dollars.

[Where guardian desires to buy] And G. G., the general guardian of the infant I. F., is hereby authorized, as such, to purchase all or any part of said premises at the sale hereby decreed, but in his name of office and for the benefit of his ward.

[Where sale is subject to judgment liens] And it appearing to be for the best interest of all parties interested, IT IS ORDERED, that said sale be made subject to the lien of the judgments hereinabove specified, and hereby established [or specify any one or more judgments, subject to which the sale may be made].

XIII. Decree for Lease or Mortgage.

[As in last form to the asterisk, continuing] that sufficient money can be so raised advantageously, as aforesaid, by a mortgage [or, lease] of said property, on the terms hereinafter prescribed: [continue as in last form, from the dagger to the double dagger; and then direct that the executor or administrator, etc., on giving bond, etc., etc., mortgage or lease].

XIV. Order Directing Execution of Decree.

[Title.]

A decree having theretofore been made herein by the said surrogate[*'s* court], entered the day of , upon a petition duly presented and the due citation of the proper persons, authorizing the sale [or, the mortgage — or, lease] of certain real property of said decedent, in said decree described, for the payment of his debts or funeral expenses; and A. B., the [executor] therein named, having duly given and, on the day of , filed in the office of the said surrogate, the bond required by law and by said decree [and, if penalty was fixed by separate order, add, and by the order of said surrogate — or, surrogate's court. — entered herein on the day of ,] with the requisite justification of sureties and approval of the surrogate: Now, on motion of A. T., attorney for said A. B.:

IT IS ORDERED, that said A. B. proceed to execute the said decree with respect to all the real property therein mentioned [or give other directions].

XV. Order Appointing Freeholders to Sell.

[Title.]

A petition having been filed in the office of the surrogate of county, on the day of , by A. B., the executor of C. D., deceased, praying for authority, pursuant to the statute, to mortgage, lease, or sell so much of the real estate of the said deceased as should be necessary for the payment of his debts, and such proceedings having been had thereon that, on the day of , authority was given to the said A. B., the executor aforesaid, to sell the real estate mentioned in the said petition, upon his executing a bond in a penalty of dollars, with sureties, and conditioned as required by the statute, and the said A. B. having neglected to execute such bond within a reasonable time, to wit, since the day of , and it appearing that R. S. is a disinterested freeholder of the town of , and that he is nominated by a majority in numbers and amount of creditors of the said C. D., deceased,

ORDERED, that the said R. S. be, and he hereby is, appointed in place of the said A. B. to make such sale, upon his executing a bond in the penalty of dollars, with sureties, and conditioned as required by the statute.

XVI. Notice of Sale.

[Title.]

In pursuance of an order of the surrogate's court of the county of New York, duly made and entered on the day of , the undersigned freeholders, appointed by said order for the purpose of selling certain property belonging to the estate of M. N., deceased, at the front door of the courthouse in the city [or, town] of , county of , at 12 o'clock, noon, on that day, will sell the following described real estate, to wit: [Describe the several

parcels to be sold, as in order of sale and petition, and describing the buildings on each parcel].

[Date.]

[Signature.]¹

XVII. Report of Sale.

[Title.]

To _____, Surrogate of the county of _____ :
I, C. D., the executor, etc., of A. B., late of _____, deceased, report and return my proceedings under the decree of sale of the real estate of the said deceased, granted by the surrogate of _____ county, on the _____ day of _____, as follows:

I caused a notice that the said real estate would be sold at public auction, at the _____, in the town of _____, on the _____ day of _____, at 12 o'clock, noon, of that day, to be posted for six weeks previous to the day appointed for the said sale, at three of the most public places in the town of _____, in which all the said real estate is situated, and the same notice to be published for six weeks successively, previous to the day appointed for the said sale, in the newspaper entitled the _____, printed in the town of _____, a copy of which said notice, with the proof of such posting and publication thereof, is hereunto annexed.

That, at 12 o'clock, noon, on the said _____ day of _____, at the _____ in the town of _____, wherein the premises ordered to be sold are situated, I sold, at public auction, the whole of the real estate mentioned and described in said order of sale as follows, and which real estate is mentioned and described in said order of sale as follows: [*Description of property.*]

XVIII. Order Confirming or Vacating Sale.²

[Title.]

A decree having been duly made by the surrogate[*'s court*] of the county of _____, on the _____ day of _____, authorizing the said A. B. [executor of the will] of M. N., deceased, to dispose of the said decedent's real property mentioned and described in the said decree, to raise money to pay the debts [*or, funeral expenses — or both*] therein mentioned and established, and, after bond duly given by said A. B., an order for the execution of said decree having been duly made by said surrogate[*'s court*], on the _____ day of _____; and said A. B. having [this day] made and filed a report of the [sale] made pursuant to said decree, showing that after having posted and published due notice of the time and place of holding the said sale, according to law, he did, on the _____ day of _____, at _____ o'clock, _____, the time mentioned in said notice, and between the hours of nine in the morning and sunset of the same day, at the [city salesrooms], in the [city of Brooklyn, county of Kings], the place mentioned in said notice, sell at public auction, by C. & M., auctioneers, the following described premises, being parts and portions of the premises mentioned and described in said order, to wit: [*description*]; together with all and singular the tenements, hereditaments, and appurtenances to the said premises belonging, or in anywise appertaining, to R. W. D. and M. J. D., for the sum of _____ dollars per lot (amounting in the aggregate to the sum of _____ dollars), they being the highest bidders therefor, and that being the highest sum bid for the same [*and so on with different parcels*]:

[*Where there was adjournment*] And said report further showing that, after selling the lots and parcels of land aforesaid, the sale of the residue of said premises ordered to be sold, was duly adjourned to the _____ day of _____, at same hour and place; and that on the said _____ day of _____, between the hour [*and so on as before*]:

And said A. B. having this day appeared in person, and by A. T., his attorney and counsel, and due proof of service of notice of this motion on

¹ Each of the freeholders must sign.

² This order is made on notice. As the surrogate must "inquire into the proceedings," an affidavit of the fairness of the sale may be presented on the motion to confirm the sale, to the effect that the affiant attended and was present at the sale; that the sale was commenced at 12 o'clock, noon, on the premises, in said town of _____, on the _____ day of _____; that the sale was legally made and fairly conducted, to the best of his knowledge and belief; and that the real estate was sold to E. F. for the sum of four thousand dollars, that being the highest sum bid for the same, and he being the highest bidder therefor.

[names], agreeably to the order herein made on the day of , , having been now read and filed, and no one appearing to oppose [or, and having been heard in opposition to] the confirmation of said sale; and the said surrogate having duly inquired into the proceedings [and having examined the said executor and other person on oath, respecting the same]; and it appearing by proof satisfactory to the said surrogate, that the proceedings were fair, and that all the acts were done which are required by law to be done, after the said order directing the execution of the decree to authorize the said surrogate to make this order of confirmation, and that said sale was legally made and fairly conducted, and that the sums bid for the said several lots and parcels were not disproportionate to their value respectively. Now, on motion of A. T., attorney for said A. B.,

IT IS ORDERED: 1. That the said sale of the said several parcels of said real property so as aforesaid made by said A. B., and his said report thereof, and everything therein contained, be, and the same is, hereby ratified and confirmed:

2. That the said A. B. [executor] as aforesaid, execute and deliver the proper conveyances of the said several lots and parcels to the purchaser or purchasers thereof [respectively], at such sale, upon compliance on the part of said purchaser or purchasers [respectively] with the terms and conditions upon which such sales were made.

3. That the said A. B. forthwith deposit the proceeds of said sale with the treasurer of the county of , to the credit of this proceeding, subject to the further order of this court, and that the said A. B. take from said treasurer a receipt therefor, and forthwith return said receipt to this court.

[Where the sale is to be vacated, say, for instance:] And it appearing from inquiry by the surrogate that the sale thereof mentioned in said report to , the purchaser, for the sum of dollars was less than the value thereof at the time of the sale, and that a sum exceeding that amount by at least ten per cent., exclusive of the expenses of a new sale, may be obtained upon a resale thereof.¹

IT IS ORDERED, that the said sale be, and the same is, hereby vacated, and that the premises aforesaid be resold pursuant to the statute in such case made and provided.

[Signature],

Surrogate.

XIX. Representative's Deed.

This indenture [etc.] witnesseth:

WHEREAS, on the day of , , a decree be made and entered by the surrogate's court of the county of , in the words and figures following, to wit: [*Recite or briefly refer to the order for sale.*] AND WHEREAS, the whole of the premises described in the said decree having accordingly been sold at public vendue, by the said party of the first part, on the day of , at , in the county of , that being the county where the said premises are situated, due notice of the time and place of holding such sale having been given according to law: AND WHEREAS, the said party of the first part did make return of his proceedings upon such order of sale to the said surrogate in pursuance of the said order, and of the statute in such case made and provided: AND WHEREAS, afterward, the said surrogate, after examining the said proceedings, did make an order in the words and figures following, to wit: [*Recite or briefly refer to the order of confirmation.*]

AND WHEREAS, the said party of the first part did, at the said sale, sell to the said party of the second part, he being the highest bidder for the same.

NOW, THIS INDENTURE further witnesseth: That the said party of the first part, in pursuance of the said sale, and of the said orders of the said surrogate, and in pursuance of the statutes of this State in such case made and provided, and also for and in consideration of the sum of dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever [description of

¹ For other reasons for vacating a sale, see Co. Civ. Proc., § 2775.

property], together with the privileges and appurtenances thereunto belonging, or in any way appertaining, and all the estate, right, and interest which the said B. M., deceased, at the time of his death, had of, in, and to the same, free and discharged from all claims for dower of R. M., widow of the said B. M., deceased; subject, however, to all charges by judgment, mortgage, or otherwise, upon the lands so sold, existing at the time of the death of the said B. M.; to have and to hold the above-described and conveyed premises, with the appurtenances, and all the estate, right, and interest which the said B. M., at the time of his death, had therein, unto the said party of the second part, his heirs and assigns forever, as fully and amply as the said party of the first part might, could, or ought to sell and convey the same, by virtue of the orders above recited, and of the statutes of this State made and provided, or otherwise. IN WITNESS WHEREOF *[etc.]*.

No. 71.

[*Ante*, § 893.]**Distribution of Proceeds of Sale.****I. Notice to Widow as to Satisfaction of Her Dower.**[*Title.*]

Take notice, that C. D., the executor *[etc.]*, has brought into the office of the surrogate of the county of New York, the moneys arising from the sale lately made by him of the real estate of the said intestate, pursuant to an order authorizing such sale, heretofore granted by the said surrogate, and that the said surrogate will satisfy your claim of dower upon the lands so sold, by the payment to you of such sum in gross as he shall ascertain to be equal to the value of your right of dower in the gross proceeds, according to the principles applicable to life annuities, if you shall consent, before or on the day of , instant, at ten o'clock in the forenoon, to accept such sum in lieu of your said dower, by an instrument under seal, acknowledged or proved and certified in like manner as a deed to be recorded; and that if such consent be not given within the time above mentioned, then the said surrogate will set apart for investment one-third of the gross proceeds of the property to which your right of dower attaches.

[*Date.*][*Signature.*]To J. D., the widow *[etc.]*.**II. Consent of the Widow to Accept a Gross Sum.**

WHEREAS, A. B., the sole executor *[etc.]*, has recently sold the real estate whereof the said C. D. died seized, upon an order of the surrogate of the county of , authorizing him to sell the same for the payment of the debts of the said deceased, and has brought the moneys arising from such sale into the office of the said surrogate for the purpose of distribution.

NOW, THESE PRESENTS WITNESS, that I, J. D., widow of the said C. D., deceased, do hereby consent to accept, in lieu of my dower, such sum in gross as shall be ascertained to be equal to the value of my right of dower on the gross proceeds of said property, according to the principles applicable to life annuities. AND THESE PRESENTS FURTHER WITNESS, that I, the said J. D., widow as aforesaid, do hereby acknowledge that I have received from , surrogate of the county of , the sum of dollars, pursuant to the foregoing consent, in full discharge and satisfaction of all my right and claim of dower upon the lands so sold as aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal *[etc.]*.[*Signature and seal.*][*Authentication as of deed.*]**III. Order for Publication of Notice of Distribution.**[*Title.*]

A. B., executor *[etc.]*, having brought into the office of the surrogate the moneys arising from the sale of the real estate of the said C. D., lately made

by him upon the order of the surrogate; and the proceeds of the sale, after making the necessary deductions therefrom, being sufficient to pay all the debts of the said C. D., deceased,

IT IS ORDERED, that such proceeds be divided among the creditors, according to law, at the surrogate's office, in the town of , on the day of next, and that notice of the time and place of making such distribution be published at least once in each of the six weeks immediately preceeding said day, in the newspaper entitled the " " printed in the county of [the surrogate,—and, also, in the newspaper entitled the " " the said last-named newspaper being deemed by the surrogate most likely to give notice to the creditors].

IV. Notice of Distribution.

[Title.]

NOTICE IS HEREBY GIVEN, that the balance remaining of the proceeds of the sale of the real estate of C. D., late of , deceased, lately made under the order of the surrogate of the county of , by A. B. [executor, etc.], will be distributed by the said surrogate among the creditors of the said deceased, in proportion to their respective debts, according to law, at the surrogate's office in on day of , at ten o'clock in the forenoon of that day. All persons interested in the same may attend on that day, and creditors who have not proved their claims may attend and prove the same before said surrogate.

[Signature of],

[Date.]

Surrogate.

V. Order for Publication of Notice of Distribution of Surplus Money Paid into Surrogate's Court.

[Title.]

Certain surplus money having, by an order of the [supreme] court, been paid into this surrogate's court, as prescribed by section 2798 of the Code of Civil Procedure, and a verified petition for the disposition of real property of said decedent, as prescribed in title 5 of chapter 18, of the said Code, having been presented to this court by A. B., executor [etc.], before the distribution of said money; which petition prays for a decree directing the distribution of said surplus money among the persons entitled thereto, as if it was the proceeds of the said decedent's real property sold pursuant to a decree of the said surrogate's court;

IT IS THEREFORE ORDERED, that [naming parties interested] and each and every other person, who would be entitled to share in the distribution of the proceeds of a sale of the real property of the said decedent, sold pursuant to a decree of the said surrogate's court, made in pursuance of title 5, chapter 18, of said Code, and all creditors of the said decedent and of his estate, and all persons interested in the distribution by the surrogate's court, of the proceeds of the said sale of said real property, and in said surplus money, show cause before said surrogate's court, of said county of , at the surrogate's office, in the village of , in said county, on the day of , at o'clock in the forenoon, why the said proceeds of said sale, and the said surplus money so paid into this surrogate's court, as aforesaid, should not be distributed among the said creditors of the said decedent, and the said other persons interested therein, according to law; and why the same should not be distributed pursuant to section 2799 of the Code of Civil Procedure. And it is ordered that a citation be made and issued by the surrogate's court of said county, or by the surrogate of said county, to each and all the above-named and above-described creditors and persons, citing them to show cause, at said last-mentioned time and place, why such a decree of distribution should not be made: and that service of said citation may be made upon all the persons designated therein, by publishing the same in two newspapers, as follows, to wit: in the , published in the town of , in said county, and in the , published in the town of , in said county, at least once in each of the four successive weeks immediately preceeding the day of , except that personal service must be made

upon the husband, wife, heirs, and devisees of the decedent, and also upon every other person claiming under them, or either of them, who resides in the State of New York.

VI. Citation — Distribution of Surplus Money.

THE PEOPLE OF THE STATE OF NEW YORK,

To G. H., E. F. [*etc.*], creditors, heirs, and next of kin of C. D., late of the town of , deceased:

WHEREAS, certain real property described as follows, viz.: [*description*] which belonged to the estate of C. D., a decedent, having been sold, in an action in the supreme court, wherein M. N. was plaintiff and O. P. and others were defendants, which action had for its object the sale of said real property to satisfy a mortgage thereupon, which mortgage was made and executed by the decedent, C. D., during his lifetime, and was not paid, and was existing thereon at the time of his death; AND WHEREAS, letters testamentary upon the estate of said decedent were on the day of , and within four years before the said sale issued from a surrogate's court of this State, having jurisdiction to grant them; and the surplus money arising from and upon such sale, having, by an order of judgment of the supreme court, made in said action, on the day of , been paid into the surrogate's court of the county of , from which such letters issued; AND WHEREAS, there being no liens upon the said real property, chargeable upon the said proceeds of or on such surplus money, which existed at the time of said decedent's death; AND WHEREAS A. B., executor of the will of said deceased, has made and presented to the surrogate's court of said county a duly verified petition bearing date the day of , praying for the disposition of the said property, as prescribed by title 5 of the Code of Civil Procedure,

THEREFORE, you, and each of you, are hereby cited and required to show cause, at a surrogate's court to be held at the surrogate's office in the village of , in and for the county of , on the day of , at o'clock in the forenoon, why the said surplus money remaining of the proceeds of the said sale of the said real property of the said C. D., late of the town of , in the county of , deceased, lately made under the said order or judgment of the supreme court, and so transferred to the said surrogate's court as aforesaid, shall not be distributed by the surrogate's court of the county of , among the creditors of the said decedent, and other persons interested therein, in proportion to their respective debts, claims, and interests, and according to law, and why said surplus moneys shall not be distributed as prescribed in and by title 5 of the Code of Civil Procedure.

IN TESTIMONY WHEREOF [*etc.*].

VII. Entry of Demands Found Due.

[*Title.*]

On the hearing for distribution, in pursuance of notice, on the day of , and at the times and places to which such hearing was adjourned, and on the hearing on the order of sale, the following demands of the following-named persons have been and were established as valid and subsisting demands against the said C. D., deceased, and are the only demands established. That said persons' names are mentioned in the first column of the following list, and the amount due to each in the second column, opposite each name, and the amount to which each is entitled on this distribution, this day ordered, in the third column, opposite each name, which is as follows, that is to say:

Names.	Amount due.	Amount entitled.

VIII. *Order of Distribution.*¹

[Title.]

Notice, that distribution of the proceeds arising from the sale [or, the mortgage — or, lease] of the real estate in this matter, would be made on the day of , having been duly published, and the said proceeds having been paid into the surrogate's court, amounting to dollars, from which is to be deducted the sum of dollars, the charges and expenses of the sale [or, mortgage — or, lease] of the premises and the actual disbursements of this proceeding, leaving in the hands of the surrogate for distribution the sum of dollars.

IT IS ORDERED: I. That out of said balance there be paid to J. D., widow [etc.], the sum of dollars, which sum she has consented, by a paper duly executed and authenticated by her, to accept in lieu of her dower in the premises so sold [or direct deduction of one-third for investment in case of widow not consenting.]

II. That out of the remainder of the said sum there be paid to J. W. S., the attorney of the petitioner, the sum of dollars, costs awarded to him in the decree of sale.

III. That out of the remainder of the money there be paid to P. C. B., the sum of dollars for the funeral expenses of the decedent, as established by the first decree herein.

IV. That the remainder of the money, to wit, dollars, be distributed among the creditors of the deceased, whose debts have been established and above recorded, in the proportion as set opposite their respective names in the left-hand column above recorded, that is to say, each to receive the amounts set opposite their respective names in said left-hand column, as the share of each on this distribution.

V. That the surplus, to wit, the sum of dollars, be distributed to and among the heirs [or, devisees] of the said decedent, that is to say: [See ante, § 901.]

No. 72.

[Ante, § 940.]

Proceedings for Voluntary or Compulsory Accounting.I. *Petition for Voluntary Accounting.*

To the Surrogate's [Court] of the county of [New York]:

The petition of C. D., of , respectfully shows:

I. That letters testamentary, [etc.— or, of administration — etc.] of A. B., late of , deceased, were granted to your petitioner on the day of , . That the persons interested in the estate of said deceased, as creditors, legatees, next of kin, or otherwise, and their places of residence, to the best of the knowledge, information, and belief of your petitioner, are as follows, to wit: [give names and residences of persons interested in the estate.]

II. That the names and residences of the sureties in the official bond of your petitioner are as follows: [stating them.]

III. All the above are of full age and of sound mind, except [state facts in regard to any who are infants, lunatics, etc., as in petition for probate, No. 16].

IV. That more than twelve months have elapsed since said appointment [or, in case of administrator, say, that a notice requiring all creditors, or persons claiming to be creditors, to present their claims to the petitioner, has been duly published according to law, and the period of such publication has expired], and your petitioner is desirous of rendering an account of all his proceedings to the surrogate of the county of New York, by whom your petitioner was appointed, and for that purpose prays that a citation issue to all

¹ Consult Co. Civ. Proc., § 2793, as amended by L. 1894, c. 735.

persons interested in the estate of said deceased, to attend a final judicial settlement of the account of the proceedings of your petitioner.

[Date.]

[Signature.]

[Verification.]

II. Citation.

[See No. 5, ante.]

III. Waiver of Service of Citation.

To the Surrogate's Court of the county of New York:

C. D., as executor under the last will and testament of A. B., deceased, having filed an account of his proceedings as such, we, the undersigned, being persons interested as [legatees] in the estate of said A. B., deceased, do hereby severally waive the issue and service of a citation in the above-entitled matter, and consent that a decree be made, settling the account of said C. D. as filed.

[Date.]

[Signatures.]

[Acknowledgment as of a deed.]

IV. Petition for Compulsory Accounting.

[Adapt from No. 67.]

V. Answer to Petition for Compulsory Accounting.

[Title.]

The answer of C. D., executor [or, administrator] of the will of A. B., deceased, to the petition of N. M. K., shows:

I. That on or about the day of , proceeding was instituted in this court by this respondent for a final judicial settlement of his accounts as executor of A. B., deceased, to which the petitioner was made a party, and that such proceedings were therein had, that on the day of , a decree was duly entered, finally and judicially settling his said accounts, and discharging him from all liability by reason of his acts as such executor.

II. That this proceeding was commenced after the expiration of seven years from the grant of letters to this respondent [or, that the claim of the petitioner did not accrue within seven years before the commencement of this proceeding, etc.]

[Verification.]

VI. Order that Executor File His Account.

[Title.]

The petition of N. M. K., of the city and county of Los Angeles and State of California, as a legatee under the last will and testament of N. M. K., late of the city, county, and State of New York, deceased, duly verified, having been heretofore duly filed on the day of , in the above-entitled proceeding, praying for a judicial settlement of the account of C. R. K., as executrix of the last will and testament of the said N. M. K., deceased, stating that she resides at Pau, France, and a citation having been thereupon issued directed to said executrix and served by publication and requiring her to show cause on the day of , at half-past ten o'clock in the forenoon of that day, before the said surrogate, at the said surrogate's court, held at the county courthouse in the said city of New York, why she should not render and settle her said account, and the said N. M. K. having appeared at the said time and place by W. M. S., Esq., his attorney, no one appearing for the said executrix [or, if the executrix presents a cross-petition for a voluntary accounting under § 2728 of the Code, say:] and the said executrix having also appeared at said time and place by P. & B., Esqrs., her attorneys, and having presented and offered to file a written petition, duly verified, praying that her

account may be judicially settled, and that the proper persons as prescribed by statute may be cited to attend such settlement:

Now, on motion of P. & B., attorneys for said executrix, after hearing W. M. S., Esq., attorney for said petitioner, in opposition thereto, it is hereby

ORDERED, that the said C. R. K. render and file an account of her proceedings as executrix of the last will and testament of N. M. K., deceased, on or before the day of , at half-past ten o'clock in the forenoon, at the said surrogate's court in the courthouse in the said city of New York, for the purpose of accounting her as said executrix.

VII. *Order to Show Cause why an Intermediate Account should not be Rendered.*

[Title.]

It appearing to me that the last will and testament of said decedent was duly admitted to probate by the surrogate's court of the county of New York, on the day of , and that letters testamentary thereon were, on the day of , duly issued to E. G., of said county of New York [*or*, that letters of administration on the goods, chattels, and credits of the said decedent intestate were duly issued by the surrogate's court, *etc.*], executor named in said will, and that no account of the proceedings of said executor has ever been filed by the said executor, and that eighteen months have elapsed since the said letters were issued, and that no special proceeding upon a petition for a judicial settlement of the accounts of said executor or otherwise is pending:

I DO HEREBY ORDER AND DIRECT that the said executor show cause before me, at the said surrogate's court, held at the county courthouse, in the city of New York, on the day of , at half-past ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why he should not render an intermediate account of his proceedings as executor as aforesaid, and that a citation be issued to him for that purpose.

VIII. *Order Discharging Order to Show Cause why Intermediate Account should not be Filed.*

[Title.]

A citation in pursuance of an order duly made by me as surrogate of the city and county of New York having been duly issued, requiring E. G., as executor of the last will and testament of L. R., deceased, to show cause before me as such surrogate why he should not render an intermediate account of his proceedings as such executor,* and good cause having been then shown, why such account should not be rendered [*or, if account has been filed, recite that fact, as thus:*] and such account having been filed, and it appearing to me sufficient,

IT IS ORDERED, that the said order and citation to show cause be and the same are hereby discharged.

[Signature.]

Surrogate.

IX. *Order for Intermediate Account.*

[Title.]

[*As in the preceding form to the *, continuing*] another said citation having been served upon the said executor, E. G., as appears by due proof of service thereof filed therein, and he having failed to appear or render such account of proceedings as executor aforesaid, or to show cause why he should not render the same, and he not having presented a petition as prescribed in section 2729 of the Code of Civil Procedure, I do hereby order and direct the said E. G., as executor as aforesaid, to render and file an intermediate account of his proceedings as such executor, within days from the date hereof, and to attend before me at said surrogate's court, on the day of , and from time to time for that purpose, and in case of disobedience of this order a warrant of attachment will issue against him.

X. *Statement of Account.*

To the Surrogate of the county of New York:

I, C. D., of , do render the following account of my proceedings as [executor, etc.], of A. B., deceased: On the day of , letters [testamentary] were issued to me. On the day of , I caused an inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisement of the appraisers duly appointed, to dollars.

Schedule A,¹ hereto annexed, contains a statement of all the property contained in said inventory, sold by me at public or private sale, with the prices and manner of sale; which sales were fairly made by me, at the best prices that could then be had with due diligence, as I then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me, for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectible by me, together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property, mentioned therein, lost by accident, without any wilful default or negligence, and the cause of its loss and appraised value. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for funeral and other necessary expenses for said estate, together with the reasons and objects of such expenditure.

[On or about the day of , in the year , I caused a notice for claimants to present their claims against the said estate to us within the period fixed by law, and at a certain place therein specified, to be published in two new papers, according to law, for six months, pursuant to an order of the surrogate of the county of New York, to which order, notice, and due proof of publication herewith filed, I refer as part of this account.²

Schedule D, hereto annexed, contains a statement of all the claims of creditors presented to and allowed by me, or disputed by me, and for which a judgment or decree has been rendered against me, together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment; it also contains a statement of all moneys paid by me to the creditors of the deceased, and their names, and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow, or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled as widow, legatee, or next of kin of the deceased, to a share of his estate, with their places of residence, degree of relationship, and a statement of which of them are minors, and whether they have any general guardian, and if so, their names and places of residence, to the best of my knowledge, information, and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting my administration of said estate, my rights, and those of others interested therein.

¹ This and the other schedules described in the statement of account are not applicable, of course, to all cases, as accounts must greatly vary in the nature of their contents; but indicate, in general, the kind of information which the account and schedules should disclose.

² This allegation is not necessary, as a failure to publish notice to creditors is not a bar to a judicial settlement of the representative's claim. The petition should state one of the three grounds specified in Co. Civ. Proc., § 2723. In proceedings for compulsory accounting, an order should be entered, preliminary to issuing citation, to the following effect: It is ORDERED, that said C. D. render an account of his proceedings [as executor of the will] of said A. B. to this court, on the day of , at o'clock in the noon, and file the same herein on or before that time; and that the said C. D. personally be and appear before said surrogate at that time, and attend from time to time for the purpose of said account, as the surrogate may decide; and that, in case of disobedience to this order, an attachment may issue against him.

I charge myself as follows:

With amount of inventory \$
 With amount of increase, as shown by Exhibit A.....

I credit myself as follows:

With amount of loss on sales, as per Schedule B..... \$
 With amount of debts not collected, as per Schedule B..
 With amount of Schedule C.....
 With amount of Schedule D.....
 With amount of Schedule E.....

Leaving a balance of \$
 to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions, and the expenses of this accounting. The said schedules, which are severally signed by me, are part of this account.

[Signature.]

XI. Oath to Accounts.

[Title and Venue.]

I, C. D., executor of A. B., being duly sworn, say, that the charges made in the foregoing account of proceedings, and schedules annexed, for moneys paid by me to creditors, legatees, and next of kin, and for necessary expenses, are correct: that I have been charged therein all the interest for moneys received by me and embraced in said account, for which I am legally accountable; that the moneys stated in said account as collected, were all that were collectible, according to the best of my knowledge, information, and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease of the value of any assets, and the charges therein, for the increase in such value, are correctly made; and that I do not know of any error in said account, or anything omitted therefrom, which may in any wise prejudice the rights of any party interested in said estate. And deponent further says, that the sums under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are produced, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged; and that said account contains, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of the estate of said decedent, and of all money and other property belonging to said estate which have come into my hands, or which have been received by any other person by my order or authority for my use, and that I do not know of any error or omission in the account to the prejudice of any creditor of, or person interested in, the estate of the decedent.

[Jurat.]

[Signature.]

XII. Answer Containing Objections to Account.¹

[Title.]

J. K. and L. M. [next of kin — *or*, legatees named in the will — *or otherwise as interested* — of said deceased], contesting the account filed by C. D., administrator of the estate [*or*, executor, *etc.*], of said deceased, allege that the said account is erroneous, in that it fails to charge the executor with the following items:

First. An item of dollars, a claim against the said executor, for a debt owing to the deceased in his lifetime.

Second. The proper sum received or chargeable against said executor for interest.

That the said account is further erroneous in the following particulars:

First. That the item of dollars, for funeral expenses, is extravagant, and not according to the station of the deceased.

Second. That the item of paid to R. S. is erroneous, in that the pretended claim was not due, and was barred by the statute of limitations. [*And so continue.*]

[Signature of].

[Date.]

Attorney.

¹ In New York county a copy of these objections should be served on the attorney for the accounting party.

XIII. *Affidavit for Order Directing Executor to Attend.*

[Title and Venue.]

N. R., being duly sworn, says: That he is one of the attorneys for the petitioner herein; that this is a proceeding to compel an accounting by M. L., as executor of B. R. L., deceased; that deponent procured an order of this court dated on the day of , requiring said M. L. to file his account as such executor, and the same was, on the day of , duly served upon him; that pursuant to said order, said account was duly filed on the day of , to which objections were filed by deponent on the day of , that the proceeding has now been set down peremptorily for hearing for the day of , but said accounting party refuses to attend upon the hearing, as deponent is informed, unless ordered to do so by this court [as appears by the annexed letters from his counsel]. Deponent, therefore, asks for an order pursuant to the terms of section 2375 of the Code, requiring the attendance of said accountant upon the hearing.

[Jurat.]

[Signature.]

XIV. *Order Directing Executor to Attend.*

[Title.]

On reading and filing the annexed affidavit and on motion of N. R., attorney for the petitioner,

ORDERED, that executor of B. R. L., deceased, attend at the surrogate's court, to be held at the county courthouse in the city of New York, on the day of , at 10:30 o'clock in the forenoon, to be examined under oath touching his receipts and disbursements, or touching any other matter relating to the above estate, and his account heretofore filed herein.

[May add clause as to mode and sufficiency of service.]

[Signature.]

XV. *Order of Reference.*

[Title.]

The said C. D., executor aforesaid, having filed his account, and objections thereto having been also filed; and the parties in interest appearing.

ORDERED, 1. That the said account be referred to J. K., Esq., and he is hereby appointed referee to examine said account [and to hear and determine the questions arising upon the settlement of said account].

2. That the hearing be had before said referee, at such time and place, in the city of New York, as he shall appoint, and upon due notice to all parties who have appeared herein; and make report of his proceedings and determination to this court, with all convenient speed, and on the coming in of said report, notice is to be given to the parties that have appeared, of motion to be made before the surrogate on the question of confirming such report, or for such other or further order as may be proper.

XVI. *Referee's Report.*¹

[Title.]

I. The subscriber, referee appointed by the surrogate of the county of New York, to examine the accounts of C. D., administrator of the estate of A. B., deceased, and to make report thereon, do hereby respectfully report that I have examined the said accounts, and have been attended upon said examination by the said administrator and by J. B., the widow of the said deceased, and by C. F., the guardian *ad litem* of the minor children of the said deceased, and by P. B., on the part of the executrix of F. C., deceased, a creditor; that the accounts of the said administrator, presented by him, are correct, with the following exceptions, that is to say:

1. That the claim made by A. C., executrix, and J. L., executor, of F. C., deceased, should have been allowed by the said administrator at \$696.29, instead of \$101.48.

¹ In New York county the referee's report will be confirmed, of course, unless exceptions are filed within eight days after written notice of filing and a copy of the report has been served upon the opposing party.

2. That from the bill of particulars of the item of \$95.13, charged in said administrator's account for cash paid J. H., attorney, etc. [which bill of particulars is annexed to the said administrator's account and marked G], there should be deducted the sum of \$5, the second item in said bill, which ought to be paid by the administrator personally, and not charged to the estate.

I do also further report that, from the testimony taken before me, it appears that the said administrator has used due diligence in endeavoring to collect the debts due to the estate, and that he has collected all of the same that were collectible.

I further report that the following are just claims against the said estate with the exception that the administrator has paid, as stated in his account, to S. H., \$22.50; and to Mrs. A. C., executrix, etc., of F. C., deceased, \$375, which amounts are to be severally deducted from their respective distributive shares of said estate, that is to say: [*specify creditors and amounts of their claims*].

There is also a suit now pending in the superior court of the city of New York, brought by said administrator against H. L., a debtor of said estate, who defends said suit on the ground that he paid the demand to the widow of the deceased before the appointment of the said administrator.

The charges in said accounts of the said administrator, for moneys paid for necessary expenses, not hereinbefore particularly referred to, are correct, and also that the fixtures, stock, etc., at the factory belonging to the estate, were sold in the usual manner at public auction, and that the ordinary means, by advertising, etc., and due diligence and prudence were used in obtaining a just price for the same.

I do hereby further report, that the whole amount of the assets which have come to the hands of the said administrator is \$1,294.57; that the amount of the administrator's commission is \$57.36; that the amount which I have allowed as properly paid for necessary expenses is \$404.08, leaving a balance applicable to the payment of debts and the expenses of this accounting, and any other necessary expenses that may yet be incurred, of \$833.13.

And I further report, that all the claims presented against the estate, and allowed, amount to \$953.42, of which a portion has been paid, as above stated. All which is respectfully submitted.

[Date.]

[Signature.]

XVII. Report of Special Guardian.

[Title.]

I, E. S., heretofore appointed the special guardian of the infants, M. I. N., J. B. N., and K. G. N., for the purpose of appearing for them and protecting their rights and interests in this proceeding, do hereby respectfully report that I have examined the accounts of W. H. G., as executor of [or, as trustee for A. B., under] the last will and testament of F. C. G., deceased, and that the same are in all respects correct, so far as they affect the interests of the said infants.

Dated, , , .

[Authentication as in a deed.]

XVIII. Exceptions to Referee's Report.

[Title.]

The contestant, I. W. S., excepts to the report of J. K., Esq., referee herein, dated and filed the day of , in the following respects:

I. That said referee reported that the account of C. D., the [executor], presented before him, and by him examined, was correct and just, and that the sum of should be credited and allowed as charged in said account. Whereas, he should have found and reported that [etc.].

II. That said referee omitted to find and report that the said C. D., executor, etc., was, and is, indebted to said estate for [etc., stating details.]

[Date.]

[Signature.]

XIX. *Motion to Confirm Referee's Report.*

[Title.]

Take notice, that upon the report of the referee herein, and upon all the papers filed and proceedings had in this matter, a motion will be made at a surrogate's court, to be held [etc.], for an order confirming said report, and also for a decree judicially settling the account of said [executor], and directing distribution to the parties entitled thereto, and for such further or other order or decree herein as may be just and proper.

XX. *Affidavit of Regularity to Obtain Decree where there is no Contest.*

[Title and Venue.]

A. B., being duly sworn, says, that he is the attorney for the executor of the above-named decedent; that all the parties to this proceeding have been duly cited or have duly waived the issuance and service of a citation, approved the accounts filed herein, and consented to the entry of a decree approving and settling the same, in the manner and form following, to wit:

[As to service on adults and infants:] I. By service of a copy of the citation issued herein upon the following persons, in the manner prescribed by sections 2520, 2526, and 2527 of the Code of Civil Procedure, as more fully appears by the proof of service thereof, made in the manner and form prescribed by law, and filed herein on the day of , viz.: [here state the names of the persons served, and when and where the service took place.]

[Nonresidents:] II. By service thereof without the State, or by publication in pursuance of an order, made herein on the day of , under sections 2522 and 2523 of the Code of Civil Procedure, as more fully appears by the proof of service thereof, made in the manner prescribed by law and filed herein on the day of , viz.: [stating names, etc.].

[Parties who waive or consent:] III. Personally, or by attorney, by duly executed waivers of the issuance and service thereof, containing an approval of the account filed herein and a consent to the entry of a decree approving and settling the same, and filed herein on the day of , by

IV. That no notice of appearance has been filed herein, except by [stating them].

V. That all of the persons named above are of full age and sound mind excepting those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.¹
[Jurat.]

XXI. *Decree Settling Account and Ordering Distribution.*

[Title.]

C. D., the executor [etc.], having heretofore made application to the surrogate of the county of , for a judicial [or, final] settlement of his account as such executor, and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of said deceased, citing and requiring them and each of them personally, to be and appear before the said surrogate, at his office in , on the day of , at eleven o'clock in the forenoon of that day, then and there to attend such judicial settlement; and the said citation having been returned, with proof of the due service thereof on [naming the person]; and the said executor having appeared on the return day of said citation, in person, and by [give appearances]; and the said executor having rendered his account, under oath, before the said surrogate, and the said account having been filed, together with the vouchers in support thereof, and no objection having been made to the said account [or, objections to the said account having been filed by J. B.—and recite reference, if any, and referee's report and exception]; and the said matter having been duly adjourned to this day, the said sur-

¹ Where a person cited is an infant, a lunatic, an habitual drunkard, or for any cause, mentally incapable adequately to protect his rights, it must so appear in the affidavit. The age of the infant must also be stated.

rogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by the said surrogate as finally settled and adjusted by him, to be recorded with and taken to be a part of the decree in this matter, to wit:

A summary statement of the account of C. D., executor [etc.], made by the surrogate as finally settled and allowed.

The said executor is chargeable as follows: [*adapt from summary as in No. 72, IX.*].

And it appearing that the said [executor] has fully accounted for all the moneys and property of the estate of said deceased, which have come into his hands as such executor, and his account having been adjusted by the said surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby ORDERED, ADJUDGED, AND DECREED, that the said account be, and the same is hereby, finally and judicially settled and allowed as filed and adjusted.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that out of the balance so found, as above, remaining in the hands of the said executor, he retain the sum of dollars for the commissions to which he is entitled on this accounting; and that he pay into this court the sum of dollars for the expenses of this accounting.

[*In case a distribution of the fund is also desired, continue as follows:*]

AND IT IS FURTHER ORDERED, that, out of said balance, the said executor invest and keep invested the sum of \$30,000, in bonds secured by mortgages of real estate in the city of New York, the income thereof to be paid to C. B., the widow of said testator, during her natural life, pursuant to the directions and provisions of the said will of the said testator; and after the death of the said widow, that the said executor distribute the said principal sum in the manner directed in and by the said last will and testament.

AND IT IS FURTHER ORDERED, that the said executor pay to R. B., a son of the said testator, the sum of dollars, which, with the sum of \$4,600 heretofore received by him, will be in full of his share of the residuary estate of the said testator, distributable upon this accounting [*and so on*].

[*If upon a final accounting, say:*] AND IT IS FURTHER ORDERED, that upon so doing he be discharged as executor of the last will and testament of A. B., deceased, and freed of and from all responsibility to any person interested in said will on account of his acts and doings thereunder.¹

[*Signature*].

Surrogate.

XXII. Discharge of Representative.

WHEREAS, on the day of , C. D. was duly appointed the executor of the last will and testament of A. B., late of the county of , deceased, and who departed this life on the day of , and which said last will and testament was duly admitted to probate by the surrogate of the county of , aforesaid, on the day of , and by him recorded in his office; and

WHEREAS, Since said C. D. was so appointed such executor he has duly settled with and paid to the undersigned, one of the legatees named in said will, his bequest, legacy, and distributive share of the estate of said deceased, and is desirous of being discharged from said trust.

NOW, THEREFORE, I, the undersigned R. S., being of full age, in consideration of the aforesaid premises and of the sum of dollars, to me in hand paid by the said C. D., as such executor, as aforesaid, the receipt whereof I do hereby acknowledge, I do hereby forever release and discharge said C. D. as such executor, of and from all claims, demands, and liabilities of every name and nature to me by reason of any and all matters in any way relating to said executorship.

And to this end I do hereby request, authorize, and empower the surrogate of said county of , upon filing this instrument in writing, to enter in his book of minutes the proper order or decree, fully, finally, and in all things

¹ For various directions as to disposal of assets, see *ante*, § 1006 *et seq.*

releasing and discharging said C. D. as such executor, as aforesaid, of and from all claims, demands, and liability of every name and nature to me by reason of any and all matters in any way relating to said executorship.

IN WITNESS WHEREOF [etc.].

No. 73.

[Ante, § 943.]

Accounting of Testamentary Trustees.

I. Petition.

[Title.]

To the Surrogate of the county of _____ :

The petition of A. B. and C. D., trustees for Y. Z., under the will of M. N., deceased, respectfully shows:

I. That under and by virtue of the will of M. N., late of the county of _____, deceased, duly admitted to probate by the surrogate's court of the county of _____, the said testator gives to your petitioners, who are [the only two] the executors named in said will, who have qualified as such [*here state the bequest in trust, e. g., thus*], all his personal estate, not otherwise effectually disposed of, in trust, to divide the same into as many shares of equal value as the said testator had children living at the time of his decease, and to set apart one of such shares for each child, to receive the interest and income of each share, and to apply the same to the use of such child during his or her natural life. And the said testator, by his said will, further gives to your petitioners all his real estate, not otherwise effectually disposed of, in trust, to receive the rents, issues, and profits thereof, and apply the same, deducting all just and lawful charges after the decease of the testator's wife, in equal parts, to the use of each of his children, living at his decease, during his or her natural life.

II. That testator's wife died on the _____ day of _____, and said testator left him surviving three children only, one of whom is Y. Z., who is the only person entitled, either absolutely or contingently, by the terms of the will or by operation of law, to share in the fund or in the proceeds of the property held by your petitioners as a part of their said trust.

III. That in the latter part of the year _____, your petitioners, as executors of, and trustees under, the will of the said M. N., deceased, rendered to the surrogate of the county of _____, a full account of their proceedings as such executors and trustees, to the _____ day of _____, and including all their proceedings, to said date, with respect to both the real and personal estate of said testator, and that a decree of said surrogate's court judicially settling said account, was duly made and entered on the _____ day of _____; and that in and by said decree, your petitioners were directed † to set apart and invest, as trustees for testator's son, the above-named Y. Z., certain assets and securities in said decree mentioned, and amounting in the aggregate to the sum of _____ dollars, and hold the said assets, securities, and cash so set apart, upon the trust contained in and established by the fifth paragraph of said will of the decedent, for the benefit of the said Y. Z., as one of the surviving children of the said decedent.

IV. That immediately upon the entering of said decree, your petitioners invested, as trustees for the above-mentioned Y. Z., the assets and securities in said decree mentioned, and have so held the same †† upon the trust for his benefit, as provided for by the above-mentioned provision of the last will and testament of the said M. N., deceased, relative to his personal estate, and have also continued to execute the above-mentioned trust for his benefit in the real estate of the said testator.

V. That your petitioners, as trustees of the said trusts, for the said Y. Z., in the real estate of the said testator, as well as in the personalty set apart by said decree, desire to render an account of all their proceedings as such trustees, from the date of the above-mentioned account and decree to and including the _____ day of _____.

VI. That the only person interested in such a proposed accounting of your petitioners is the above-named Y. Z., a resident of the city, county, and State of New York, but at present temporarily absent in Europe.

WHEREFORE, your petitioners pray that their account of their said proceedings, as such trustees, may be judicially settled, and that [names] may be cited to attend such settlement.

[Date.]

[Signature.]

[Verification.]

II. Account of Proceedings.

[Title.]

We, A. B. and C. D., trustees of Y. Z., under the will of M. N., hereby render the following account of our proceedings, as such trustees, down to the day of , ,

I. By the decree of the surrogate's court of the county of , made and entered on the day of , , in the matter of our final accounting as executors of, and trustees under, the will of the said M. N., deceased, we, as such executors, were directed [*continue as in previous form from dagger in par. III. to the double dagger in par. IV. thence continuing*], and the same or so much thereof as are held by us, constitute the capital of the said trust for Y. Z., as is more fully shown in the schedule of assets hereto annexed.

II. In addition to the above-mentioned trust, said will further gives all testator's real estate to his qualified executors in trust, to receive rents, issues, and profits thereof, and after death of testator's wife, which occurred in , , to apply the same, after deducting all just and lawful charges, in equal parts, to the use of his children living at his decease, during their respective lives, and of which said children three were living at the time of testator's death, and are now living, one of whom is the above-mentioned Y. Z. And in the above-mentioned accounting, on which the decree of December, , was entered, is included a full account of all our proceedings to the said day of December, , relative to said real estate trust for the said Y. Z.; and the following account embraces all our proceedings as trustees, as well of the personalty as of the realty of the above-mentioned trusts for the said Y. Z., from the said day of , , to and including the day of , .

[Here will follow schedules, for instance, as follows:]

Schedules A, hereto annexed, contain a statement of all rents, interest, or other income belonging to the said trust for the benefit of the said Y. Z., received by us, as trustees of the said trust, during the period of time embraced in this accounting—that is to say:

Schedule A, No. 1, contains a statement of all interest or other income from personal estate received or collected by us.

Schedule A, No. 2, contains a statement of all rents from leasehold premises received or collected by us.

Schedule A, No. 3, contains a statement of all other rents received or collected by us.

Schedule B, hereto annexed, contains a statement of loss incurred on the sale of certain assets formerly held by us as trustees of the said trust for Y. Z.

Schedules C, hereto annexed, contain a statement of all amounts of income expended by us, for the necessary expenses and disbursements, in the management and execution of said trusts for the said Y. Z.—that is to say:

Schedule C, No. 1, contains a statement of all charges against the income of the personal estate paid by us.

Schedule C, No. 2, contains a statement of all charges against the income from leasehold estate paid by us.

Schedule C, No. 3, contains a statement of all charges against the real estate paid by us.

Schedule E, hereto annexed, contains a statement of all amounts of principal paid by us to the said Y. Z., under the power and authority vested in us by the fifth paragraph of testator's will [as well as by virtue of the judgment of the supreme court of the State of New York, entered on the day of , , on remittitur from the court of appeals of the State of New York, in an action in which the said Y. Z. and others were plaintiffs,

and we, as executors of, and trustees under, the will of A. B., deceased, and others were defendants].

Schedule F, hereto annexed, contains a statement of all amounts of income paid by us to the said Y. Z., on account of the income of the trusts held for his benefit.

Schedule G, hereto annexed, contains a statement of the various assets now constituting the capital or principal of the personalty of the said trust for Y. Z., as well as the amount of the present capital of said trust. It also contains a brief description of the parcels of real estate held for his benefit, under and by virtue of the above-mentioned trust.

As to the income of the said trust for Y. Z.

We, as such trustees, charge ourselves as follows:

With amount of income, personal estate, Schedule A, No. 1....	\$
“ “ “ rents, leasehold premises, Sch. A, No. 2.	
“ “ “ rents, Schedule A, No. 3.....	
	\$

We credit ourselves as follows:

With charges against income, personal estate, Schedule C, No. 1..	\$
“ “ “ leasehold premises, Sch. C, No. 2..	
“ “ “ real estate, Schedule C, No. 3.....	
“ payments on account of income.....	\$

Leaving a balance of.....\$
which is distributable, after the deduction of the amount of our commissions for receiving and paying out said income and expenses of this accounting.

The said several schedules hereto annexed, and signed by us, form, and are to be taken as, a part of this account.

[Date.]

[Signatures of],

Trustees.

[Decree thereon may readily be adapted from No. 72, XXI.]

No. 74.

[Ante, § 1019.]

Appointment of Guardian of Infant Over Fourteen.

I. *Petition by Infant.*

To the Surrogate's Court of the county of :

The petition of A. B., of , respectfully shows:

I. That your petitioner is a resident of the county of , and is a minor over fourteen years of age, and was sixteen years of age on the day of , last past. That your petitioner is entitled to certain property and estate, to wit: [specify it briefly and state value:] and that to protect and preserve the legal rights of your petitioner, it is necessary that some proper person should be duly appointed the guardian of his person [or, property—or, person and property] during his minority.

II. That such a general guardian has not been duly appointed, either by a court of competent jurisdiction of this State, or by the will or deed of the father or mother of your petitioner, admitted to probate or authenticated and recorded as prescribed by law. [Or, that G. G., of , was appointed general guardian of your petitioner by—state manner of appointment, as above,—and—died on the day of ,—or, became incompetent—or, disqualified—by reason of the following facts—stating them,—or, refuses to act—or, was removed by the court of , on the day of ,—or, his term of office expired on the day of .]

[If the petitioner is a married woman, add:] That your petitioner is a married woman, being the wife of , who resides at , in the State of . If a nonresident, and the petition relates to personal property only, add: That the only property of your petitioner, within this State, is the personal property above described, which, as your petitioner is informed

and advised by her counsel _____, of _____, is not subject, by the law of her residence, to the control or disposition of her said husband. That the law of said State — *here plead the statute or rule of law, setting it forth at length.*]

III. *[State whether father or mother of petitioner is living, e. g., thus: That the father of your petitioner died on the _____ day of _____, and E. B., the mother of your petitioner, is living and resides at _____, in the county of _____; that the appointment of a person other than petitioner's said mother as such general guardian, is expedient by reason of the following circumstances — stating them,— and your petitioner prays that the said E. B., the mother of your petitioner, and said G. G. and _____, your petitioner's husband, may be cited to show cause why the decree prayed for herein should not be made.]*

IV. That the only relatives of your petitioner, residing within the county of _____ *[surrogate's county]* are *[stating names — or, if there are none such, state names and addresses of other nearest relatives.]*

WHEREFORE, your petitioner prays that _____, of _____, *[merchant.]* may be appointed the general guardian of your petitioner's person and property *[or state either separately]*, and that a citation may be issued requiring *[names]* to show cause why a decree to that effect should not be made, and for such other relief as may be proper.

[Date.]

[Verification.]

[Signature.]

[Annex affidavit of third person, as follows:]

M. N., being duly sworn, says, that he is acquainted with the property and estate of the above-named infant, and that the same consists of *[real and]* personal estate; and that the personal estate of said infant does not exceed the sum of _____ dollars, or thereabouts; and that the annual rents of the real estate of the said infant do not exceed the sum of _____ dollars, or thereabouts.

[Indorse on petition, the following consent:]

I, C. D., above named, do hereby consent to be appointed the guardian of the person and estate of the above-named infant during his minority.

[Signature.]

II. Consent of Parent to Appointment of Third Person.

I, the undersigned, father *[or, mother]* of the minor above named, do hereby consent and pray that C. D. be appointed the general guardian of the person and estate of said minor.

[Date.]

[Acknowledgment as of a deed.]

[Signature.]

III. Oath of Guardian.

[Venue.]

I, C. D., do solemnly swear and declare, that I reside at No. _____, in the _____, and am over the age of twenty-one years, and that I will well, faithfully, and honestly discharge the duties of guardian of the persons and estate of *[naming them,]* infants according to law.

[Jurat.]

[Signature.]

IV. Decree Appointing General Guardian.

[Title.]

On reading and filing the petition of A. B., an infant over the age of four-teen years, residing in the county of _____, duly verified on the _____ day of _____, _____, praying the appointment of _____, as general guardian of his person *[or, property — or, person and property:]* and a citation having been duly issued directing *[names]*, the parties entitled to notice of this application, to show cause why a decree should not be made as prayed in said petition, and the same being now here returnable; and the surrogate, having duly inquired into the circumstances, and heard the allegations and

proofs of the parties and of , and being satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian of his person [*or*, property — *or*, person and property]; and on reading and filing the bond executed by said to said infant, with sufficient sureties approved by said surrogate,

IT IS ORDERED AND DECREED, that said be, and he is hereby, appointed the general guardian of the person [*or*, property — *or*, person and property] of said infant, M. N., and that letters of guardianship issue accordingly.

V. Bond of General Guardian of Infant's Property.

KNOW ALL MEN BY THESE PRESENTS,

That we, C. D., of No. , street, in the city of New York, and E. F., of No. , street, in said city, and G. H., of No. , street, in said city, are held and firmly bound unto A. B., of the city of New York, an infant under [*or*, over] fourteen years of age, in the sum of [four] thousand dollars, lawful money of the United States, to be paid to the said infant, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of ,

WHEREAS, by an order of the surrogate's court of the county of [New York], made the day of , the above-bounden C. D. was appointed general guardian of the property of the above-named A. B., an infant [*etc.*] upon executing a bond to the said A. B., with the said C. D. and E. F. as his sureties, in the penalty and on the conditions therein mentioned,

NOW, THEREFORE, THE CONDITION of this obligation is such, that if the above-bounden C. D. shall in all things faithfully discharge the trust reposed in him,* as guardian of the property of the said infant, and obey all lawful directions of the surrogate of the county of , touching the trust, and shall, in all respects, render a just and true account of all money and other property received by him, and of the application thereof and of his guardianship, whenever he is required so to do, by a court of competent jurisdiction,* then this obligation to be void, else to remain in full force and virtue.

[Signatures and seals.]

[Sealed and delivered in the presence of]

[Affidavit of sufficiency as in No. 45.]

VI. Bond of General Guardian of Infant's Person.

[Same as in preceding form substituting person for property, and for matter between the asterisks the following:] as guardian of the person of the said infant, and shall duly account for all money and other property which may come to his hands, as directed by the surrogate's court of the county of .

VII. Letters of Guardianship.

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B., send greeting:

WHEREAS, an application, in due form of law, has been made to our surrogate of the county of New York, to have said A. B. appointed the guardian of G. G. C., a minor over fourteen years of age,

AND WHEREAS, said A. B. has agreed and consented to become such guardian, and has duly executed and delivered a bond pursuant to law, for the faithful discharge of his duty as such guardian, and we, being satisfied of the sufficiency of said bond, and that said A. B. is a good and reputable person, and is in every respect competent to have the custody of the person and estate of said minor, do by these presents allow, constitute, and appoint you, the said A. B., the general guardian of the person and estate of said minor, during his minority, hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor which shall hereafter come to your custody, and not suffer any waste, sale, or destruction of the

same, but to keep up and sustain his lands, tenements, and hereditaments, by and with the rents, issues, and profits thereof, or with such other moneys belonging to him as shall come to your possession, and to deliver the same to him when he becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you receive the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of said county, at the city of New York, the _____ day of _____, in the year of our Lord, one thousand nine hundred and _____.

[Signature.]

Clerk of the Surrogate's Court.

No. 75.

[Ante, § 1017.]

Appointment of Temporary Guardian of Infant Under Fourteen.

To the Surrogate's Court of the county of _____ :

The petition of A. B. respectfully shows:

I. That your petitioner resides at _____, in the county of _____, and is the [state relationship] of M. N., an infant under fourteen years of age, who resides at No. _____, street, in the _____ of _____, and was _____ years of age on the _____ day of _____, last past; that said infant is the owner of property, now situated at _____, in the county of _____, to wit: [specify it briefly, and state value of rents and profits of real property].

[Continue as in No. 74, substituting "said infant" for "your petitioner," and "temporary" for "general" guardian, concluding thus:] WHEREFORE, your petitioner prays that some suitable person, to be nominated by the surrogate, may be appointed guardian of the person [or, property — or, person and property] of said infant, to serve until said infant attains the age of fourteen years, and a successor to said guardian is appointed and has qualified; and that a citation may be issued to [names] to show cause why a decree should not be made appointing such a guardian.

[Date.] _____ [Signature.]

[Add affidavit and consent of proposed guardian, as in No. 74, I.]

[The decree for appointment of temporary guardian can be adapted from No. 74, IV.]

[For letters of guardianship on the foregoing petition, see No. 74, VII.]

No. 76.

[Ante, § 1061.]

Application for Letters of Testamentary Guardianship.¹

I. Consent of Guardian to Act.

[Title and Venue.]

To the Surrogate's Court of the county of New York:

WHEREAS, by and under the last will and testament of C. D., deceased, which said last will and testament was duly admitted to probate on the _____ day of _____, I am named as testamentary guardian of the person and estate of E. G., a minor child of said deceased;

Now I, A. B., of the city of New York, do hereby accept the appointment of such testamentary guardian, and do consent to act as such, during the minority of said E. G., the minor aforesaid, and pray that letters of testamentary guardianship may issue to me in pursuance of said appointment.

[Date.] _____

[Signature.] _____

¹ See Laws 1893, ch. 175.

II. *Oath.*[*Venue.*]

I, A. B., the testamentary guardian, named in the last will and testament of C. D., late of the city of New York, deceased, do depose and say, that I am a resident of the city of New York, State of New York; that I am over twenty-one years of age, and that I will faithfully and honestly discharge the duties of testamentary guardian of E. G., the minor child of said deceased.

[*Jurat.*][*Signature.*]III. *Letters of Testamentary Guardianship.*

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B., of the city of New York, the testamentary guardian named in the last will and testament of L. R., deceased, for E. G., a minor child of said deceased, send greeting:

WHEREAS, the last will and testament of said L. R., deceased, was duly admitted to probate by the surrogate of the county of New York, on the day of _____, in and by which said A. B. is named as the testamentary guardian of E. G., the said minor.

AND WHEREAS, said A. B. has agreed and consented to become such guardian and has duly taken an oath, according to law, that he will well and faithfully discharge his duty as such testamentary guardian, and we being satisfied that said A. B. is a good and reputable person, and is in every respect competent to have the custody of the person and estate of said minor, do by these presents allow, constitute, and appoint you, the said A. B., the testamentary guardian of the person and estate of said minor, during her minority, hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor, which shall hereafter come to your custody, and not suffer any waste, sale, or destruction of the same, but to keep up and sustain her lands, tenements, and hereditaments, by and with the rents, issues, and profits thereof, or with such other moneys belonging to her as shall come to your possession, and to deliver the same to her when she becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you receive the same, and also to render a just and true account of all moneys and property secured by you, and the application thereof, and of your guardianship in all respects, to any court having cognizance thereof when thereunto required.

IN TESTIMONY WHEREOF we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of said county, at the city of New York, the _____ day of _____, in the year of our Lord, one thousand nine hundred and _____.

[*Signature*],

Clerk of the Surrogate's Court.

No. 77.

[*Ante*, § 1051.]

Ancillary Letters of Guardianship.

I. *The Petition.*

To the Surrogate's Court of the county of _____ :

The petition of A. B. respectfully shows:

I. That your petitioner resides at _____, in the State of _____; and, on the _____ day of _____, was duly appointed the general guardian of the property of M. N., an infant, who was _____ years of age on the _____ day of _____, last, and who then was, and still is, residing at _____, in said State of _____, by the _____ court of _____, a court of competent jurisdiction within the State where said ward resides. That hereto annexed are duly-authenticated exemplified copies of the records and other papers showing that your petitioner has been so appointed, and has given the security, as hereinafter alleged.

II. That your petitioner has duly given security in said State, as required by law, in the sum of _____ dollars, which is at least twice the value of the personal property, and of the rents and profits of the real property, of said ward.

III. That said infant M. N. is entitled to property within the county of _____, and State of New York, to wit: [*specify it and state value*]. [*Or, is entitled to maintain an action in the courts of the State of New York against one Y. Z., who resides at _____, in the State of _____, for the following cause of action — recite briefly the facts constituting the cause of action, and showing jurisdiction of New York courts*].

IV. That no debts are due from said ward's estate to residents of the State of New York [except as follows — *specify amount of debts, and name and residence of creditor*].

WHEREFORE, your petitioner prays that ancillary letters of guardianship of the property of said infant M. N. may be granted to your petitioner accordingly.

[Date.] [Signature.]

[Verification.]

II. Decree Granting Ancillary Letters.

[Title.]

On reading and filing the petition of A. B., duly verified on the _____ day of _____, _____, by which it appears that the petitioner was duly appointed the general guardian of the property of M. N., an infant, residing at _____, in the State of _____, by a decree or order duly given or made on the _____ day of _____, _____, by the court of _____, a court of competent jurisdiction within the State where said ward resides, to which petition are annexed exemplified copies of the records and other papers showing such appointment and duly authenticated; and that said A. B. has there given the security required by the statutes of this State in such a case [and a citation having been duly issued thereupon to — *nunes* —, directing them to show cause why the prayer of the petition should not be granted, and having been duly returned and filed with proof of due service thereof]:

[And it appearing, upon due inquiry, that all the debts due or to become due from said ward's estate to residents of the State of New York have been fully paid:]

And the said surrogate being satisfied that all the facts alleged in said petition are true, and that the case is within section 2838 of the Code of Civil Procedure, and that it will be for the said ward's interest that ancillary letters of guardianship issue to the petitioner:

Now, on motion of A. T., attorney for petitioner,

IT IS ORDERED AND DECREED, that the exemplified copies of the foreign letters of guardianship, annexed to said petition, be recorded in the office of said surrogate; and that ancillary letters of guardianship be granted to the petitioner accordingly.

III. *Ancillary Letters of Guardianship.*

THE PEOPLE OF THE STATE OF NEW YORK,

To A. B., send greeting:

WHEREAS, A. B., who has been duly appointed the general guardian of the property of M. N., a minor, by a court of competent jurisdiction within the State of _____, where the said minor resides, has presented to the surrogate's court of the county of New York a petition for his appointment as ancillary guardian of said minor:

AND WHEREAS, our surrogate has, on the _____ day of _____, made a decree granting such petition, and directing that such ancillary letters of guardianship issue to the petitioner,

We, in pursuance of said decree, do by these presents issue these letters, constituting and appointing you, the said A. B., the ancillary guardian of said minor, until another guardian shall be appointed, hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor which shall hereafter come to your custody, and not suffer any waste, sale, or de-

struction of the same, but to keep up and sustain his lands, tenements, and hereditaments, by and with the rents, issues, and profits thereof, or with such other moneys belonging to him as shall come to your possession, and to deliver the same to him when he becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you received the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

IN TESTIMONY WHEREOF, we have caused the seal of office of the surrogate's court of the county of New York to be hereunto affixed.

WITNESS, Hon. _____, surrogate of our said county, at the city of New York, the _____ day of _____, in the year of our Lord, one thousand nine hundred and _____.

[Signature],

Clerk to the Surrogate's Court.

No. 78.

[Ante, § 1030.]

Annual Inventory and Account of Guardian.

I. Order to File Inventory, etc.

[Title.]

On reading and filing the report of X. Y., [the guardian accounting clerk in said surrogate's office], whereby it appears that A. B., the general guardian of M. N., infant, has failed to render the annual inventory and account required by law, ORDERED, that said A. B., the general guardian, aforesaid, file with the guardian accounting clerk of this court his annual inventory and account as prescribed by sections 2842, 2843, and 2845 of the Code of Civil Procedure.

II. Affidavit of Failure to File Inventory.

[Title and Venue.]

X. Y., being duly sworn, says that he is a clerk in the office of the surrogate of the city and county of New York, specially appointed and designated by the surrogate of said city and county to make the examination provided for by section 2844 of the Code of Civil Procedure as to the accounts and inventories of guardians required to be filed in the month of January, _____, pursuant to section 2842 of said Code, and that he duly took and filed the oath prescribed by section 2844, and duly made and filed with said surrogate a certificate and report of the examination made by him pursuant to said appointment and designation.

That A. B. was, on the _____ day of _____, duly appointed guardian of the property of M. N., an infant, by letters of guardianship duly issued from said court. That deponent in the course of said examination has made examination and inquiry respecting the filing by said guardian of the annual account or inventory required by said section 2842 to be filed in the month of January, _____, and finds and states, and he has so certified and stated in the aforesaid certificate and report, that said guardian has never filed such account or inventory. That on the _____ day of _____, an order was made by the said surrogate requiring the said guardian to file said account or inventory, and the said order was served on the said guardian on the _____ day of _____, and he has failed to comply with the same, and deponent has made and filed with the said surrogate a certificate to this effect.

[Jurat.]

[Signature.]

III. Order upon Foregoing Affidavit.

[Title.]

It appearing from an examination duly made under my direction pursuant to section 2844 of the Code of Civil Procedure, as to the filing of their annual accounts and inventories in the month of January, _____, by guardians of the estates of their wards, theretofore appointed by said court, that the said A. B., the guardian of the property of M. N., an infant, has failed and omitted to

file the annual account or inventory required to be filed in the month of January, , and an order having been made on the day of , requiring said guardian to file such an account and inventory, and it appearing that said order was served upon the said guardian on the day of , and that he has failed to comply with the same:

IT IS ORDERED, that O. P. be and he is hereby appointed the special guardian of the said M. N., infant, for the purpose of filing a petition in his behalf for the removal of his said guardian and prosecuting the necessary proceedings for the purpose.

IV. *Annual Inventory and Account.*

[*Title.*]

I, A. B., of , the general guardian of M. N., infant, do make, render, and file the following inventory and account:

On the day of , I was duly appointed the general guardian of M. N., an infant, by the surrogate of the county of .

SCHEDULE A, hereto annexed (as part of said inventory), contains a full and true statement and description of each article or item of personal property of said M. N., received by me since , the date of my appointment [*or, last account*], and of the value of each article or item so received.

SCHEDULE B, hereto annexed (as part of said inventory), contains a full and true statement and list of the articles or items of said property now remaining in my hands.

SCHEDULE C, hereto annexed (as part of said inventory), contains a full and true statement and list of the articles or items of said property now remaining in my hands.

SCHEDULE D, hereto annexed (as part of said inventory), contains a full and true statement of the amount and nature of each investment of money made by me, and of the manner in which the fund is at present invested.

Said SCHEDULES A, B, C, and D constitute said inventory, and are respectively signed by me.

SCHEDULE E, hereto annexed, and signed by me, is a full and true account, in form of debtor and creditor, of all my receipts and disbursements of money, since , the date of [*as above*], and distinctly states the amount of the balance remaining in my hands, to be charged to me in the next year's account, as the sum of dollars; all of which is respectfully submitted.

[*Date.*]

[*Signature.*]

[*Verification as follows:*] I, A. B., being duly sworn, say, that I am the general guardian of M. N., an infant; that the foregoing inventory and account contain, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of my ward; and of all moneys and other personal property of my ward which have come to my hands, or have been received by any other person by my order or authority, or for my use, since , and of the value of all such property; together with a full and true statement and account of the manner in which I have disposed of the same, and of all the property remaining in my hands at the present time; and a full and true description of the amount and nature of each investment made by me since ; and that I do not know of any error or omission in the inventory or account to the prejudice of my ward.

[*Jurat.*]

[*Signature.*]

No. 79.

[*Ante*, § 1033.]

Accounting of General Guardian.

I. *Petition for Voluntary Accounting.*

[*Title.*]

To the Surrogate's Court of the city and county of New York:

The petition of A. B., residing at No. street, in the city of New York, respectfully sheweth that letters of guardianship upon the estate of M. N., infant over [*or, under*] the age of fourteen years, were granted to your

petitioner on the day of , , by this court; that said infant resides at No. , street, in said city of New York.

That the sureties in the official bond of your petitioner as such guardian are the following persons [*giving names and residences*].

That said infant, on the day of , , attained the age of years. And your petitioner is desirous of rendering an account of all his proceedings as such general guardian to the surrogate's court of this city and county, and of having the same judicially settled and of being discharged from his duties and liabilities. And for that purpose prays that a citation may be issued to the above-named person to attend such settlement.

[Date.]

[Signature.]

[Verification.]

II. *Petition by Ward for Order to Account.*

To the Surrogate's Court of the county of :

The petition of M. N., of the town of , in the county of , respectfully shows that letters of general [*or otherwise*] guardianship of the property and estate of your petitioner, an infant under [*or, over*] the age of fourteen years were granted to A. B., of the town of , in the county of , on the day of , . That your petitioner, on the day of , , attained the age of twenty-one years, and that his said guardian has rendered no account of his proceedings as such.

Your petitioner desires said A. B. to render an account of all his proceedings as such guardian, and for that purpose prays that a citation issue to him requiring him to appear in this court at a certain day to be therein specified, and render an account of his proceedings as such guardian, and that such other and further proceedings may be had thereon as shall be just and equitable.

[Date.]

[Verification.]

III. *Account of Proceedings*

[Title.]

To the Surrogate's Court of the city and county of New York:

I, A. B., residing at No. , street, in the city of New York, do hereby render the following account of my proceedings as general guardian of M. N., infant: On the day of , , letters of guardianship on the estate of said infant were granted to me by this court. On the day of , , I caused to be filed in the office of the surrogate of this county a true and full inventory and account of each article or item of personal property belonging to said infant, pursuant to sections 2842 and 2843 of the Code of Civil Procedure; and annually thereafter, to wit: on the [*specifying the dates on which the guardian had previously filed his annual inventory*], I caused to be filed in the office of said surrogate annual inventories and accounts of the personal property of said infant, as prescribed by the sections of the Code of Civil Procedure above specified; the last of which said inventories and accounts was so filed on the day of , , and the value of the personal property of said infant then remaining in my hands amounted to the sum of dollars.

SCHEDULE A, hereto annexed, contains a statement of all property belonging to my ward, which came into my hands upon assuming the office of general guardian.

SCHEDULE B, hereto annexed, contains a statement of all property which has come into my hands since said day of , , together with a statement of all the debts due said ward, collected by me, and also of all moneys and interest received by me for which I am legally accountable.

SCHEDULE C, hereto annexed, contains a statement of all property of said ward now remaining in my hands, and a full and true description of the amount and nature of each investment made by me since my appointment.

SCHEDULE D, hereto annexed, contains a statement of all property charged in schedules A and B, *not* now remaining in my hands, together with a statement of the manner and purposes of its disposal.

SCHEDULE E, hereto annexed, contains a statement in form of debit and credit of all moneys received and disbursed by me on account of said ward, since the said day of , , and distinctly states the balance now remaining in my hands.

SCHEDULE F, hereto annexed, contains the name, age, and place of residence of the ward for whom I have acted as general guardian.

SCHEDULE G, hereto annexed, contains a statement of all other facts affecting my administration as such general guardian.

I charge myself as follows:

With amount of property, as per Schedule A.....	\$
“ “ increase, “ “ B.....	
Total	\$
I credit myself as follows:	
With amount as per Schedule D.....	\$
“ “ of disbursements, as per Schedule E.....	
Total	\$

Leaving a balance of dollars to be distributed to said ward, subject to the amount of my commissions and the expenses of this accounting. The said schedules, which are severally signed by me, are a part of this account.

[Signature],

General Guardian of , infant.

IV. Oath to Account.

[Venue.]

I, A. B., the general guardian of M. N., infant, being duly sworn, do depose and say, that the foregoing account and schedules contain, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of said ward; and of all moneys and other personal property of the said ward, which have come to my hands or have been received by any other person by my order or authority, or for my use, since my appointment; and of the value of all such property, together with a full and true statement and account of the manner in which I have disposed of the same, and of all the property remaining in my hands at the present time, and a full and true description of the amount and nature of each investment made by me since my appointment; and I do not know of any error or omission in the foregoing account and schedules to the prejudice of said ward.

[Jurat.]

[Signature],

General Guardian.

V. Decree Settling Guardian's Account.

[Title.]

A. B., general guardian of M. N., infant, having heretofore made application to the surrogate of the city and county of New York, for a judicial settlement of his account as such general guardian, and a citation having been thereupon issued, pursuant to statute, directed to said M. N., citing and requiring him personally to be and appear before the said surrogate, at his office in the city of New York, on the day of , , last past, at ten o'clock in the forenoon of that day, then and there to attend such judicial settlement, and the said citation having been returned with proof of the due service thereof on said M. N., and the said general guardian having appeared on the return day of said citation, by G. H., his attorney [name other appearances, if any], and the said general guardian having rendered his account under oath, before the said surrogate; and the said account having been filed, together with the vouchers in support thereof, and [recite the filing of objections and reference, if any], and the same matter having been duly adjourned to this day, the said surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the

following summary statement thereof, made by the said surrogate as settled and adjusted by him, to be recorded with and taken to be a part of the decree in this matter, to wit:

A summary statement of the account of proceedings of A. B., general guardian of M. N., infant, made by the surrogate as judicially settled and allowed.

The said general guardian, A. B., is chargeable as follows: [*give summary as in account of proceedings*].

And it appearing that the said general guardian has fully accounted for all the moneys and property of the estate of said infant, which have come into his hands as such general guardian, and his account having been adjusted by the said surrogate, and a summary statement of the same having been made as above and herewith recorded, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted.

AND IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that [*add, if desired, clauses as to payments to infant on attaining majority, and as to a final discharge of the guardian*].

VI. Discharge of Guardian by Ward, after Reaching Majority.

[*Title.*]

I, M. N., of the county of _____, New York, do hereby declare and state the fact to be that I became of the full age of twenty-one years on the _____ day of _____, _____. And further that since I so became of full age my general guardian, A. B., who was so appointed by the surrogate of said county of _____, on the _____ day of _____, has had an accounting and settlement with me of and concerning all matters in any way relating to my said guardianship, and that on such settlement said A. B. did pay to me the sum of _____ dollars, and which sum of money I did and do now receive in full of all claims and demands of every name and nature against said A. B., as my said general guardian, and to the end that said A. B. may be in all things fully and finally discharged from said trust and from all liability to me by reason of such guardianship; I do hereby request, authorize, and empower the surrogate of said county of _____, upon filing this instrument to enter the proper order or decree fully, finally, and in all things releasing and discharging said A. B. of and from all claims, demands, and liability to me by reason of any and all matters in any way relating to my guardianship.

IN WITNESS WHEREOF [*etc.*].

[*Acknowledgment.*]

No. 80.

[*Ante*, § 1045.]

Revocation of Letters of Guardianship.

I. Petition.

[*Title.*]

To the Surrogate's Court of the county of _____ :

The petition of R. M., an infant, respectfully shows:

I. That your petitioner is an infant under [*or, over*] the age of fourteen years [*or, state relationship to infant — or, that petitioner is a surety of guardian*].

II. That on the _____ day of _____, _____, one M. G., of W., in the county of S., was, by a decree of this court, appointed general [*or, temporary*] guardian of the personal property [*or either*] of your petitioner [*or, said infant*], and letters of guardianship were thereafter issued to said M. G. by this court.

III. [*Set forth ground of removal, e. g., thus:*] That said guardian has removed from the State of New York, and now resides at _____, in the State of _____.

WHEREFORE, your petitioner prays the decree of this court revoking said letters of guardianship; and that said guardian may be cited to show cause why such a decree should not be made.

[Date.]

[Signature.]

[Verification.]

II. Citation.

[Adapt from above petition and No. 5.]

III. Order Removing Guardian.

[Title.]

On reading and filing the citation heretofore issued in this matter, returnable this day, with proof of the due service thereof on M. G., the guardian of the above-named minor; and the said M. G. [not] having appeared, and the surrogate being satisfied, after hearing proofs and allegations of the parties, as to the truth of the matters stated in the petition of A. B. in this proceeding, it is

ORDERED AND DECREED, that the said M. G. be removed from the office of guardian of the person and estate of said minor, and that his appointment heretofore made be revoked.

[Signature],

Surrogate.

No. 81.

[Ante, § 1042.]

Resignation of Guardian.

I. Petition.

[Title.]

To the Surrogate of the county of _____ :

The petition of M. G., of the town of W., county of S., respectfully shows:

That heretofore your petitioner was, on the _____ day of _____, duly appointed by the surrogate of said county the guardian of person and estate of R. M., a minor, and has, as your petitioner verily believes, conducted herself honestly in the execution of her trust.

That A. G. M. and E. R. M. are the next of kin of said minor, residing in this county, above the age of fourteen years; and that O. B. and D. R. are the sureties in the official bond of your petitioner.

That your petitioner is desirous of resigning her trust as such guardian, and that her letters be revoked, for the reason that she has removed from this State [or, is about to remove — or other cause], and she prays that she may be permitted to render an account of her proceedings as such guardian, and that the same be judicially settled, to the end that a successor may be appointed, and that your petitioner may be relieved therefrom.

[Date.]

[Signature.]

[Verification.]

II. Citation.

[Adapt from No. 5.]

III. Order for Delivery of Assets to Surrogate.

[Title.]

It appearing to the satisfaction of the surrogate, that M. G., guardian of the above-named minor, has, in all respects, conducted herself honestly in the execution of her trust; that she has rendered a full, just, and true account of her proceedings as such, and that the interests of the said minor would not be prejudiced by allowing the guardian to resign her trust, it is

ORDERED, that said M. G., who has accounted, deliver over all the books, papers, money, choses in action, or other property of said minor, appearing in her hands by her said account to the surrogate, and that she take duplicate receipts for the same.

[Signature],

Surrogate.

IV. *Decree Revoking Letters.*

[Title.]

M. G., guardian of the above-named minor, having heretofore petitioned this court to be allowed to resign her trust, and the said minor having been cited, and also the sureties in the official bond of the petitioner, and such further proceedings having been had that the said M. G. rendered her account as such guardian, and the said M. G. having, in accordance with the order of this court, delivered over to the said surrogate, all the books, papers, moneys, choses in action, or other property of said minor, and having filed in this court one of the receipts taken therefor, it is

ORDERED AND DECREED, that the said M. G., on her own application, has been and is permitted to resign her trust as guardian of the said minor, and she is discharged from any further custody or care of said minor, or of his estate, and the letters issued to said guardian be and the same are hereby revoked.

[*May provide for a successor, as thus:*] AND IT IS FURTHER ORDERED, that L. R., of , be and he is hereby appointed the successor of the said M. G., as guardian of the said R. M., upon his taking the oath and giving the bond required by law, and that upon so doing letters of guardianship issue to him as such guardian.

No. 82.

[Ante, § 1093.]

Enforcement of Orders and Decrees by Attachment.I. *The Attachment.*

THE PEOPLE OF THE STATE OF NEW YORK, to the Sheriff of the county of , greeting:

We command you, that you attach W. B., the administrator [*etc.*] of M. B., deceased, if he shall be found in your bailiwick, and bring him personally before our surrogate of the county of , at the surrogate's office of the county of , on the day of , to answer unto us for certain trespasses and contempts against us in not complying with the exigency of a citation heretofore duly issued by our surrogate of the county of , directed to him, requiring him to appear before said surrogate on a certain day, now past, and render an account of his proceedings as such administrator as aforesaid, or show cause why an attachment should not be issued against him, and duly and personally served on the said W. B. more than days before the return day thereof, as appears by satisfactory proof of such service duly taken and had before our said surrogate, and for disobedience to which citation this attachment is issued. Letters of administration [*etc.*] of said M. B., deceased, having been heretofore, in due form of law, granted and issued by our said surrogate to the said W. B. And you are to make and return to our said surrogate, in the surrogate's court of the county of , on the day of , at the surrogate's office in aforesaid, a certificate under your hand, of the manner in which you shall have executed this writ; and have you then and there this writ.

IN TESTIMONY WHEREOF, we have caused the seal of office of our said surrogate to be hereunto affixed.

[L. S.] WITNESS [*etc.*].

[Signature of surrogate.]

[*Indorsement:*] Let the administrator within named give a bond for his appearance to answer on the return day of the within writ, in the penalty of dollars, with two sufficient sureties.

[Signature of surrogate.]

II. *Order Directing Interrogatories.*[Title: *Matter of Accounting, etc.*]

It appearing to the court that W. B., the administrator [*etc.*], being in contempt for not appearing, personally or otherwise, and rendering an account of his proceedings as such administrator, pursuant to a citation for that pur-

pose duly issued and served upon him, a writ of attachment had issued against him, directed to the sheriff of _____ county, returnable this day, whereupon the sheriff returned that he had attached the said W. B., and had let him at large on bail, according to a bond returned with such attachment [*or*, taken his body, and that, for want of bail, he had him in custody before the court]: and he denying that he is guilty of the misconduct alleged against him:

IT IS ORDERED, that interrogatories specifying the facts and circumstances alleged against the said W. B. be forthwith filed in this office, and that a copy thereof be served on the said W. B.; and that he put in, immediately after the service upon him of such copy, written answers to such interrogatories, upon oath, and file the same in this office.

AND IT IS FURTHER ORDERED, that the said sheriff detain the said W. B. in his custody until the further order of this court.

III. *Interrogatories.*

[*Title.*]

INTERROGATORIES to be exhibited for the examination of W. B., the administrator [*etc.*], pursuant to an order made in this matter on the _____ day of _____, _____:

First Interrogatory. Were you, or were you not, on or about the day of _____, last, or at any other and what time, served with a citation to appear personally before the surrogate of _____ county, on the _____ day of _____ inst., at ten o'clock, A. M., at the courthouse in _____, and render an account of your proceedings as administrator [*etc.*] of M. B., deceased? When and by whom was such service made? Answer this interrogatory fully and particularly.

Second Interrogatory. Is not the citation now shown and read to you the one served, and the copy whereof was so left with you? Answer fully.

Third Interrogatory. Did you, or not, personally or otherwise, appear or render your account as such administrator or otherwise, pursuant to the exigency of said citation? Did you, on that day, show cause why an attachment should not be issued against you? Answer fully.

[*Signature of surrogate.*]

IV. *Answers to Interrogatories.*

[*Title.*]

ANSWERS to the interrogatories exhibited and filed in the above matter, under the oath of W. B., the administrator aforesaid.

To the first interrogatory he, answering, says: I was, on or about the day of _____, last, duly served with such a citation as is referred to in this interrogatory. A copy of the citation was left with me. The service was made by H. S.

To the second interrogatory he, answering, says: It is the same citation and of which a copy was left with me.

To the third interrogatory he, answering, says: I did not, personally or otherwise, appear or render any account as such administrator, or otherwise, pursuant to the exigency of the said citation. I did not, on that day, show cause why an attachment should not issue against me.

[*Jurat.*]

[*Signature.*]

V. *Commitment.*

[*Title.*]

A writ of attachment having been heretofore issued, out of and under the seal of this court, against W. B., the administrator [*etc.*] of M. B., deceased, for his contempt in not appearing and rendering an account as such administrator as duly cited and ordered to do, directed to the sheriff of _____ county, and returnable the _____ day of _____, instant, and the said sheriff having returned that he had attached said W. B., and taken his body, and that, for want of bail, he had him in custody before the court [*or*, and had let him at large on bail, according to a bond returned with such attachment]: and the said W. B. having been, by virtue of such attachment, personally before

the court, on this day, and denying the alleged contempt, it was thereupon ordered that interrogatories specifying the facts and circumstances alleged against the said W. B. should be forthwith filed in this office, and that a copy thereof should be served on him, and that the said W. B. should put in written answers to such interrogatories, upon oath, immediately after the service of such interrogatories upon him, and file the same in his office. And it now appearing, from said interrogatories and answers thereto, and proofs in this matter, that the said W. B. has committed the contempt with which he is charged, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did, actually defeat, impair, impede, or prejudice the rights of the legatees under the will in this matter.

IT IS ORDERED, that a fine of \$25 be, and the same is hereby, imposed upon the said W. B. for his said misconduct.

AND IT IS FURTHER ORDERED, that the said W. B. do pay the charges and fees for serving the citation in this matter, amounting to \$10, and also pay to the sheriff of the county of his legal charges and fees for executing said warrant of attachment.

AND IT IS FURTHER ORDERED, that the said W. B. be, and he is hereby, directed to stand committed to the common jail of the county of , there to remain charged upon this contempt, until he shall have rendered an account of his proceeding as such administrator [*etc.*] of said M. B., deceased, and paid such fine, charges, and costs; unless the court shall see fit sooner to discharge him. And that a warrant issue for that purpose.

[*Signature of surrogate.*]

No. 83.

[*Ante*, § 1094.]

I. Order to Pay Money.

[*Title.*]

On reading and filing the order to show cause herein, dated , , and the affidavits of , on which the same was based, and due proof of the due service thereof on John Jones, temporary administrator; and on reading and filing the affidavit of John Jones, submitted in opposition to said motion, after hearing for the motion, and no one appearing on behalf of said Jones to oppose,

ORDERED, that the said motion be, and the same hereby is, granted.

ORDERED, that John Jones, as temporary administrator of the above estate, pay to , administrator with the will annexed, of , deceased, or to Messrs. Jackson & Martine, his attorneys, within five days from the service on him of a copy of this order, the sum of two thousand dollars, and that upon such payment, and production of a receipt showing the same, to the referee to whom has been referred the settlement of said temporary administrator's account, the said administrator be credited with that amount, the said sum of \$2,000. After the same is so placed in the hands of said administrator, to be subject to the payment of such sum as may be found due said temporary administrator for commissions, disbursements, or any other lawful costs and charges.

[*Signature of*],

Surrogate.

II. Order for Warrant of Commitment for Nonpayment of Money.

[*Title.*]

On reading and filing the affidavits of , administrator with the will annexed of , deceased, and the affidavit of , showing due personal service on said John Jones, of a certified copy of the order made herein, on the day of , , and that more than five days have elapsed since such service; and also showing a demand of the payment of the moneys mentioned in said order of said John Jones personally, and also showing the violation by said John Jones of said order, and his neglect and refusal to pay said moneys or any part thereof, which said order directed said John Jones to pay

the said _____, as administrator, etc., within five days from the service on him of a copy of said order, the sum of two thousand dollars; and on reading also the order of the general term of the supreme court, first department, dated the _____ day of _____, affirming said order of _____, and the costs of this proceeding to compel such payment, being now fixed at _____ dollars.

Now, on motion of Messrs. Jackson & Martine, attorneys for said _____, administrator as aforesaid,

IT IS ORDERED, that a precept be issued out of, and under the seal of this court, directed to the sheriff of the county of New York, commanding him to take the body of the said John Jones, if he shall be found in his bailiwick, and commit him to the common jail of said county of New York, and to keep and detain him therein, under his custody, until he shall pay the sum of two thousand dollars, as required by said order, and also the further sum of _____ dollars, for the costs and expenses of the proceeding to compel such payment, together with the sheriff's fees on such precept.

III. Warrant of Commitment.

THE PEOPLE OF THE STATE OF NEW YORK,

To the Sheriff of the county of New York, greeting:

WHEREAS, on the _____ day of _____, by a certain order made in our surrogate's court for the county of New York, in a certain proceeding depending therein, entitled "In the Matter of the Accounting of John Jones, as temporary administrator of the estate of _____, deceased," it was ordered that the said John Jones pay to _____, administrator with the will annexed of _____, deceased, or to Messrs. Jackson & Martine, his attorneys, the sum of two thousand dollars, within five days from the service upon him of a copy of said order.

AND WHEREAS, it appears that a certified copy of said order has been served upon said John Jones more than five days since, and that a personal demand has been made on the said John Jones for the payment of the said sum of two thousand dollars, by and on behalf of the said _____, administrator, as aforesaid, and by and on behalf of Messrs. Jackson & Martine, his attorneys, and that the said John Jones has hitherto neglected and refused, and still neglects and refuses to pay the same.

AND WHEREAS, an order was made herein on the _____ day of _____, directing a warrant to issue to commit the said John Jones to the common jail of the said county, there to be kept and detained until he shall pay the said sum of money, together with the sheriff's fees herein.

NOW, THEREFORE, we command you, that you take the body of the said John Jones, if he shall be found in your bailiwick, and commit him to the common jail of the county of New York, and keep and detain him therein, under your custody, until he shall have fully paid the said sum of two thousand dollars, as required by said order, and also your fees hereon, or until the said John Jones be discharged according to law.

And you are to return this writ and mandate on the _____ day of _____, to this court, together with a certificate, under your hand, of the manner in which you shall have executed the same.

WITNESS, _____, surrogate of the county of New York, at the county courthouse, in the city of New York, the _____ day of _____, [Signature of],

[Seal.]

Surrogate.

No. 84.

[Ante, § 1122.]

Probate of Heirship.

I. The Petition.

[Allege death and other jurisdictional facts, as in Nos. 16 and 42.]

[If the court has already acquired jurisdiction of the estate] That on the _____ day of _____, this court acquired jurisdiction of the estate of said

M. N., by virtue of the aforesaid facts and the following facts, to wit: that, on said day, a verified petition for a decree awarding the issue of letters of administration [or, of temporary administration — or, for a decree admitting to probate a paper writing propounded as the last will and testament of said M. N.], was duly filed in this court, by C. D., stating the foregoing facts, and thereupon all the aforesaid [heirs and next of kin and widow] were duly cited or appeared in this court to show cause why such a decree should not be made. [Or if no surrogate's court has acquired jurisdiction, allege, instead: That your petitioner is informed and believes, that no application has been made by any one, to any surrogate's court in this State having jurisdiction, for probate of any alleged will of said M. N., or for letters of administration or temporary administration on his estate: and your petitioner verily believes, that no surrogate or surrogate's court of this State has acquired jurisdiction of the estate of said M. N.]

That the said M. N. died seized in fee of the following described premises: [Description in full, with location showing the county].

[State interest or share of parties claiming inheritance; see No. 16.]

WHEREFORE, your petitioner prays that a decree be made herein, establishing the right of inheritance to said real property: and that all the heirs of the decedent may be cited to attend the probate of that right.

[Date.]

[Signature.]

[Verification.]

II. Citation to Attend Probate of Heirship.

[The command is:] to be and appear personally before our surrogate at his office [etc.], then and there to attend to the probate of the right of inheritance of the heirs of M. N., deceased, in said real property.

III. Decree of Probate of Heirship.

[Title.]

[After reciting the filing of the petition, the issue and service of citation, and the appearances on the hearing, proceed as follows:] And the said surrogate having heard the allegations and proof of the parties, and there being no contest respecting the heirship of any party, nor respecting the share to which any party is entitled as an heir of said M. N., and the surrogate having inquired into the facts and circumstances of the case; and the said A. B., having established, by satisfactory evidence, that on or about the day of ,

said M. N. died at [the city of New York], which at the time was his place of residence [or other facts giving the surrogate's jurisdiction]; and that said M. N. died seized of the real property in said citation mentioned and hereinafter described; and that said M. N. died intestate [or, without having devised the real property in said citation mentioned and hereinafter described, to any specific person or persons]; that there are [five] and only [five] heirs of the said M. N. entitled to inherit, in the manner hereinafter mentioned, the real property in , of which M. N. died seized and intestate [or, without, etc., as above]; and that said heirs are L. N., aged years, a [son] of said deceased, who resides at [Paris, in the Republic of France]; K. N., aged years, a [daughter] of said deceased, who resided at No. , street, in the city of Brooklyn, county of Kings, and State of New York [and so on], each of whom are proved to be entitled to one-[fourth] share in said real property; and O. P., aged years, and Q. P., aged years, who reside at No. , street, in said city of , who are [grandchildren of said deceased, and children of his deceased daughter J. P. formerly J. N.], each of whom are proved to be entitled to one-[eighth] share in said real property. Now, on motion of A. T., attorney [etc.],

IT IS ORDERED, ADJUDGED, AND DECREED, 1. That the right of inheritance of [naming heirs], in and to the real property situated in the of ; of which M. N., late of the [city and county of New York], died seized, and which is hereinafter described, has been established to the satisfaction of the surrogate of [New York] county, in accordance with the fact hereinbefore recited; and that said L. N., K. N. [etc.], are each entitled to one undivided

[fourth] part or share, and said O. P. and Q. P. are each entitled to one undivided [eighth] part or share of said real property, which said real property is bounded and described as follows: [*description.*]

2. That said pay to the sum of dollars, for his costs and disbursements herein.

[*Signature.*]

No. 85.

[*Ante*, § 1118.]

Bill of Costs.¹

[*Title.*]

COSTS.	DISBURSEMENTS.
Costs pursuant to section 2561 of the Code of Civil Procedure	For serving citation on parties
Contest	For publication citation, Law Journal
No contest	For publication citation
Days occupied in the trial or hearing, <i>less two, and less adjournments</i>	For referee's fees
Motion for new trial	For appraiser's fees
Allowance to accounting party under section 2562, Code of Civil Procedure, viz.:	For stenographer's fees
Days occupied in trial or hearing, <i>less adjournments</i>	For affidavits and acknowledgments
Days necessarily occupied in preparing account	For postage
Days necessarily occupied in otherwise preparing for trial	For certified copies, orders
	For certified copy decree
	For satisfaction of decree
	For certificate of filing satisfactions
	For necessary copies of papers, as follows:
TOTAL COSTS AND ALLOWANCE.. \$	For attendance of witnesses...
DISBURSEMENTS	
TOTAL	

STATE OF NEW YORK, }
COUNTY OF , } ss.:

A. B., being duly sworn, says that he is [managing clerk for] the attorney and counsel for [the executors] in the above-entitled proceeding; that the foregoing disbursements have been actually made or will be necessarily incurred therein, by or in behalf of the said [executor]. That such disbursements are correctly stated, and are for reasonable and necessary expenses in this proceeding.

Deponent further says that the time stated in the foregoing bill of costs as having been occupied as therein specified, was actually, substantially, and necessarily so occupied and employed in this matter by deponent, and that the *time occupied on each day* in the rendition of the services aforesaid, and their *nature and extent* in detail are as *hereinafter* set forth, opposite the *date* of the rendition of the services and under the *appropriate head* of particular class of services rendered in the above-entitled proceeding.

That no compensation has been paid or given out of the funds of the estate of the said deceased, for or on account of the services specified herein.

[*Jurat.*]

¹ No indorsement of this bill is required. See §§ 2561 and 2562 of the Co. Civ. Proc. and Rule 22 of Surrogate's Court, of New York county.

No. 86.

[Ante, § 1128.]

Appeals.¹

I. Notice of Appeal.

[Title as in surrogate's court, in name of the proceeding therein.]

Take notice, that S. R., one of the legatees named in the last will of M. N., deceased, appeals to the general term of the supreme court, in the [first] department, from the decree entered herein on the day of , , and from each and every part thereof [or, if from a portion only, specify what portion].

[Date.]

[Signature and address of],

Attorney for S. R.

To Hon. , Surrogate of [New York] county.

O. P., Attorney for X. Y.,

Executor, etc., of A. B., deceased.

[Names of parties, if any, who have not appeared by attorneys.]

II. Undertaking on Appeal.

[Title.]

WHEREAS, on the day of , , this court made a decree [or, order] in this matter [state briefly the result sufficiently to identify it].

AND WHEREAS, W. V., feeling aggrieved thereby, intends to appeal therefrom to the supreme court:

Now, THEREFORE, we, E. F. [specifying residence and occupation], and G. H. [specifying residence and occupation], hereby, pursuant to the statute, jointly and severally undertake to and with the people of the State of New York, that the appellants will pay all costs and damages which may be awarded against them upon the appeal, not exceeding two hundred and fifty dollars.

[Date.]

[Signatures.]

[Acknowledgment; Affidavit of sufficiency; and Approval of judge.]

III. Same, on Appeal from Money Decree.

WHEREAS, etc., [reciting decree and appeal, as above].

Now, THEREFORE, we [specifying residence and occupation of sureties], hereby, pursuant to the statute, jointly and severally undertake to and with the people of the State of New York, in the sum of dollars, that if the decree, or any part thereof, is affirmed, or the appeal is dismissed, the appellants will pay all the costs and damages which may be awarded against them upon the appeal, and will pay [or, deposit — or, distribute] the sums so directed to be paid [or, collected] by the decree [or, and will deliver the property so directed to be delivered by the decree], or the part thereof as to which the said decree is affirmed.

[Date.]

[Signature.]

¹For forms of notice of appeal in proceedings to enforce transfer tax, see Form 66, XV and XVIII, ante.

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